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REPORTS

OF CASES RELATING TO

MARITIME LAW;

CONTAINING ALL THE

DECISIONS OF THE COURTS OF LAW AND EQUITY

IN

The United Kingdom,

AND SELECTIONS FROM THE MORE IMPORTANT DECISIONS

IN

The Colonies and the United States.

EDITED BY

JAMES P. ASPINALL, Barrister-at-Law.

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ERRATA.

- Page 21, col. 1, line 21, and col. 2, line 28, for "The *Clethra*, 19 L. T. Rep. N. S. 622," read "The *Clarissa*, 12 Moore P. C. C. 344."
 Page 22, line 2, for "H. F. PURCELL" read "J. P. ARPINALL."
 Page 29, col. 1, line 11, after "Emerigon," read "(Traité des Assurances et des Contrats à la Grosse, par Boulay-Paty, Tit. I, ch. 12, sect. 11.)"

REPORTS

OF

All the Cases Argued and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

[Priv. Co.]

THE ESK AND THE NIORD.

[Priv. Co.]

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Nov. 28 and 29, 1870.

(Present: the Right Hon. Sir JAMES W. COLVILLE,
Lord Justice JAMES, and Lord Justice MELLISH.)
THE OWNERS OF THE STEAMSHIP ESK (apps.), v. THE
OWNERS OF THE STEAMSHIP NIORD (resps.)

THE ESK AND THE NIORD.

*Collision—Damage—Change of course—Judgment
in the case of the Velocity explained.*

*The Esk was going down the Thames while the
Niord was coming up. The Esk was coming
round a point on a port helm. As the vessels ap-
proached each other, the Niord first ported her
helm, and then put it hard a-port, till she had paid
off about five points. The Esk, on seeing this
manœuvre of the Niord, stopped and reversed her
engines, and put her helm hard a-starboard. The
result was a collision:*

*Held (affirming the judgment of the Court of Admi-
rality), that the Esk was to blame for the collision:*
*since, dealing with the question as one of general
navigation, the Esk was in fault, either in not dis-
covering, from insufficiency of the outlook, the
course that the Niord was taking, or in failing,
from some other cause, to port her helm as she
ought to have done.*

*The decision in the case of The Velocity (21 L. T.
Rep. N. S. 686) does not justify one of two vessels
(which would go clear of each other if each held
her own course) in crossing the course of the other,
since such an act would be a violation of the
"Regulations for preventing Collisions at Sea."*
*But vessels are generally free to pass from one
side of the mid-channel to the other.*

*This was an appeal from a judgment of the Court
of Admiralty, in cross causes of damage, civil and
maritime, between the appellants and respondents,
on account of a collision which occurred between
the two vessels in the Thames on Nov. 12, 1869,
under circumstances stated in the judgment post.*

Sir Robert Phillimore found that the *Esk* was
solely to blame for the collision, and condemned
the appellants in damages and costs. His judg-
ment (not reported), after a statement of the facts,
proceeded:—"The question which vessel was to
blame for this collision has been much and care-
fully considered by the court and its nautical

assessors. It appears that both these vessels were
in the same reach, steering nearly opposite courses;
the river seems not to have been in any material
degree crowded with shipping, or to have pre-
sented any circumstances of difficulty to a naviga-
tion conducted with ordinary skill and care. After
the recent decision of the Privy Council in the
case of the *Velocity* (21 L. T. Rep. N. S. 686;
39 L. J. 21, Ad.), I think I am bound to hold that
it was competent to either vessel to pass on either
shore. The *Niord* availing herself of this right,
ported her helm and attempted to pass on the
north shore; and I am informed by the Trinity
Masters that this was her proper course according
to the custom of the river. While the *Niord* was
taking this course, the two vessels came into
collision. On the part of the *Niord*, it is asserted
that she commenced the manœuvre of porting her
helm when sufficiently far apart from the *Esk* for
the latter vessel to have seen her intention, and to
have taken steps to avoid the collision, which she
ought to have done. The *Esk* contends that this man-
œuvre on the part of the *Niord* was executed when it
was too late for the *Esk* to take any other step than
that of starboarding her helm and reversing her
engines. The question, therefore, which the court
has to determine is narrowed to a small compass.
The *Niord*, according to the evidence, went off under
her port helm five points, and this is corroborated
by the evidence that the blow was nearly a right-
angled one. From the evidence on the part of the
Esk, it appears that only one minute, or less than
that time, elapsed between the order to starboard
and reverse and the collision. The court is of
opinion that the porting of the helm of the *Niord*
was not seen as soon as it should have been by the
Esk, and it appears in evidence that neither the
master nor the chief officer of the *Esk* were on the
bridge superintending the navigation of the vessel,
but that she was left to the sole charge of a water-
man. And the Trinity Masters are further of
opinion that the starboarding of the helm of the
Esk was an improper manœuvre. Upon the whole
the court has, under the advice of the Trinity
Masters, arrived at the conclusion that the *Esk* was
solely to blame for this collision, and I pronounce
accordingly."

Milward, Q.C., and Clarkson, for the appellants.

Bull, Q.C., and Phillimore, for the respondents.

Judgment was delivered by Sir JAMES W.
COLVILLE.—The collision which has given rise to

PRIV. CO.

THE *ESK* AND THE *NORD*.

[PRIV. CO.]

the suit and cross-suit which are now brought on appeal before their Lordships took place in that portion of the river Thames which is known as the Halfway Reach on the 12th Nov. 1869, about half-past nine on that morning. The screw steamer *Esk*, a collier in ballast, was proceeding down the river, and the *Nord*, Swedish screw steamer laden with a crop of oats, was coming up the river. Near the place of collision is a not very well defined point on the southern or Kentish side of the river, which divides the Halfway Reach from the Barking reach. The vessels appear to have first sighted each other across this point, whilst the *Esk* was coming down the Barking Reach; and as they approached each other, the *Nord*, which was in charge of a licensed pilot first ported her helm and then put it hard a-port until she had paid off about five points. The *Esk*, on the other hand, upon seeing this manoeuvre of *Nord*, stopped and reversed her engines, and put her helm hard a starboard. The result was a collision, the *Esk* running almost at a right angle into the *Nord*, nearly amidships, cutting clean into her boiler, and compelling her, in order to avoid sinking in deep water, to run ashore on the northern side of the river. These facts seem to be undisputed. The evidence as to the precise time at which the manoeuvres were executed, the circumstances which preceded them, and the relative position of the vessels when the *Esk* first rounded the point, is conflicting, and in many respects even more loose and unsatisfactory than nautical evidence in cases of collision almost proverbially is. Upon that evidence, however, the learned judge of the Admiralty Court, assisted by two Elder Brethren of the Trinity House, came to the conclusion that the *Esk* was solely in fault; and upon the principles which uniformly guide this board, and which are more particularly laid down and enforced in the case of the *Julia* (14 Moo. P. C. 210), it will be their Lordships' duty to affirm that decision upon questions of fact, unless they are clearly satisfied that it is erroneous. Before, however, they proceed to consider the effects of the evidence and of the arguments which have been founded upon it, their Lordships deem it right to make a few observations upon the case of the *Velocity* (21 L. T. Rep. N. S. 696; 39 L. J. 21, Adm.), which was cited by the learned judge of the Admiralty Court in his judgment, and has also been cited at the bar, in order to remove any possible misapprehension which may exist concerning its effect. In that case the Admiralty Court had held that the case was one which fell within the 14th of the Steering and Sailing Rules; that the two steamers in question were crossing each other; that it was the duty of the *Velocity* to keep her course, and the duty of the other vessel (the *Carbon*) to get out of the way; that the *Carbon* by porting her helm, which brought her across the river, had executed the manoeuvre which the performance of her duty required; and that the *Velocity* had failed to keep her course and was, therefore, solely in fault. The appellate court, on the other hand, held that the case was not one of two vessels crossing within the meaning of the 14th rule; that the course of the *Velocity* was, after rounding the Millwall Pier, to run down the river on the north shore; that the *Carbon* was not justified in assuming that the *Velocity* was crossing the river, but should have pursued her own course on the south of the mid channel, in

which case the two vessels would have passed free starboard to starboard. It held further that if the case was one within the 18th rule, the *Carbon* was still to blame, inasmuch as she had not got out of the way of the *Velocity*, which had "kept her course," their Lordships holding that according to the true interpretation of the term "keeping her course" she was at liberty to hold on upon the course which she would have pursued, had no vessel been in sight, and was not bound to follow the direction in which her head, as she rounded the point, happened to be at the moment when she was first sighted. In the course of the argument, however, it had been brought to their Lordships' notice that whilst the Merchant Shipping Act of 1854 was in force, the *Velocity* would, under its provisions, have been bound to keep on the south side of the mid channel. But their Lordships, advertent to the repeal of the 297th section of that Act, observes that "vessels navigating the river were now at liberty to go on whichever side of it they pleased, taking care, of course, to observe the regulations for preventing collisions." This ruling seems to their Lordships to be by no means so broad as the summary of it which appears in the shorthand writer's note of the judgment in the Admiralty Court. If, for instance, it were clear upon the evidence, that the two vessels would have gone clear of each other if each had held on upon her own course, then the ruling would not have justified the *Nord* in crossing the course of the *Esk*, and so by her own act bringing the two vessels into the category of crossing vessels, since by such an act she would have violated the regulations for preventing collisions, and would have done that which, it was held in the case of the *Velocity*, she ought not to have done. It is probable, however, that the learned judge of the Admiralty Court only meant to say that in shaping her course up the river, the *Nord*, under the decision in the case of the *Velocity*, was generally free to pass from the one side of the mid channel to the other. Again, something has been said in argument of the negligence of the master of the *Esk*, in leaving his vessel in charge of the licensed waterman, Mr. Braine, and of the insufficiency of the look-out, in consequence of the mate quitting the fore-castle. As to the first point, it is sufficient to observe that whatever blame may attach to the master for leaving the steering and manoeuvres of the vessel in charge of the waterman, that circumstance cannot effect the decision of this appeal, since the owners of the *Esk* are clearly responsible for the acts and omissions of the waterman as one of the crew. The insufficiency of the outlook, which their Lordships think is established by the evidence, is a very material consideration, if the evidence, really affords ground for believing that had there been a proper outlook on board the *Esk*, the accident would have been avoided. The real question, as it seems to their Lordships, is this,—was the *Nord* justified in coming across the river under a port helm? If she was, then if the effect of that manoeuvre was to make the vessels crossing vessels within the 14th of the Steering and Sailing Rules, it seems to have been the duty of the *Esk* to get out of the way; and she failed to do so. On the other hand, if whilst executing that manoeuvre the *Nord* was still in such a position that the two vessels, keeping each its proper course, might have passed each other free port side to port side, it was the duty of the *Esk*, by

[ROLLS.]

CONSERVATORS OF THE THAMES v. SOUTH-EASTERN RAILWAY COMPANY.

[ROLLS.]

porting her helm, to ensure that safe passage, whereas by starboarding she brought about the collision. Their Lordships do not think it necessary to affirm that these vessels were, at the moment at which they first sighted each other, crossing vessels within the meaning of the rule; they will assume that the case does not strictly fall within the rule, and will then consider which vessel was in fault, dealing with that question as one of general navigation. They have had the benefit of consulting their nautical assessors, and those gentlemen entirely concur with the Trinity Masters, and with the learned Judge of the Admiralty Court, in the conclusion to which they came, that the *Esk* was solely in fault. The *Esk* unquestionably, in rounding that point, must have been under the port helm for a time. The other vessel had been hugging the south shore, and would, in the ordinary course of navigation, have gone under a port helm to the other side of the river about the point at which she did go. On the other hand, there seems to be no reason why the *Esk* coming round the point under a port helm, should not have followed the southward shore, continuing to port her helm. At all events, whatever may have been her rights or whatever course she might have taken had no other vessel been in the way, it was clearly her duty to observe the *Nord*, to see whether she was taking that course which persons acquainted with the navigation of the river must have known to be the ordinary course, viz., that of crossing the river, and to conduct her own manoeuvres accordingly. She seems to their Lordships not to have done this. Whether in consequence of the insufficiency of the outlook she did not discover early enough what the *Nord* was doing, or whether from any other cause she failed to take the course which their Lordships, as advised by their nautical assessors, conceive was the right course, namely, that of porting her helm, she must be held responsible for the collision. Their Lordships do not consider it necessary to go further into the discrepancies in the evidence upon various points which have been commented upon at the bar. They will, however, mention that in their opinion, the place of the collision cannot have been below the lower creek marked in the chart, and therefore must have taken place shortly after the rounding of the point by the *Esk*. On the whole case, looking at the question as one of navigation on which four professional persons concur in supporting the judgment of the court below, their Lordships feel it to be their duty to advise her Majesty to dismiss this appeal with costs.

Judgment affirmed.

Proctors for the appellants, *Clarkson, Son, and Greenwell*.

Proctors for the respondents, *H. G. Stokes*.

ROLLS COURT.

Reported by H. FEAT, Esq., Barrister at-Law.

Dec. 7, 8, 16, 1870, and Jan. 13, 1871.

CONSERVATORS OF THE THAMES v. THE SOUTH-EASTERN RAILWAY COMPANY.

Floating pier—Tolls—Revocable licence—Bill to obtain possession—Jurisdiction in equity.

The City of London by licence granted a company permission to form a floating pier on the River Thames, such pier to remain during pleasure, and

to take tolls on all passengers landed at the pier. Under the powers conferred upon them by the Thames Embankment Act 1862 the Board of Works took the floating pier from the company, and agreed to pay them a certain sum and to construct a new landing stage in lieu of the old pier, and to appropriate it in perpetuity to the benefit of the company. The Thames Embankment Act 1868 purported to give validity to this agreement. On a bill by the Conservators of the Thames (in whom all the estate, &c., of the City of London in the bed, soil, and shores of the river had become vested by the Thames Conservancy Act 1857) to restrain the company from continuing in possession of the landing stage constructed in lieu of the old pier: Held, that the company were entitled to the use of the pier only on sufferance, and at the pleasure of the plaintiffs; that the Board of Works had no power to convert the licence at pleasure into an irrevocable licence; and that the Act which purported to give a validity to the agreement between the company and the Board of Works did not affect the rights of the plaintiffs: Held, also, that the proper remedy of the plaintiffs was by bill in equity, and not by ejectment.

This was a suit by the Conservators of the River Thames, who claimed, under the Thames Conservancy Act 1857, to be owners of the foreshore and soil of the river, to restrain the South-Eastern Railway Company from continuing in possession of the floating pier known as the Charing-cross Pier. The bill asked for an injunction and an account of the tolls.

On the 2nd Aug. 1844, the navigation committee of the river Thames, duly appointed by and acting for the mayor, commonsalty, and citizens of the City of London, did, by licence not under seal, grant permission to the Hungerford Suspension Bridge Company to form a floating pier on the east side of the north pier of the bridge, such pier to remain during pleasure only. The pier was soon afterwards constructed in conformity with the licence, and was subsequently, by Act of Parliament, vested in the Charing-cross Railway Company, and finally in the South-Eastern Railway Company.

By an indenture dated the 24th Feb. 1857, all the estate, right, title, and interest of Her Majesty in right of the Crown of in and to the bed, soil, and shores of the Thames, within flux and reflux of the tides bounded eastwards by an imaginary line to be drawn from the entrance to Yantlett Creek, in the county of Kent, on the southern shore of the river, to the city stone, opposite Canvey Island, in the County of Essex, on the northern side of the river, were conveyed unto and to the use of the Corporation of London and their successors as conservators of the river.

By the Thames Conservancy Act 1857, all the estate, &c., of the Corporation of London in the bed, soil, and shores of the river, and all powers, authorities, &c., belonging to them in relation to the conservancy of the river were vested in the plaintiffs, who were incorporated by the Act.

The Thames Embankment Act 1862 authorised the Metropolitan Board of Works to construct the embankment, and to make all necessary walls, piers, &c. Sect. 27 of the Act was in the following words:

Subject to the provision herein contained, it shall be lawful for the board, by agreement, to appropriate by way of grant or demise, or for any term of years or other

[ROLLS.]

CONSERVATORS OF THE THAMES & SOUTH EASTERN RAILWAY COMPANY.

[ROLLS.]

period, and for or subject to a nominal or any other consideration, or rent, any reclaimed land or any absolute or partial or qualified licence or right of user or enjoyment, right of way, right of frontage, or other right or easement of, out of, over, upon, in connection with or in relation to any reclaimed land, or any wharf, &c. . . . and landing places to be constructed or provided by the board under the powers of this Act, and the approaches, conveniences, and works connected therewith to any owner of lands now situated on the present left bank and river frontage of the river Thames, in front whereof the said intended embankments and roadway shall pass as aforesaid, in consideration of, and in lieu in whole or in part of the compensation which such owner or person may be entitled to claim for the damage (if any) to be sustained by him, by loss of river frontage or otherwise, by reason of such embankment and roadway, or other the exercise of any of the powers of this Act.

By an agreement, dated the 19th July 1867, and made between the South-Eastern Railway Company of the one part and the Metropolitan Board of Works of the other part, it was agreed that the Board of Works should pay the railway company 16,000*l.* by way of compensation for taking their pier at Charing-cross, and that they should construct a new landing stage instead of the old one, and should appropriate such new landing-stage in perpetuity to the benefit of the company.

By the Thames Embankment Act 1868 (31 & 32 Vict. c. 111), s. 16, it was provided that as soon as the landing stage to be constructed by the Board under the agreement with the South-Eastern Railway Company had been constructed, the railway company should have and might exercise and enjoy the same rights, powers, and authorities for taking tolls and dues, and all other rights, advantages, powers, &c., and should be subject to the same duties and obligations affecting the public in respect of the landing stage to be provided as aforesaid, as they had exercised and enjoyed and were subject to as regarded the old landing stage.

On the 4th March 1870 the plaintiffs served notice on the defendant company, determining the licence of the 2nd Aug. 1844.

Southgate, Q.C., and Montague Cookson, for the plaintiffs contended that licence granted by their predecessors in title, being only at pleasure, they had a right by giving notice as they had done, to determine the licence and to resume possession of the pier. The Board of Works had no power to grant an irrevocable licence as against the plaintiffs, and the Thames Embankment Acts did not deprive the plaintiffs of their right to possession of the pier.

Jessel, Q.C., and Phear, for the defendant company, contended that their agreement with the Board of Works was valid, and that the plaintiffs had no right to disturb them in their possession; and that, assuming the plaintiffs to be entitled to resume possession of the pier, their proper remedy was by ejectment, as they could not bring a bill, on a legal title, to turn the defendant company out of possession.

The following cases were cited:—

Corporation of Exeter v. Earl of Devon, 23 L. T. Rep. N. S. 382;

Attorney General v. The Conservators of the Thames, 1 H. & M. 1;

Attorney General v. The Metropolitan Board of Works, 1 H. & M. 298.

Jan. 13.—Lord ROMILLY.—This suit was instituted by the Conservators of the River Thames for the purpose of obtaining an injunction to restrain the defendants from continuing in possession of the floating pier known by the name of the

Charing-cross pier, which possession, in point of fact is nothing more than the receipt of tolls. The defendants claim the right of taking tolls for passengers, luggage or goods landed from any vessel at this pier. The plaintiffs only take tolls from steamboats. The plaintiffs under the Act of 1857, claim to be owners of the foreshore and soil of the river. The defendants claim the floating pier by virtue of certain statutes and agreements unaffected by the Acts creating the plaintiffs. [His Lordship examined at great length the statutes above referred to and the agreement between the defendant company and the Board of Works, and then continued:] The question I have to determine is this, Do this agreement and this Act deprive the plaintiffs of their power to take possession of this pier? What I have first to consider is, what was the position of the defendants as regards the pier at the passing of this Act of 1857, and what effect has been produced by the provisions of the Act upon them? I think it clear that prior to the passing of this Act the South-Eastern Railway Company were only occupants of this landing pier during the pleasure originally of the City of London, and that under the Act which I have fully stated all the powers, rights, and privileges of the City of London relating to this matter, and including the power of resuming this pier, were for this purpose vested in the Conservators of the River Thames. I am also of opinion that these rights and powers are not affected or abrogated by any of the subsequent Acts. The only one that can be said to deal with the matter is the Thames Embankment Act, 1862, but it contains nothing to abridge or destroy the powers of the conservators over the floating pier or landing-place at Hungerford. At the time when this Act (31 & 32 Vict. c. 111) passed, I am of opinion that the South-Eastern Railway Company held the pier solely on sufferance at the pleasure of the Conservators of the River Thames, who might at any time have given them notice to conclude the occupancy. I say that after expressly referring to a clause which I read at length in the Thames Embankment Act, which is the only one that can have any reference to the subject, and which does not at all appear to me to deal with this particular point. If this view is correct, I look in vain for any power conferred on the Board of Works to interfere with the powers and rights of the Conservators of the River Thames. On the contrary they are all preserved to them by the Act except so far as they are expressly taken away. This floating pier is not within the scope or range of the powers of the Board of Works. It is true they may and probably have seriously affected and destroyed the pier in the occupation of the South-Eastern Railway Company, for which they may be liable to compensate them. But I am unable to see in what way it can reasonably be said that the Board of Works have power to deal with or destroy the power of resumption which was vested in the conservators, and which has not in express words been taken away by the Act of Parliament. The deed certainly does assume to convert into a perpetuity the licence to use during pleasure the landing pier which is given in lieu of the old one which is taken away. But if that was the intention of the Board of Works it was clearly, in my opinion, *ultra vires*. The 27th section of the Thames Embankment Act is that which is relied upon for this purpose, but it is to my mind clear that this section has no reference to the subject

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at all so far as regards the power of the plaintiffs, and that under it no power is given to the Board of Works to convert a mere licence to use and occupy during pleasure a landing pier granted by a third person without the concurrence or sanction of that third person who is the owner of the property, and the person who alone had the power to give such a licence. I am of opinion that such was not the intention of the Board of Works or the proper construction to be put upon their conduct. Their contract and deeds relate solely to the acts and deeds of the Board of Works, and consequently reading the agreement as if the words "so far as the Board of Works had power to do," were introduced, I am of opinion that the Board of Works had no such power, and that the licence they gave is confined to their own acts, and they had no power to give a licence at all. I am of opinion that if they had, the grant of a perpetual licence would not be valid. I concur in the observation that upon such a state of things no security could be given for the pier being properly supplied with lights, gangways, and attendance, and the case of the *Attorney-General v. The Conservators of the River Thames* (1 H. & M. 1), seems to me to establish that such a licence granted in perpetuity would be illegal and invalid. The railway company could only sell what they had, which was a revocable licence. The Board of Works did not, in my opinion, intend, and if they did so intend, they had not the power to buy such licence, nor had they the power, if they so intended, to diminish the amount they had to pay the South-Eastern Railway Company, as the value for what they took, by altering the character of the property they took, or giving instead other property in another place under the control of others and belonging to other persons, or to convey a fresh power upon the spot so given in exchange. The Board of Works took the site of a floating landing stage, held by the South-Eastern Railway Company upon a licence revocable at pleasure; the Board of Works gave them another floating landing place near to it, and it may well be that the South-Eastern Railway Company is not prejudiced thereby, and that it takes the new floating stage upon the same terms as the one taken. The Board of Works had no power to grant anything further, and their licence in perpetuity solely affects the acts of the Board of Works, which may be thereby debarred from taking any active steps to deprive the South-Eastern Railway Company of such floating landing stage, but leaves the rights and privileges of the plaintiffs untouched. This, however, does not dispose of the whole case. An objection was raised to this suit, which applies to the jurisdiction, and this is said to be the more material because, if the defendants fail, they will have a right to maintain an action for damages against the Metropolitan Board of Works. The court may hold that the railway company have been improperly deprived of their possession, that they are still entitled to it, and therefore, if their right is disposed of by a court acting *ultra vires*, it will have no effect upon the defendants' rights; and, therefore, it is said that some proceeding at law, either by ejectment or by trespass, and not by bill in Chancery, is the proper remedy for the plaintiffs to pursue. I have considered this question well, and I am of opinion that this is a case strictly belonging to this court, and that the plaintiffs are entitled to come here for a declaration of their

rights, and for an injunction to compel the defendants to abstain for the future from levying tolls or doing any other act belonging to the occupancy of this floating pier, and that as the plaintiffs have given the proper notice determining the tenancy, or rather the occupancy of this pier, they are entitled to such a declaration, and to the injunction consequent upon it, and also to an account of the tolls from the filing of the bill.

Solicitors for the plaintiffs, *Frere, Cholmeley, Forster, and Frere*.

Solicitor for the defendant, *Cearns*.

V. C. MALINS' COURT.

Reported by G. I. P. COOK and T. H. CARSON, Esqrs.,
Barristers-at-Law.

Thursday, Jan. 26, 1871.

LEATHER v. SIMPSON.

Document bills—Forged bills of lading—Representation.

A London bank received two bills of exchange drawn by S., a merchant in America, upon B., his correspondent in Liverpool, against two lots of cotton, each bill of exchange having attached to it a document purporting to be the bill of lading for the cotton, against which the bill of exchange was drawn. The bank attached to each bill of exchange a memorandum in the following form:—"The Union Bank of London holds bill of lading and policy for 251 bales cotton, per William Cummings;" and, retaining the bills of exchange to B. policies, they presented the bills of exchange to B. for acceptance through their Liverpool agent. B., having been advised by S. of the shipments of cotton, accepted the bills of exchange on the faith of the statements in the memoranda. Before the bills fell due he retired them by paying to the bank their value less a rebate of interest, and obtained possession of the bills of lading. The latter proving to be forged, B. filed a bill against the bank to have the money returned.

Held, that the statements contained in the memoranda did not amount to a representation or a guarantee on the part of the bank that the bills of lading were genuine, and that B. had no equity to have the money returned.

Thiedemann v. Goldschmidt (1 De G. F. & J. 4; 1 L. T. Rep. N. S. 50) followed.

In the year 1870 John Newton Beach was carrying on the business of a merchant in Liverpool, under the style or firm of J. N. Beach and Co., and George B. Shute was his correspondent in New Orleans.

On the 23rd May 1870 Shute wrote to Beach and Co., advising them that he was about to consign to them by a vessel named the *William Cummings* two lots of cotton, consisting of 251 bales and 253 bales respectively.

In June 1870 two bills of exchange came into the hands of the Union Bank of London. One was dated the 23rd May 1870, and was drawn against 251 bales of cotton per *William Cummings* by Shute upon Beach and Co. for £3254, 9s. 3d., payable sixty days after sight; the other was dated the 25th May 1870, and was drawn against 253 bales of cotton per *William Cummings*, by Shute upon the same firm for £3544, 13s. 7d., payable also sixty days after sight. Each of the bills of exchange had a document attached purporting to be a bill of lading for the cotton against which the bill of exchange was drawn.

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According to the usual practice of the Union Bank in dealing with such bills of exchange (which are called document bills), a printed form of memorandum was filled up and pinned to each of the bills. The memorandum attached to the bill of exchange of the 23rd May 1870 was as follows: "The Union Bank of London holds bill of lading and policy for 251 bales cotton per *William Cummings*." A memorandum in a similar form was attached to the bill of exchange of the 25th May 1870.

On the 13th June 1870 the bills of exchange, with these memoranda attached to them, were presented to Beach for acceptance by the Bank of Liverpool, as agents for the Union Bank of London. Beach did not see the documents referred to in the memoranda, but believing (as he alleged) that the Union Bank of London were then in possession of the genuine bills of lading for the cotton, he accepted the bills.

The *William Cummings* arrived in Liverpool in the beginning of August, and Beach being desirous of possessing himself of the cotton, applied to Joseph Leather and William Marriott (who were carrying on business as cotton brokers in Liverpool) to assist him in retrieving the bills of exchange. Accordingly, on the 2nd Aug. 1870 Beach, Leather, and Marriott paid to the Bank of Liverpool the sum of 7969*l.*, of which 4500*l.* was found by Beach, and the remainder was supplied by Leather and Marriott. The bills of exchange, and two documents which purported to be bills of lading for the cotton, were then handed over by the bank. On these two documents being presented to the captain of the *William Cummings*, he stated that they were forgeries, and that the cotton had been delivered to the holders of the genuine bills of lading. Beach, Leather, and Marriott, immediately gave notice to the Bank of Liverpool not to part with the money, and offered to return the bills of exchange and documents which they had received, upon having repayment of the amount which they had paid. The bank, however, refused to repay any part of the money; and on the 4th Aug. 1870 a bill was filed by Beach, Leather, and Marriott against the Bank of Liverpool and the Union Bank of London, who were sued in the name of their respective public officers. The bill prayed for a declaration that, under the circumstances, the defendants were bound in equity to repay to the plaintiffs the sum of 7969*l.*, and for an order for such repayment; it also prayed for an injunction to restrain the defendants from paying the said sum of 7969*l.* except to the plaintiffs or as the plaintiffs might direct. An interim injunction was obtained in Aug. 1870, and the matter now came on strictly upon motion; but all parties agreed to treat it as the hearing of the cause.

Cotton, Q.C., Bardswell, and Benjamin, for the plaintiffs, contended that Beach had only accepted the bills on the faith of the statement by the bank that they had the bills of lading; and that if the bank did not make this statement good, the plaintiffs were entitled to have their money returned. They referred to

Folhill v. Walter, 3 B. & Ad. 114;
Hitchcock v. Giddings, 4 Price, 135;
Jenkins v. Brown, 14 Q. B. 496;
Gomperts v. Bartlett, 2 El. & Bl. 849;
Gurney v. Wormersley, 4 El. & Bl. 133;
Slim v. Croucher, 1 De G. F. & J. 515; 2 L. T. Rep. N. S. 103;

Ramshire v. Boulton, L. Rep. 8 Eq. 294; 21 L. T. Rep. N. S. 50;
Knight v. Wigen, L. Rep. 5 Q. B. 669;
Hill v. Lane, L. Rep. 11 Eq. 215.

Pollock, Q.C., Pearson, Q.C., and Jackson, for the defendants, contended that the bank had not made any representation, nor given any guarantee, that the bills of lading were genuine documents; and that the plaintiffs had no equity to have their money returned. They referred to

Robinson v. Reynolds, 2 Q. B. 196;
Thiedemann v. Goldschmidt, 1 De G. F. & J. 4;
 1 L. T. Rep. N. S. 50;
Base v. Olive, 4 M. & S. 13;
Wilkinson v. Johnson, 3 B. & Cr. 468;
Aschpittel v. Bryan, 32 L. J. 91, Q. B.; 33 L. J. 328, Q. B.; 7 L. T. Rep. N. S. 700;
Byles on Bills, 8th edit., 177.

Cotton in reply.

The VICE-CHANCELLOR (after stating the facts of the case).—The claim upon the part of Messrs. Beach and Co., the plaintiffs, is rested upon this, that they accepted the bills on the faith of the representation made by the Union Bank of London. "The Union Bank of London holds bill of lading and policy for 251 bales of cotton, per *William Cummings*." It is urged that this is a representation by the Union Bank of London that they hold a genuine bill of lading, and therefore that the person who is called upon to accept the bill will have the security of a document which will insure to him the delivery of 251 bales of cotton. Against that it is said there is no representation that it is genuine, and no guarantee. The bank do not undertake to say whether it is good or not; they only say, we have a bill of lading, but the fair meaning of that may possibly be, we have a document which on the face of it is a bill of lading. Nothing had occurred to excite their suspicion; they believed it to be a bill of lading, and they called it a bill of lading, because they so believed it. Then does this amount to a representation that it was a genuine bill of lading? The question that arises is whether by this representation the position of Messrs. Beach and Co. has been in any way altered. I put the case to the learned counsel in the course of the argument, "Suppose the bill of lading had been forwarded with the bill of exchange, which is the usual course of business?" It is perfectly clear, I apprehend, that Messrs. Beach and Co. would not have accepted the bill without the bill of lading accompanying it, if it had been in the hands of parties unknown to them, and who are not so responsible as they knew the Union Bank to be. The representation of the Union Bank that they had the bill of lading was a sufficient assurance to Messrs. Beach and Co., that that bill of lading would be forthcoming in proper time. They, therefore, give credence to their representation and act upon the faith of it. But does it make the case different from what it would have been if the bill of lading had actually been forwarded? I cannot myself, after all that I have heard on the subject, come to the conclusion that this puts Messrs. Beach and Co. in a different situation from what they would have been in if the bill of lading had accompanied the bill of exchange. Now, if the bill of lading had accompanied the bill of exchange, would they have accepted it? The best proof that they would have accepted it is this, that on the 2nd Aug., when they are desirous of having the cotton, the bill of lading is put into their hands, they pay the money on the faith of it, and

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they take the bill of exchange and the bill of lading in the perfect belief that it is a genuine document; they make no inquiry with regard to it; they take it to the captain of the ship, and then for the first time discover that they have been imposed upon, as all parties engaged in the transaction had been. Is it, then, I repeat, a guarantee by the Union Bank? It would be a very dangerous thing for a bank, if it were to be said that because they say they have a document of that kind, which they believe to be genuine, they therefore guarantee it. I do not think they do anything of the kind. I think Messrs. Beach and Co., if the matter had been the subject of the slightest degree of suspicion, ought to have said, "You say you have a bill of lading, we should like to look at it, forward it to us. We are going to accept two bills of exchange for a very large amount, more than 8000*l*. Before we do so we should like to see the bills of lading to test the signature, and see that we are perfectly safe." That is the course which they might have taken but they did not. In my opinion they are precisely in the same position as they would have been if they had seen the bills of exchange. They stand precisely in that situation, neither better nor worse. They are therefore precisely in the same situation as if this bill of exchange had annexed to it the bill of lading, and, having looked at it, they accepted the bill of exchange in the belief that the bill of lading was a genuine document. Now it certainly is, as Lord Campbell has pointed out, of the highest importance to the commercial interests of this country, that discredit should never be thrown upon a bill of exchange if it be possible to avoid it. No doubt there are many instances in which this court has to deal with bills of exchange which young spend-thrifts are in the habit of accepting. This court will stay an action on a bill of exchange, where a proper case is made for doing so, but it must be a very peculiar case. This court will always restrain an action on a bill of exchange if there is fraud in the person who holds the bill; but as against such a holder there can be no remedy unless he has taken it under circumstances which this court regards as amounting to notice. If he takes it without giving adequate consideration; if he buys it at a very cheap rate or takes so high a rate of interest that the court attributes notice to him, it is on such grounds as these that the court interferes against the legal rights of the holder of a negotiable instrument. I pressed Mr. Cotton with a question, what would have been the position of Messrs. Beach and Co., if they had discovered this fraud before they wanted the cotton? They would have said this: "We have been induced to accept bills of exchange for 8000*l*. by fraud; they are not binding upon us." And it is perfectly clear that if they are entitled to get back the money which was paid on the bills of exchange, as they now seek to do in this suit, they would, before they paid the money, have been entitled to get the bills of exchange themselves back. But if when they filed a bill on the 4th Aug., they had not then paid the money, and the bill had been filed to get the bills of exchange delivered up to them, as having been accepted under a misrepresentation of fact, it is settled by the case of *Thiedemann v. Goldschmidt*, that they would not have been entitled to have the bills delivered up. I am not able to see that any difference between *Thiedemann v. Goldschmidt* and the present case, is caused by the fact that here the money was

actually paid before maturity, and on a rebate of interest on the bills, instead of the bills remaining out. *Thiedemann v. Goldschmidt* was to all intents and purposes like the case now before me. The facts were these: [His Honour stated the facts and read the judgment in that case]. The full Court of Appeal there decided that the plaintiff had no equity to have the bills delivered up. Now if in that case there was no equity to have the bills delivered up, the bills must have remained out, and therefore the acceptor was liable upon those bills, and as they were a good firm the bills were undoubtedly sure to be honoured. The decision that the bills were not to be delivered up, is, in my opinion, a decision that there was no equity to have the money back, or restrain the whole rights of the holder of the bill against the acceptor under such circumstances. In the case of *Robinson v. Reynolds* precisely the same question arose: where a bill of exchange had been accepted on the faith of a bill of lading, presented by the *bona fide* holder who had not been guilty of any improper conduct whatever, and who, when he presented the bill of exchange for acceptance, believed the bill of lading to be genuine; was the holder of the bill of exchange precluded from recovering under that bill? I think the observations of Lord Denman there, are very applicable to the present case. Shute, the man who has probably committed the fraud, was the correspondent of the Liverpool firm. He told them by the letter of the 23rd May that he was going to send the 251 bales of cotton by the *William Cummings*; and it appears that the usual course of dealing with the Liverpool firm was, that whenever they accepted these bills drawn by Shute they uniformly had the bill of lading. There was no instance of Messrs. Beach and Co. having accepted a bill of exchange without the bill of lading. Therefore, when Shute in America, writing on the 25th May from New Orleans to Messrs. Beach and Co. says, "I am going to consign to you 251 bales of cotton by the *William Cummings*," that necessarily led the mind of Beach and Co. to this, that accompanying the acceptance which will represent the cotton there will be a bill of lading. Then if they expected that there would be a bill of lading coming from their own correspondent Shute, what could they understand from the memorandum from the Union Bank, "The Union Bank of London hold bills of lading and policy for 251 bales of cotton?" So far from the Union Bank misleading Beach and Co., I am of opinion that Beach and Co. could only have understood the memorandum in one way, "Shute has transmitted a bill of lading; we have that bill of lading." The meaning of that was, "You accept the bill; if you want to see the bill of lading we will forward it for your inspection; if you do not want to see it, you need not, we tell you we have it. If you accept the bill it will be handed to you when the bill arrives at maturity, and when you are called on to pay it." Therefore, I think to say that there was any misloading by the Union Bank is attempting to carry the case far beyond anything that the facts warrant. As to the general law of misrepresentation, the rules of this court are settled that when a representation in a matter of business is made by one man to another, calculated to induce him to adapt his conduct to it, it is perfectly immaterial whether the former makes the representation, knowing it to be untrue or whether he makes it believing it to be

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true, if, in fact, it was untrue. Because every man making a representation and inducing another to act on the faith of that representation must make it good if he takes upon himself to represent that which he does not know to be true, and he is equally bound as if he made it knowing it to be untrue. Therefore, if the court was warranted in any way in treating this memorandum as a representation that the document was genuine or a guarantee, the consequence would be plain; Messrs. Beach and Co. must have been indemnified by the Union Bank of London, and the money received by the bank must have been returned, as having been obtained upon a representation which turns out to be untrue. But after what I have said, it is unnecessary for me to go into this doctrine. If there be a distinction between this case and the cases of *Thiedemann v. Goldschmidt*, and *Robinson v. Reynolds*, I confess this case appears to me rather more unfavourable to Messrs. Beach and Co. In *Thiedemann v. Goldschmidt* the money had not been paid, but in the present case Messrs. Beach and Co. elected to pay the money. The money is taken, and it is much on the same principle as the cases which were cited, where a bank having presented to them a forged cheque, of course can reject it; but if it be presented, it is their duty to know the signature of their own customers, and if they pay the money they cannot get it back again. Here Messrs. Beach and Co. trusted to their own correspondent Shute that he would not transmit anything but a genuine bill of lading. I agree with the observation made by Mr. Jackson, that the equities between these parties are equal, the parties are equally innocent in the transaction. They have all been imposed upon; but there is this difference, that one of them by the course of the transaction has been in possession of the money; and I am at a loss to see any ground upon which I can be justified in making a decree that that money should be restored. I quite agree with Mr. Pollock's argument, that the case really depends on *Robinson v. Reynolds* and *Thiedemann v. Goldschmidt*. I can see no distinction between a bill filed to have the acceptance delivered up before it is arrived at maturity, and a bill filed to have the money restored after the bill has arrived at maturity, or has been treated as having arrived at maturity, and the amount of it paid. Upon these grounds I am of opinion that the bill fails, and must be dismissed.

Solicitors: Chester and Urquhart; Lyne and Holman.

COURT OF QUEEN'S BENCH.

Reported by T. W. SUNDERS, and J. SMOUT, Esqrs.,
Barristers-at-Law.

Saturday, Jan. 28, 1871.

Es parte FERGUSON AND HUTCHINSON.

Merchant Shipping Acts 1854, 1862 (17 & 18 Vict. c. 104, and 25 & 26 Vict. c. 63)—Collision between two "ships"—Loss of life—Failure of person in charge to render assistance—Jurisdiction of justices—Suspending certificates.

A collision having occurred off the Yorkshire coast between a steamship and a fishing coble, whereby the latter sank and three men on board were drowned, a coroner's inquest was held, to which the Board of Trade sent a clerk, who took notes of the evidence, and returned them to the Board.

Acting thereon, the Board of Trade ordered an investigation into the circumstances of the collision by two justices, who accordingly sat as a court of inquiry, summoned the master and mate of the steamship, and other witnesses, and heard a charge preferred against the master and mate on behalf of the Board of Trade, under 25 & 26 Vict. c. 63 s. 33, which enacts that "in every case of collision between two 'ships' . . . the person in charge of each ship shall render to the other ship, her master, crew, and passengers (if any) such assistance as may be practicable and necessary to save them from danger, and if he fail so to do his certificate may be cancelled or suspended."

The coble was a vessel of ten tons burden, twenty-four feet in length, decked forward only. She had two movable masts, and a lug sail for each; was accustomed to go twenty miles out to sea, and to remain out twelve hours at a time. She usually sailed, but was sometimes propelled by oars when occasion required.

The court of inquiry having heard evidence, found that the master and mate of the steamship did not render assistance to save the crew of the coble, and made an order suspending their certificates. (In a motion for a writ of certiorari to bring up this order for the purpose of quashing it.)

Held, that the justices had jurisdiction, and their proceedings were regular under the Merchant Shipping Act 1854, and the Amendment Act 1862 (17 & 18 Vict. c. 104, ss. 241, 242, 432, 433; 25 & 26 Vict. c. 63, ss. 23, 33) and that the coble, being substantially a seagoing vessel, was a ship within the terms of those statutes.

Motion for a rule calling on two justices of the borough of Sunderland to show cause why a writ of certiorari should not issue to bring up, for the purpose of quashing it, an order made by a court of inquiry, under the Merchant Shipping Act 1854 and the Merchant Shipping Act Amendment Act 1862, suspending the certificate of John Ferguson, the master, and of Lewis Hutchinson, the mate, of the steamship *Thames*.

It appeared from affidavits that, on the 21st Sept. 1870 the *Thames* was proceeding on a voyage from Sunderland to Cherbourg under steam, and was about three and a half miles off Saltburn, when about half-past two o'clock a.m. she came into collision with a fishing coble, named the *Rachel*. In consequence of the collision the *Rachel* sank directly, and three men on board of her were drowned.

The mate of the *Thames* was keeping his watch when this happened, and the master came on deck immediately afterwards. They made no effort to save the crew of the coble, but continued their course. No damage whatever was done to the *Thames*, nor to anyone on board of her.

The *Rachel* was a vessel of the kind used for the herring fishery along the northern coast of England, and locally termed a coble. She was 21ft. in length, of ten tons burden, was decked over about eight feet of her length, drew about 18in. of water, and had a flat bottom aft, so that she might be easily drawn up on the beach. She had two movable masts fitting into bores in the foremast and stern sheets, and a bowsprit, and was furnished with a lug sail for each mast, and a jib. She had also a large rudder, extending below her keel, and four oars. The rudder could be readily shipped or unshipped, and required to be unshipped whenever the vessel was in shallow water.

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The oars were commonly used in propelling her to or from the shore and during the time she was engaged in shooting her nets, in calm weather or light airs, or on some part of her course. She was accustomed to go out to sea for a distance of twenty miles from the harbour to the fishing ground, and stayed out sometimes twelve hours at a time. Her crew consisted of three men and a boy.

A coroner's inquest having been held on the body of one of the men who were drowned, the depositions of Ferguson and Hutchinson and of other witnesses were taken. The jury found a verdict of "manslaughter" against Hutchinson, who was afterwards arraigned on the coroner's inquisition at the York Assizes, and acquitted.

A clerk, sent down by the Board of Trade to attend the inquest, took notes of the evidence, and forwarded them to the Board of Trade. The board thereupon directed a formal investigation concerning the running down of the fishing vessel and loss of life to be held before two justices. (a)

(a) 17 & 18 Vict. c. 104 (The Merchant Shipping Act 1854) s. 241, enacts that, "If the Board of Trade or any local marine board has reason to believe that any master or mate is, from incompetency or misconduct, unfit to discharge his duties, the Board of Trade may either institute an investigation or may direct the local marine board at or nearest to the place at which it may be convenient for the parties and witnesses to attend, to institute the same, and thereupon such persons as the Board of Trade may appoint for the purpose, or as the case may be, the local marine board shall, with the assistance of a local stipendiary magistrate (if any), and if there is no such magistrate, of a competent legal assistant to be appointed by the Board of Trade, conduct the investigation, and may summons the master or mate to appear, and shall give him a full opportunity of making a defence, either in person or otherwise, and shall, for the purpose of such investigation, have all the powers given by the first part of this Act to inspectors appointed by the Board of Trade, and may make such order with respect to the cost of such investigation as they may deem just; and shall, on the conclusion of the investigation, make a report upon the case to the Board of Trade; and in cases where there is no local marine board before which the parties and witnesses can conveniently attend, or where such local marine board is unwilling to institute the investigation, the Board of Trade may direct the same to be instituted before two justices or a stipendiary magistrate, and thereupon such investigation shall be conducted, and the results thereof reported, in the same manner and with the same powers in and with which formal investigations into wrecks and casualties are directed to be conducted, and the results thereof reported, under the provisions contained in the eighth part of this Act, save only that, if the Board of Trade so directs the persons bringing the charge of incompetency or misconduct to the notice of the Board of Trade shall be deemed to be the party having the conduct of the case." In part 8 of the said Act, sect. 432 enacts that: "In any of the cases following, that is to say, whenever any ship is lost, abandoned, or materially damaged on or near the coasts of the United Kingdom; whenever any ship causes loss or material damage to any other ship on or near such coasts; whenever by reason or any casualty happening to or on board of any ship on or near such coasts loss of life ensues . . . it shall be lawful for the inspecting officer of the coast guard . . . or for any other person appointed for the purpose by the Board of Trade to make inquiry respecting such loss, abandonment, damage, or casualty." Sect. 433, "If it appears to such officer or person as aforesaid, either upon or without any such preliminary inquiry as aforesaid, that a formal investigation is requisite or expedient, or the Board of Trade so directs, he shall apply to any two justices . . . to hear the case; and such justices . . . shall thereupon proceed to hear and try the same, and shall for that purpose, so far as relates to the summoning of parties, compelling the attendance of witnesses, and the regulation of the pro-

Such investigation was accordingly held by two justices, assisted by two nautical assessors. The master and mate of the *Thames* and other witnesses were summoned before the court thus constituted. The proceedings at the inquiry took the form of a charge preferred on behalf of the Board of Trade against the master and mate, of having been guilty of a breach of the provisions of the 33rd section of the Merchant Shipping Act 1852. (b)

Objections were raised by the attorney acting for Ferguson and Hutchinson that the court had no jurisdiction, and that the proceedings were irregular; but the court decided that the inquiry should go on. The defendants relied on the above objections, and declined to make any other defence. Witnesses were examined, and finally the justices gave judgment as follows:—"The court is of opinion that, although the master could not, and the mate might not have seen the collision, both master and mate had almost immediate evidence that a collision had taken place, and that men were in the water. It also finds on the evidence that neither the mate before the master came on deck, nor the master afterwards, did render such assistance as was necessary and practicable to save the lives of the men from the danger caused by the collision, which could have been done without any danger to their own ship and crew. The court therefore orders their respective certificates to be, and they are hereby, suspended for the period of three calendar months from this date, Dec. 22nd, 1870." (c)

ceedings have the same powers as if the same were a proceeding relating to an offence or cause of complaint upon which they . . . have power to make a summary conviction or order or as near thereto as circumstances permit; and it shall be the duty of such officer or person as aforesaid to superintend the management of the case, and to render such assistance to the said justices . . . as is in his power; and upon the conclusion of the case the said justices . . . shall send a report to the Board of Trade, containing a full statement of the case and of their . . . opinion thereon, accompanied by such report of or extracts from the evidence, and such observations (if any) as they . . . may think fit." Sect. 434 gives the Board of Trade a power to appoint nautical assessors.

(b) 25 & 26 Vict. c. 63, s. 33: "In every case of collision between two ships, it shall be the duty of the person in charge of each ship, if and so far as he can do so without danger to his own ship and crew, to render to the other ship, her master, crew, and passengers (if any) such assistance as may be practicable, and as may be necessary in order to save them from any danger caused by the collision; in case he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default; and such failure shall also, if proved upon any investigation held under the third or the eighth part of the principal Act, be deemed to be an act of misconduct or a default for which his certificate (if any) may be cancelled or suspended."

(c) By the Merchant Shipping Act 1854, s. 242, "The Board of Trade may suspend or cancel the certificate (whether of competency or service) of any master or mate in the following cases (that is to say), (1.) If upon any investigation made in pursuance of" sect. 241, "he is reported to be incompetent or to have been guilty of any gross act of misconduct, drunkenness, or tyranny; (2.) If upon any investigation conducted under the provisions contained in the eighth part of this Act . . . it is reported that the loss or abandonment of or serious damage to any ship or loss of life has been caused by his wrongful act or default. . . . And every master or mate whose certificate is cancelled or suspended shall deliver it to the Board of Trade or as it directs, and in default shall for each offence incur a penalty not exceeding fifty pounds; and the Board of Trade may at any subse-

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Whereupon the certificate of service of Ferguson and the certificate of competency of Hutchinson having been demanded by, were subsequently delivered up to, the justices, but under protest, without admitting jurisdiction. (a)

Gainsford Bruce, in support of the motion.—It is clear that the proceedings were under sect. 241 of the Merchant Shipping Act 1854. But as there is a local marine board at Sunderland, that board was the proper tribunal, and therefore the justices had not jurisdiction. On the facts proved before the justices, it was evident that no offence had been committed for which the certificates could be suspended or cancelled under sect. 242 of the Act of 1854; there was not any "gross act of misconduct" on the part of the master or mate. [BLACKBURN, J.—But was there not loss of life . . . caused by his wrongful act or default" within the terms of sub-sect. 2? Those words are comprehensive.] But the enactment, for a breach of which the justices proceeded to suspend the certificates, was the Amendment Act 1862, s. 33, which provides, that in cases of collision between two ships, one ship shall assist the other. The collision in this case, however, was not between two ships, but between one ship and a fishing boat. [BLACKBURN, J.—Then we must consider whether a cable is a ship, although I should have thought that the duty to save life ought to have been made the same in all cases.] The definition of the word "ship" is to be found in the interpretation clause of the Act of 1854: "every description of vessel used in navigation, not propelled by oars." In *Everard v. Kendall* (22 L. T. Rep. N. S. 408; L. Rep. 5 C. P. 424), a dumb-barge, being a vessel propelled by oars only, was held not to be within the County Courts Admiralty Jurisdiction Acts (31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51). The *Malvina* (6 L. T. Rep. N. S. 369; Lush. Ad. Rep. 493), was a case of damage done by a ship to a barge, within the body of a county. But sect. 7 of the Admiralty

Court Act 1861 declares expressly that the High Court of Admiralty shall have jurisdiction over any cause of damage done by any ship. The *Bilboa* (3 L. T. Rep. N. S. 338; 1 Lush. 149) decided that "ship" means a vessel "not propelled by oars." The cable was adapted for the use of oars, and they were ordinarily used in some part of her trip. A probable reason why such a vessel is decked over the forepart only is, that if the deck were carried further aft, it would prevent the men sitting on the thwarts to row. An open boat of this kind is not a ship in ordinary language. [BLACKBURN, J.—The *Argo* was "propelled by oars," yet was always called a ship. LUSH, J.—Suppose this cable had been propelled by means of steam and a screw, she would then have been strictly within the definition given in the interpretation clause. BLACKBURN, J.—And sect. 19 is worthy of notice; it enacts that every British ship must be registered, except . . . (2) Ships not exceeding fifteen tons burden, employed solely in navigation on the rivers or coasts of the United Kingdom," &c., thereby clearly implying that a vessel under fifteen tons, not employed solely in navigation on the rivers or coasts, would be a ship.] Next, the master, who was asleep in his berth at the time of the collision, was not the "person in charge of the ship" within sect. 33. [BLACKBURN, J.—If he were not in fault at the moment of collision, yet, coming on deck afterwards, was in fault in not picking up the drowned men, he would be within the terms of the section.] The duty is cast upon the person in charge at the time of the collision.

Cases showed cause in the first instance, and was requested by the court to address them on two points only, viz.—1. Whether or no the two justices were empowered finally to decide to suspend the certificates, or whether their duty was not confined to making a report to the Board of Trade, who would have power if the judgment were too harsh to make it less so? 2. Whether sect. 33 is not limited to collision between two ships, and whether a cable like the one in question is a ship? and, further, whether it was not a ship which drowned the men, no matter whether they were on board or not?—Confining the argument to those points, it is to be observed in the first place that the power of cancelling the certificates was given to the Board of Trade by the Act of 1854, s. 212, after an investigation had been ordered, and held under sect. 241, and the results reported. But by sect. 23 of the Amendment Act 1862, the power of cancelling or suspending certificates was in all instances transferred to the local tribunal by which the case is investigated. And an express power of cancelling or suspending certificates for an offence under sect. 33 is given by that section. Secondly, it was necessary that the justices should determine whether this cable was a "ship" before they proceeded on sect. 33, and it must be assumed that their decision was right. For a vessel to be within the words of the interpretation clause (sect. 2), of the Act of 1854, oars must be the principal means of propulsion, and not merely secondary means or auxiliary to sails. In part 3 of the same Act, s. 109, sub-sects. 1 and 2, the Legislature treats fishing vessels as "ships" within the meaning of the Act. Then the Amendment Act 1862, s. 25, enacts that certain regulations concerning lights, &c., contained in table C in the schedule, shall come into operation. Turning to that table a clause is found

quent time grant to any person whose certificate has been cancelled a new certificate of the same, or of any lower grade." By the Merchant Shipping Act Amendment Act 1862, sect. 23, it is enacted that ". . . (1.) The power of cancelling or suspending the certificate of a master or mate by the 242nd section of the principal Act conferred on the Board of Trade shall . . . vest in and be exercised by the Local Marine Board, magistrates . . . or other court or tribunal by which the case is investigated or tried, and shall not in future vest or be exercised by the Board of Trade. . . . (3.) Every such board, court, or tribunal shall, at the conclusion of the case, or as soon afterwards as possible, state in open court the decision to which they may have come with respect to cancelling or suspending certificates, and shall in all cases send a full report upon the case, with the evidence to the Board of Trade, and shall also, if they determine to cancel or suspend any certificate, forward such certificate to the Board of Trade, with their report. (4.) It shall be lawful for the Board of Trade, if they think the justice of the case require it, to re-issue and return any certificate which has been cancelled or suspended, or shorten the time for which it is suspended, or grant a new certificate of the same, or of any lower grade, in place of any certificate which has been cancelled or suspended. . . ."

(a.) Sect. 24: "Every master or mate . . . whose certificate is or is to be suspended or cancelled in pursuance of this Act shall, upon demand of the board, court, or tribunal by which the case is investigated or tried, deliver his certificate to them, or if it is not demanded by such board, court, or tribunal, shall, upon demand, deliver it to the Board of Trade, or as it directs, and in default shall for each offence incur a penalty not exceeding fifty pounds."

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(art. 9), providing that "open fishing boats and other open boats shall not be required to carry such lights provided for other vessels," &c. And sect. 27 enacts that all owners and masters shall be bound to take notice of all such regulations; . . . and in case of wilful default the master or owner of the ship . . . shall be deemed to be guilty of a misdemeanor. So there fishing vessels and boats are apparently included under the term "ship." Now unless the master of a fishing vessel or boat is master of a "ship," he is not bound to carry a light. [LUSH, J.—Sect. 29 assists that view.] Moreover, by sect. 30, surveyors appointed by the Board of Trade have power to inspect any "ships" for the purpose of seeing that such ships are properly provided with lights. It would be strange if they were not at liberty to inspect fishing vessels and boats. The conclusion to be drawn from the wording of these sections is, that the Legislature intended that fishing vessels and boats should be included in the word "ship." If so, the justices who were assisted by nautical assessors, and who heard the testimony of many witnesses, have come to the right conclusion.

Abbs appeared for the justices.

Gainsford Bruce, in reply, referred to

The Sea Fisheries Act 1865 (31 & 32 Vict. c. 43), s. 5.

BLACKBURN, J.—I think we must discharge this rule on the ground that the justices seem to have had jurisdiction, and that all they did was perfectly right. The original Merchant Shipping Act of 1854 provided, by its third part, for a variety of matters, and, amongst other things, it was enacted that where there was an offence charged against a master, &c., the Board of Trade should investigate; and then sect. 242 enacted that "the Board of Trade may suspend or cancel the certificate (whether of competency or service) of any master or mate in the following cases, that is to say, (1) If upon any investigation the master is reported . . . to have been guilty of any gross act of misconduct; . . . (2) If, upon any investigation conducted under the provisions contained in the eighth part of the Act, it is reported that the loss or abandonment of, or serious damage to, any ship, or loss of life has been caused by his wrongful act or default; then (3) If, upon any investigation made by any court or tribunal authorised . . . to make inquiry into charges of incompetency or misconduct on the part of masters or mates of ships, or as to shipwrecks or other casualties affecting ships, a report is made by such court or tribunal to the effect that he has been guilty of any gross act of misconduct, drunkenness, or tyranny, or that the loss or abandonment of, or serious damage to, any ship or loss of life has been caused by his wrongful act or default . . ." Now, in all those cases, the Board of Trade is to cancel the certificate, not only if the inquiries are made when a charge has been preferred against the man, but also when a report has been made to the board in proceedings under the eighth part of the Act. Turning to that division of the Act, we find sect. 432 provides *inter alia* that: "Whenever, by reason of any casualty happening to, or on board of any ship on or near the coasts of the United Kingdom, loss of life ensued, . . . it shall be lawful for the inspecting officer of the coast guard, or the principal officer of customs residing at or near the place where such . . . casualty occurred, . . . or for any other person appointed for the purpose by

the Board of Trade, to make inquiry respecting such . . . casualty." Then by sect. 433: "If it appears to such officer or person as aforesaid, that a formal investigation is requisite or expedient, or if the Board of Trade so directs, he is to apply to two justices to hear the case." They are merely to hold an investigation as here, and report to the Board of Trade. And sect. 438 enacts that "such justices . . . may . . . require any master or mate possessing a certificate of competency or service, whose conduct is called in question or appears to them, . . . likely to be called in question in the course of such investigation" (it being quite sufficient if they bring him before them, and the matter arises in the course of the investigation) "to deliver such certificate to them . . . and they . . . shall hold the certificate so delivered until the conclusion of the investigation, and shall then either return the same to such master or mate, or if their report is such as to enable the Board of Trade to cancel or suspend such certificate under the powers given to such board by the third part of this Act, shall forward the same to the Board of Trade to be dealt with as such board think fit." Under the Act of 1854, therefore, the Board of Trade had power to cancel if the report on the investigation was such as to enable them to do so. But under Part eight the justices had not power in themselves to cancel the certificates, but only to forward them to the Board of Trade, who had power to cancel them. Then, by the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), it is provided (sect. 23, sub-sect. 1), that "the power of cancelling or suspending the certificate of a master or mate by the 242nd section of the principal Act conferred on the Board of Trade shall . . . vest in and be exercised by the local marine board, magistrates, naval court, admiralty court, or other court or tribunal by which the case is investigated or tried, and shall not in future vest in or be exercised by the Board of Trade;" so that the power given to the Board of Trade to cancel, which was the only power which enabled them to do so, is there taken away, which was clearly no oversight, for the Legislature, remembering that the certificate would be sent up to the Board of Trade, provided expressly by the 4th sub-section of sect. 23 that "it shall be lawful for the Board of Trade, if they think the justice of the case requires it, to reissue and return any certificate which has been cancelled or suspended, or shorten the time for which it is suspended, or grant a new certificate of the same or any lower grade in place of any certificate which has been cancelled or suspended," thereby giving full and complete power to review and reverse any sentence that might seem to the board too harsh or severe. Now, applying the above provision to the facts of the present case, it seems that this steamship did come into contact with the *coble* (which, I think, is a ship within the meaning of the Act), and in consequence of the collision there was loss of life to the crew of the *coble*, and therefore the calamity was a case of a "ship occasioning loss to another," and also a "casualty occasioning loss of life." It was a casualty to both vessels, although there was a loss of life in the fishing boat exclusively. Clearly it was a case to be investigated under the eighth part of the Merchant Shipping Act 1854, and it was properly sent to two justices. Now, the power of suspending or cancelling certificates

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THE STEAMSHIP WESTHALIA.

[AMERICAN REFS.]

is expressly declared to vest in the magistrates. It therefore vested in, and was correctly exercised by them. Then there is a question arising upon the terms of the 3rd section of the Merchant Shipping Act Amendment Act 1862, which are these: [Reads it.] What then the justices have found and said in effect is this: "The fishing vessel was a ship. There was a collision between the two ships. The two men, master, and mate of the steamer, were in fault in not saving life." Whether the justices were right on the facts is not a question for us. If they came to too harsh a conclusion the Board of Trade can review and mitigate their sentence. But it is argued that the fishing vessel cannot be called a ship. She is 24 ft. long, is only partly decked, has two masts, which may be struck, and sails. It is shown that she is fitted for and propelled by oars, but that the oars are only used in calms, or on occasions of difficulty arising from adverse winds or in tending the nets. Yet, notwithstanding all that, it is said, she is not a ship. Let us next consider the argument on the interpretation clause of the Act of 1854, s. 2, the material part of which runs thus: "Ship shall include every description of vessel used in navigation not propelled by oars." Now these words have been regarded as if they exclusively applied to such and such things. But we must take it that if a ship is shown to be a ship, she shall be deemed to be a ship within the Act, whatever her character may be. Most of these small vessels often go far out to wrecks, and it would be monstrous to say they are not themselves ships so as to be within the protection of the Merchant Shipping Act. As to the oars, it must be remembered that vessels such as those which came over in the Armada with a thousand men on board, were "propelled by oars" worked by hundreds of slaves. Yet could it be said they were not ships? My own definition would be this, viz., "Every vessel that substantially goes to sea is a ship." I do not mean to say that every little boat that goes a mile or two outside a harbour is a ship, but if it carries on the business of going to sea, then I deem it to be a ship, although it may be propelled by oars like the vessel in question. The Act would take in the case of river steamers if the absence of oars were the test of a 'ship'; yet they never go to sea. But I repeat, whenever the vessel is substantially a seagoing vessel, whether it be decked or not decked, it would be a ship, and as such would be brought within the Act, if mine is the right definition. No one can doubt that this coble was a ship, although of only ten tons, and twenty-four feet long, when it was accustomed to go from twenty to thirty miles out to sea almost entirely by sails, and to stay out many hours. I should think it impossible to say that the justices were wrong in coming to the conclusion that this was a seagoing vessel, and consequently a ship, without reference to the interpretation clause. Then, as there was a collision between two ships, and default in the master of one in not saving the crew of the other, there is an offence within the terms of the Act. The other conclusion—that if the ship run down was a fishing-boat, the master of the other vessel would be free from blame or liability—would be simply monstrous. So that point also fails.

MELLOR, J.—I am of the same opinion. For the purpose of deciding this case it was necessary to go through a multitude of references which require considerable attention. But it would be a work of

supererogation to go through them seriatim, because my brother Blackburn has not only shown very clearly how the matter stands, but he has put a reasonable construction on them in which I agree. In the conclusion he has arrived at with regard to the word "ship" I entirely concur. It was not, so to speak, the place of the Act of Parliament to limit the definition of that word, and I also think the rule must be discharged.

LUSH, J.—I am of the same opinion, and have nothing to add to what my brother Blackburn has said.

Rule discharged.

Attorneys: for applicants, John Scott; for Board of Trade, Solicitor to Customs.

UNITED STATES DISTRICT COURT.

Reported by ROBERT D. BENEDICT, Proctor in Admiralty.

EASTERN DISTRICT OF NEW YORK.

THE STEAMSHIP WESTHALIA.

Collision in a fog—Steamship and brig—Speed—Fog horn.

Where a steamship, bound to the westward, in the English Channel, when off the Casketts, and ten miles therefrom, was running at a speed of eight or nine knots an hour in a dense fog;

Held, that the rate of speed was unlawful.

A steamer in a dense fog is bound to go as slow as it is possible for her to go and maintain steerage way.

In the locality mentioned the omission of a sailing vessel in a dense fog to sound her fog horn until she heard the whistle of a steamer quite near, was great neglect on her part. The horn should be continually sounded from the moment fog sets in.

BENEDICT, J.—This action is brought to recover of the steamship *Westhalia* for the damages occasioned by the sinking of the Norwegian brig *Procia*, in a collision which occurred between these two vessels in the daytime on the 9th July last, off the Casketts in the English Channel. The brig was sailing N. by E., close-hauled, with a very light breeze—just enough to move her through the water. The *Westhalia* was steering to westward, bound from Havre to New York. The sea was calm. The evidence on the part of the steamship shows that at half-past twelve o'clock, when the watch changed and the second officer took his station on the bridge, the weather showed signs of fog, which by one o'clock shut in so thick that objects could not be seen at any considerable distance. The look-out and wheel were then doubled, the passengers, of which some one hundred were on deck, directed to keep quiet, and orders given to whistle every fifteen seconds. At one o'clock p.m. the captain, having first slowed the speed of the steamer, went on the bridge and there remained. No vessel was seen or heard by those on the steamship until a few minutes after 2 p.m., when the look-outs reported a vessel right ahead, which proved to be the brig *Procia*, then from 150 to 160 feet distant, presenting her starboard side to the steamship and moving very slowly. The engine of the steamship was at once stopped and reversed and the wheel hove hard aport, but the vessels were in contact before the steamship could be stopped, or her course materially changed. The brig was struck by her fore-rigging and sank almost immediately. Fortunately, however, all her crew were saved, being

picked up in the water by the boats of the steamer. Some eleven witnesses from the steamer have been examined, who substantially concur as to the facts above stated, and all say that no fog-horn was heard, nor was any notice given by the brig until she was seen right under the steamer's bows and oncries were heard from her crew. On the part of the brig it is shown that she was closehauled, going about half a mile an hour with all her sails set; that she had a man at the lookout and a man at the wheel; that the mate and captain were in the cabin engaged in working out the ship's position until nearly 2 p.m., when they came on deck, and shortly after the steamer's whistle was heard; whereupon the mate at once blew the fog-horn, answering the blasts of the steamer's whistle, and also blowing between the whistles, until the steamship came out of the fog close upon them and almost immediately ran them down. The faults charged against the steamship are that she was running at too high speed in such a fog, and that she ported her helm instead of starboarding when the brig was seen. On the part of the claimants it is contended that the steamer was running at a proper speed, with all possible caution; that the brig was seen at the earliest possible moment and all efforts made to avoid her, but it was then impossible; and that the sole cause of the collision was the omission of those on the brig to notify the steamer of their presence by blowing a fog-horn. Upon the proofs, I consider it clear that the steamship was not in fault for porting when she did instead of starboarding, but that she was in fault for running at a speed of nine or ten knots an hour in a dense fog. There is some evidence tending to show that the speed of the steamer before she was slowed by the captain was thirteen miles an hour over the ground, but that she had a tide with her running some three knots, making her speed through the water ten knots, which was reduced three knots when she was slowed; and in this way it is claimed that her speed through the water was only seven knots. The more reliable evidence is, however, to the effect that she was running from eight to ten knots an hour through the water when the brig was seen. The log showed the speed through the water, and the man who gave it says she was running ten knots. The captain says at that time, "she was running about eight to nine miles, I believe," and I notice that the log-book which would show the marking of the log, although called for, is not produced, nor is the engineer called as a witness, nor is his absence accounted for. Such a rate of speed in such a fog is unlawful. Indeed, a speed of seven knots could not be justified. I have not overlooked the testimony which has been introduced to show that this steamer which was sailing to the west, the tide, as she claims, running with her three miles an hour, at a distance of ten miles or more off the Caskettes, in the English Channel, and which stopped for half-an-hour to pick up the crew of the brig, was compelled, in order to keep her course, to maintain a speed of seven or eight knots under all circumstances, owing, as it is said, to the strong currents of the locality; but this testimony has failed to convince me that such is the fact. I know that the steamer would answer her helm more quickly when going at eight or ten knots than at six, but she could not stop so quickly, and in such a dense fog she was bound to be going as slow

as it was possible for her to go consistent with steerage-way, in order to enable her to stop in proper time. This, I am satisfied she was not doing, and for the omission I held her in fault. There remains to consider the fault charged upon the brig, that she omitted to blow her fog-horn. It cannot be doubted upon the evidence that no horn was heard by those upon the steamer. The precautions taken on the steamer indicate a state of watchfulness and render it difficult to understand how a horn could fail to have been heard, if blown, while, on the other hand, to hold that a horn was not blown is to disregard the positive evidence of six different witnesses from the brig, who testify affirmatively to the fact that their horn was blown. Moreover, the brig had a man on the lookout and a man at the wheel. She was in a dangerous locality, enveloped in a dense fog, and under such circumstances it seems hardly possible that a steamer's whistle would not have attracted their attention, even if it did not even occasion alarm. The master and mate were also on deck part of the time of the fog, and all say that the whistle did attract their attention, and that it was at once replied to by the horn. To omit that signal would be to greatly increase their peril, and no reason can be assigned for such an omission. It seems impossible, therefore, upon the evidence, to hold that the horn was not blown when the whistle was heard. But it is admitted that the horn was not blown until the whistle was heard, which was some time after the fog set in and when the steamer was quite near. The evidence for the brig, that the whistle was heard from three to five times, only shows this. The evidence of the number of times the horn was blown tends to show the same thing. According to the account given by the libellants themselves, therefore, the steamship was running within hearing distance of the brig for some minutes before the horn was blown, the fog being then very thick. To omit sounding the horn until they heard something, when in such a fog and in that locality, was great neglect. The horn should have been continually sounded from the moment the fog set in. It is true that when the horn was sounded it was not heard on the steamer, owing, it may perhaps be, to some passing current of air which carried the sound away; but it cannot be inferred from that circumstance that if blown when the steamer first came within hearing distance it would not then have been heard. The presumption must be that it would have been heard at that time. My conclusion therefore is, that this is a case of fault in both the colliding vessels—the fault in the steamer being that of running at too high speed in a thick fog; on the part of the brig, that of omitting to blow the horn from the time the fog set in, instead of from the time of hearing the steamer's whistle at no very great distance. I cannot dismiss the case without remarking, in addition, that if the not very unreasonable supposition be made that the witnesses for the brig, in their zeal for their own vessel and their own case, have been led to over-estimate and over-state the time which elapsed between hearing the whistle and the collision, the failure of those on the steamer to hear the horn would be explained. Under such an hypothesis the case would show the master and mate remaining in the cabin while the vessel was in a thick fog and coming out at the last moment only to find the steamer upon them. The horn blown at that time

would naturally be unnoticed on the steamer in the excitement attendant upon the discovery of the brig close under their bows. But this hypothesis would impute to the lookout and man at the wheel of the brig, who were both on deck from the commencement of the fog, such an extraordinary neglect of duty—such disregard of their own personal safety even—and be so greatly opposed to the whole tenor of the evidence given for the brig, that I hesitate to adopt it as the explanation of the case but rest my decision on the other grounds above stated. This being a case of mutual fault, the damages will of course be apportioned. Let decrees be entered accordingly, and a reference ordered to ascertain the amount due to the libellants.

SUPREME COURT OF MISSOURI.

Collated by F. O. CHURCH, Esq., Barrister-at-Law.

March Term, 1870.

THE PHOENIX INSURANCE COMPANY (apps.) v. COPELIN (resp.)

THE BENTON (ss.)

Marine insurance—Abandonment—When justifiable—Expense of repairs—Partial or total loss—Ship stranded.

On Nov. 3, 1865, a steamship, when proceeding down the Missouri, was driven by a violent wind upon a large snag with such violence that the snag went through her into her hull, making a large hole, from which she soon filled with water. She was run upon a bar and attempts made to raise her, but without success. She was twisted and in danger of breaking in two. On the 21st the plaintiff, considering the ship a total loss, gave notice of abandonment. The defendants, on the 27th, raised her; she was repaired and tendered to the plaintiff on the 9th May, 1866. The actual repairs cost 1764dols. 76c.; the expense of raising her was 12,132dols. 82c. When tendered to the plaintiff she was worth 12,000dols.; her valuation in the policy was 45,000dols.

Held, that the plaintiff was entitled to recover for a total loss.

When it appears that by proper exertions a stranded vessel might have been got off and been fully repaired at a moderate cost, the abandonment is void, and a partial loss only can be recovered; and to warrant the recovery of a total loss it must be proved that the delivery of the vessel from the peril was, upon reasonable grounds, judged to be impracticable.

The right to abandon must be determined by the judgment of experts, applied to the condition of the vessel at the time of abandonment.

The owners of a vessel are not bound to receive her from the underwriters if there is any material deficiency in the repairs. She must be as good as she was before, and be returned within a reasonable time.

If the underwriter takes possession of the ship, although under protest, and gets her off and repairs her, it is an acceptance of the abandonment if he does not return her in a reasonable time.

This was an appeal.

WAGNER, J.—This was an action brought upon a policy of insurance against the underwriter in favor of the plaintiffs, by which the steamboat *Benton* was insured for 5000dols. for one year, commencing on the 26th March 1865. The policy is

in the usual form of marine insurance. The evidence in the case tends to show that on the morning of the 3rd Nov. 1865, while the *Benton* was descending the Missouri River, a number of miles above Omaha, she was driven by a heavy wind upon a large snag with such violence that the snag went through her into her hull, making a large hole, from which she soon filled with water, and that she was run upon a bar as far as possible. That her officers immediately erected pumps and balkheads, and commenced pumping and used their best efforts to raise her, and that they worked for several days without success. That all the time the water was washing out from under midships and her bow, that her bow was settling down. She was in a bad condition, being twisted, and in danger of breaking in two. While in this condition the officers concluded that they could only save her machinery, and that all the balance would be a total loss. These facts they telegraphed to the plaintiff, at St. Louis, and received instructions from him, and they say from the defendant also, to proceed to wreck her as the only means of saving anything. The weather at that time was cold, and the river about closing with ice; that on the 21st Nov. the defendant took possession of the boat or wreck for the purpose of raising or repairing her, and restoring her to the plaintiff; that on that day, as plaintiff considered her a total loss, he made a formal written abandonment of her to defendants; that on the 27th Nov. defendant succeeded in raising the hull, as the river had fallen very much in the mean time. Defendant started with her for St. Louis on the 26th March 1866, being prevented from going earlier, as alleged, on account of the ice, and she arrived at that port on the 12th April thereafter. She was then put upon the docks to be repaired, and on the 9th May 1866, she was tendered to the plaintiff, six months after the loss, and two after the expiration of the policy. The actual repairs cost 1764dols. 76c., and the expense of raising her was 12,132dols. 82c., and she was worth when tendered to the plaintiff 12,000dols. only, her valuation in the policy being 45,000. There was further evidence going to show that defendant did not use proper diligence in making the repairs, and that the repairs could all have been done that were done, within four days after the boat reached St. Louis. That the defendant did not repair the injury done by the sinking, and that he well knew this—that, in fact, it would have cost from five to six thousand dollars additional to have repaired the boat and put her in substantially as good condition as she was when she struck the snag, and that she was not properly repaired or tendered within a reasonable time. The case was tried before the court, and upon certain declarations of law the verdict was for plaintiff. Without particularly, or in detail noticing the instructions given for the respondent, we will simply state the law as we understand it in regard to the question of abandonment. In *Norton v. The Lexington Fire, Life, and Marine Insurance Company*, (16 Ill. 235) the court, after a very free discussion of the subject, say that the right to abandon must be determined by the judgment of experts, applied to the condition of the vessel at the time of abandonment; and although the cost of saving and repairing the vessel after her abandonment may be less than 50 per cent., yet, if at the time the facts ap-

parently justified an abandonment, it will be good. In *Ruckman v. Merchants' Louisville Insurance Company* (5 Duer 36), Duer, J., a very high authority on the law of insurance, declares in the opinion, that, "the true principle upon which the whole doctrine of abandonment may be said to rest, and by which alone its application, in converting a partial into a total loss can be justified, is that which in the leading case of *Lordon v. Wallis* (2 M. & S. 240) is stated by Lord Ellenborough, with his accustomed brevity and force. It is, that an abandonment is never to be authorized, except when, at the time, the loss was actually total, or in the highest degree probable; and if we analyze the cases that have settled the law that now prevails in England, we should find that it is this principle that runs through, explains and justifies them all. To select an example from each class of cases: When the vessel insured is captured, there is an actual total loss; but, as she may be recaptured or restored, an abandonment is necessary to warrant its recovery; a title must be vested in the insurer to give them the benefit of the *spes recuperandi*. But when the vessel is stranded, the question whether the loss shall be deemed partial, or so far total as to warrant an abandonment, will depend upon the nature and extent of the peril in which the vessel is involved, and the probable difficulty, hazard, and expense of attempting to deliver and repair her. When it appears that by proper exertions she might have been gotten off, and have been fully repaired at a moderate cost, the abandonment is void, and a partial loss only can be recovered; and to warrant the recovery of a total loss, it must be proved that the delivery of the vessel from the peril was, upon reasonable grounds, judged to be impracticable, or not to be effected unless at an expense that would absorb her value. In other words it must be proved that a loss actually total in the highest degree probable: (*Fontaine v. Phoenix Insurance Company*, 11 John. 295; *The Sarah Ann*, 2 Sumn. 255.) Judge Story distinctly announces the rule, that in case of stranding, the course an owner uninsured, in the exercise of his best judgment, would have followed, furnishes the correct test of the right of the assured to abandon: (*The Sarah Ann*, 2 Sumn., *sup.*) Chancellor Walworth in the case of the *American Insurance Company v. Ogden* (20 Wend. 302), holds the same doctrine, and there would seem to be no reason why the same test might not, with equal justice, be applied to every case in which an absolute right to abandon is not established by conclusive proof that the cost of repairs would have exceeded the value. The matter resolves itself into a question of fact, and must be determined by the jury upon the evidence before them. By the application of these principles we cannot say that there was sufficient error in the first of the instructions given to justify a reversal. Although they are subject to some verbal criticism, yet they are substantially correct. But the greatest objection is made to the instructions given by the court which in effect declared, that if the defendant on or about the 21st Nov. 1865 took possession of said boat with a view of raising and repairing her and retained her till the 9th May 1866, before offering to return her to the plaintiff, and that she never was repaired as required by the terms of the policy, and that the defendant and his agents knew that she was not so repaired, and that it would have required a large additional sum of money to have

been expended upon her, to have put her in such repair, and that if the written notice of abandonment given by plaintiff was served on the defendant on the 22d Nov. 1865, then the plaintiff was entitled to recover. Another instruction in substance told the jury that if the repairs could have been reasonably made in a much shorter time, and that the boat was not repaired and tendered in a reasonable time, then the verdict should be for the plaintiff. It seems to be well settled that the owners of a vessel are not bound to receive her from the underwriters, if there is any material deficiency in the repairs. She must be made as good as she was before. As to the return of the vessel within a reasonable time, the cases lay down a uniform rule. I have seen but one authority denying the proposition, and that is an adjudication of an inferior court. In *Norton et al. v. The Lexington Fire, Life, and Marine Insurance Company*, (*sup.*), it is held, that if after an abandonment, the underwriter takes possession of the vessel although he does it under protest, and gets her off and repairs her, no matter at how small or great a cost, it is an acceptance of the abandonment, if he does not return her in a reasonable time. This principle was first announced in *Peete v. The Suffolk Insurance Company* (7 Peck. 254) where it was explicitly adjudged that unless the repairs are made within a reasonable time, the insurer forfeits his right to return the vessel and he must be considered as having accepted the abandonment. In this last case the reason for the rule is thus stated by Parker, C. J.: "But the underwriter has his duties as well as his rights; if he took the vessel into his possession to repair her, he must do it as expeditiously as possible, in order that the voyage, if it be not completed, may not be destroyed. If he delay the repairs beyond a reasonable time, he forfeits his right to return the ship, and must be considered as taking her to himself under the offer to abandon. This principle cannot well be contested; without it, the underwriters may keep the assured entirely uncertain in regard to his rights and interests, and put his property in jeopardy. The right of the insurer to take into his custody the vessel of the assured without his consent, except under the abandonment, cannot exist without the correlative duty to keep her as short a time as possible under the circumstances in which she may be placed." The same principle is again affirmed in *Reynolds v. Ocean Insurance Company* (1 Met. 160), and in the case between the same parties in 22 Pick. 191. We are also informed by the counsel for the respondent that the principle has recently been examined and approved in the Supreme Court of the United States, but the decision has not been published, and we have not yet seen it. The only case that we have seen that controverts the above authorities is the *Marine Dock and Mutual Insurance Company v. Goodman*, decided in the Mobile Court of Chancery, and published in 4 Am. Law. Reg. 481. This case is not sufficient to overcome the great weight of authority arrayed against it, and its reasoning does not commend itself to our approbation. We see nothing objectionable in the action of the court in the matter of giving and refusing instruction on behalf of the appellant. Our conclusion is that the judgment should be affirmed. The other judges concur.

ADM.] THE NUOVA RAFFAELINA—JOHN JAFF AND JOSEPH KIRBY v. FRANCISCO DURANTE. [ADM.]

COURT OF ADMIRALTY.

Reported by H. F. PURCELL, Esq., Barrister-at-Law.

April 19 and 25, 1871.

THE NUOVA RAFFAELINA.

JOHN JAFF AND JOSEPH KIRBY (appes.) v. FRANCISCO DURANTE (resp.)

Claim arising out of the use or hire of a ship—Broker's commission—32 & 33 Vict. c. 51, s. 2, sub-sect. 1—Jurisdiction of County Court.

A charter-party made between captain and charterers contained a clause providing for payment of commission to broker for negotiating charter.

Held, that the broker could not sue in rem under 32 & 33 Vict. c. 51, s. 2, sub-sect. 1, as he was not a party to the charter.

THIS was an appeal from a decision of the learned Assessor of the Liverpool Court of Passage.

On the 3rd Dec. 1870, a cause for a claim alleged to arise out of an agreement made in relation to the use or hire of a ship, namely, for the sum of 87l. 14s. 9d., for commission on the effecting by a charter-party of the ship *Nuova Raffaella* of the appellants for the respondent, dated the 14th Nov. 1870, was instituted in the Court of Passage of the borough of Liverpool under the provisions of the County Courts Admiralty Jurisdiction Act 1868, and the County Courts Admiralty Jurisdiction Amendment Act 1869, on behalf of the plaintiffs (now appellants), against the ship *Nuova Raffaella* and the master and owner of the said ship the above-named defendant (now respondent).

On the 7th Dec. the defendant served the plaintiffs with notice of a motion that the said cause might be dismissed on the ground that the claim of the plaintiffs was not a claim arising out of any agreement made in relation to the use or hire of any ship within the meaning of the County Courts Admiralty Jurisdiction Amendment Act 1869, and that the said claim was not enforceable by proceedings *in rem* or *in personam* or otherwise within the Admiralty jurisdiction of the said Court of Passage.

The learned judge dismissed the cause on the ground that under the 32 and 33 Vict. c. 51, s. 2, sub-sect. 1 (a) the court had no jurisdiction over the subject matter of the claim. By the charter-party made between Captain Durante (the respondent) and Messrs. Shute and Hamilton, the charterers, it was stipulated that 2½ per cent. commission is due on the execution of this charter-party to Jaff and Kirby, Liverpool (ship lost or not lost), by whom the ship is to be reported at the Custom House on her arrival at Liverpool, or by their agents, if at any other port of discharge. It was for this amount of commission that the plaintiffs had instituted their suit.

Charles Russell for the appellants.—The question is whether the plaintiffs' claim arises out of the agreement contained in the charter-party. It was contended by the other side in the court below that the words of the section could only mean that the claim must be one between the shipowner and the charterers, or *vice versa*, and could not extend to a collateral claim not directly arising under the agreement itself. But even if this were so, I should contend that this claim did directly arise

out of the agreement. A large jurisdiction was given to the Court of Admiralty by 24 Vict. c. 10, but, nevertheless, it is reasonable to suppose that the Legislature, by 32 and 33 Vict. c. 51, intended to give a larger power than existed under that statute. Further, having, by 24 Vict. c. 10, given a remedy by process *in rem* for necessities supplied to foreign ships, it is not unreasonable to conclude that the Legislature intended to give a similar remedy in a contract of this kind. Here is a foreign ship in the port of Liverpool without any owners in this country. Before it can be turned to any account in the earning of freight shipbrokers must be employed. Their claim to commission arises, therefore, directly out of the agreement and is within the Act.

Gainsford Bruce, for the respondent.—First, the right to commission does not arise under the charter-party; secondly, if it did, it is still not a claim arising out of an agreement relating to the hire of a ship within the meaning of the Act. (1) There is an agreement contained in the charter-party made by any person on behalf of the ship to pay commission to the broker. The broker is no party to the agreement. If he is entitled to commission it arises out of a distinct agreement. (2) The words in the Act must be interpreted, not in all their latitude, but must have a meaning attached to them in accordance with the general scope of the Act. In the case of the *Dorcas* (22 L. T. Rep. N. S. 627; L. Rep. 3 Adm. 135), the claim was for necessities, and the only question before the court was "Is it a claim for necessities?" and the court said, "No." The court put a limited meaning on the words. The Legislature must have intended these words to be qualified to some extent when it is considered that the power given by the Act may be exercised *in rem*. It is unreasonable to suppose that any claim having any relation, however remote, to an agreement relating to the hire of a ship, is a claim for which a ship may be arrested. [Sir R. PHILLIMORE.—There is a stipulation for the commission in the charter-party. Do you say that if the charterers had brought the action, they would have had *no locus standi*?] That would be a different case. [Sir R. PHILLIMORE.—Your objection rather goes to the names of the plaintiffs. It is a claim under a charter-party which charter-party relates to the use and hire of the ship. You say it is an agreement not competent to the particular party to put in force.] I should say that it is an agreement in the charter-party which could not be enforced by anybody. An agreement to pay commission is not sufficiently connected with the carriage of goods in a ship to come within the clause of the Act of Parliament. The broker may have his remedy for work and labour. [Russell.—The ship pays commission in the absence of a contract to the contrary.] The claim exists independently of the charter-party. It is the nature of the claim which the court must look at. Brokerage has no relation to the carriage of goods.

Russell, in reply cited

Robertson v. Watt, 22 L. J. 290, Ex.

Our. adr. vult.

April 25, Sir R. PHILLIMORE.—This is an appeal from the Court of Passage at Liverpool under 32 & 33 Vict. c. 51. The learned judge of that court, without assigning any reasons, decided that he had no jurisdiction to entertain the case. I regret that I have not the benefit of knowing the grounds on which he proceeded. The point to be

(a) This section gives the County Court power to try *inter alia* "any claim arising out of any agreement made in relation to the use or hire of any ship."

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[ADM.]

decided is, whether the present plaintiffs, who are ship brokers, are entitled to sue in rem in the Admiralty Court for their commission under the following circumstances:—On the 14th Nov 1870, a charter-party was entered into between the captain of the *Nuova Raffaella*, and certain Liverpool merchants and charterers. In the penultimate clause of that charter-party it is stated that "2½ per cent. commission is due on the execution of this charter-party to Japp and Kirby." the present plaintiffs and appellants. It is contended that Japp and Kirby may sue for this commission in the Court of Passage by reason of the following words in 32 & 33 Vict. c. 51, s. 2. Any County Court with admiralty jurisdiction may try a cause, "as to any claim arising out of any agreement made in relation to the use or hire of any ship." I have not now to consider whether if the charterers were suing for the commission in question they would not be entitled to do so. It is very possible that under the authority of *Robertson v. Wait* (22 L. J. Ex. 209), they might have a *locus standi* as trustees for the broker for this purpose. I am inclined to think that if they were so suing on the charter-party the claim might be considered as arising out of the use or hire of the ship. But the appellant, who is the broker, cannot sue upon this instrument made between other parties, whatever use he might make of it as evidence in another action upon an implied contract for his services. As the jurisdiction of the Court of Passage must in this case be founded upon a claim growing out of the charter party, a claim which I have said the broker cannot maintain, I must, for the reasons which I have stated, and those only, dismiss the appeal, with costs.

Solicitors for the appellants, Makinson and Carpenter, agents for Bretherton, Son and Hannan, Liverpool.

Solicitors for the respondents, Chester and Urquhart, agents for Tyrer, Smith and Kenion, Liverpool.

Tuesday, Jan. 17, 1871.

THE INDUSTRIE.

Damage—Where no collision—Jurisdiction.

This court has jurisdiction where damages have been done or received by a ship, although there may not have been any collision between two or more ships. The vessel *B. B.*, coming up the channel to H. on a dark morning, was compelled suddenly to port her helm by reason of the vessel *I.* being discovered across the fair way of the channel without any light exhibited, in consequence of this manoeuvre the *B. B.* took the ground, and though her anchor was let go, dragged it and drove against the town wall of H., suffering damage:

Held (on motion to strike out articles of the answer, denying the jurisdiction and the relevancy of the petition alleging these facts), that the court had jurisdiction to entertain the action, and that a good ground of action had been disclosed.

By general maritime law those in charge of a ship abroad at night in the fair way of a navigable channel are bound to take proper means to apprise other vessels of her position.

This was a cause of damage instituted on behalf of the owners of the brig *Blue Bell* against the vessel *Industrie*. The following are the material allegations contained in the petition.

1. On the 11th Oct. 1870 the brig *Blue Bell*, of the burthen of 191 tons register or thereabouts, navigated by Benjamin Dickens and a crew of six hands, sailed from Shoreham in ballast bound to Hartlepool.

2. Shortly after five a.m. of the 16th of the said month the *Blue Bell*, in the prosecution of her said voyage, was in the channel leading to the harbour at Hartlepool, proceeding under close-reefed foretopail and fore-topmast staysail only, steering N.W. and by N. half N., and making about seven or eight knots an hour, with the Admiralty regulation lamps, to wit, a green lamp on the starboard side, and a red lamp on the port side, duly exhibited and burning brightly, and a good look-out was being kept from on board her.

3. The morning at this time was dark, the tide was flood and of the force of about one knot an hour, and the wind was a gale from S.S.W.

4. Whilst the *Blue Bell* was proceeding under the circumstances aforesaid, the lights of two steam-tugs were seen ahead towards the W. side of the obannel. The *Blue Bell* approached to pass astern of the said two steam tugs, there being room sufficient for her to do so; but whilst so doing, a vessel, which proved to be the *Industrie*—the vessel proceeded against in this cause—and which had not any light exhibited, was made out ahead at the distance of about fifty yards from the *Blue Bell*. The helm of the *Blue Bell* was then ported; but as soon as this had been done, it was discovered that the *Industrie* was across the channel, and that the *Blue Bell* was in imminent danger of running into the side of the *Industrie*, and doing that vessel and herself considerable injury. The helm of the *Blue Bell* was put hard aport to avoid running against the *Industrie*, and thereby the *Blue Bell* succeeded in avoiding the *Industrie*, but in so doing, the *Blue Bell* was compelled to go out of the fair way of the channel, and in consequence thereof she took the ground close under the bows of the *Industrie*, and although the anchor of the *Blue Bell* was immediately let go, and her topail forled, she dragged her anchor and drove against the Hartlepool town wall, and thereby sustained serious damage, and also did damage to the said wall.

5. The said damage to the *Blue Bell*, and the losses of the plaintiffs by reason thereof, were occasioned by the negligence of those on board, or in charge of, the *Industrie*, in having got that vessel across the fair way, and in leaving her there without any light exhibited, or other measures taken to warn other vessels of her position.

6. The measures taken by the *Blue Bell* to avoid coming into collision with the *Industrie* were proper, and were necessary for that purpose, and after taking such measures, those on board the *Blue Bell* were unable to prevent the *Blue Bell* from taking the ground and striking the said wall, and suffering the damage aforesaid.

7. The said damage to the *Blue Bell* was occasioned by the negligence of those on board or in charge of the *Industrie*, and not by any negligence of those on board the *Blue Bell*.

An answer was filed by the proctor for the owners of the *Industrie*, which contained, *inter alia*, the following articles: First, the said proctor admits that this court has no jurisdiction in respect of the matter or things alleged by the plaintiffs in their petition herein. If this court has or shall have jurisdiction, then he further says; secondly,

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[ADM.]

the allegations contained in the said petition are irrelevant. No damage is shown to have been or was in fact done by the *Industrie* to the brig *Blue Bell* in the petition mentioned.

E. C. Clarkson.—The petition discloses a good ground of action. The *Blue Bell* in the exercise of proper caution and prudence, was compelled to port to avoid running into the *Industrie*, and the direct consequence of this manœuvre was the driving of the *Blue Bell* against the wall. When through the negligence of another, persons are compelled to adopt a dangerous alternative and suffer injury thereby, liability attaches to the party guilty of negligence, though not the direct cause causes; (*Jones v. Boyce*, 1 Stark.) The court has jurisdiction to entertain this action. It is not necessary, to found the jurisdiction in a cause of damage, that the plaintiff's vessel should come into collision with the wrongdoer, or that there should be a collision between two ships.

The Emery, L. Rep. 3 Adm. 48; 39 L. J. 25, Adm.; 23 L. T. Rep. N. S. 601;

The Night Watch, Lush. 542; 32 L. J. 47, Adm.;

The Excelsior, L. Rep. 2 Adm. 208; 37 L. J. 54, Adm.;

19 L. T. Rep. N. S. 87;

The Sylph, L. Rep. 2 Adm. 24; 37 L. J. 14, Adm.;

17 L. T. Rep. N. S. 519;

The Clarn Killam, L. Rep. 3 Adm. 161; 23 L. T. Rep. N. S. 27;

The Beta, L. Rep. 2 P. C. 447, 449; 29 L. T. Rep. N. S. 988; 38 L. J. 52, P. C.;

The Ohio, 19 L. T. Rep. N. S. 55; 37 L. J. 16, Adm.

The court has jurisdiction in this case as part of the ancient jurisdiction of this court, and also under the 3 & 4 Vict. c. 65, s. 6, and the 24 & 25 Vict. c. 10, s. 7.

Phillimore, contra.—There is no good cause of action here. It is necessary that there should be some default on the part of the defendants amounting to negligence in law to support the action:

Adams v. Lancashire and Yorkshire Railway Company, L. Rep. 4 C. P. 739; 20 L. T. Rep. N. S. 850;

38 L. J. 277, C. P.;

Boatys of Romney Marsh v. Trinity House, L. Rep. 5 Ex. 204; 22 L. T. Rep. N. S. 446; 33 L. J. 168, Ex.

But here the *Industrie* was under no obligation to exhibit a light. She was neither under way nor at anchor. The law imposes no duty on the owners of wrecked vessels to warn other vessels of her position: (*Brown v. Mallet*, 5 C. B. 599; 17 L. J. 227, C. P.) The petition ought to have shown that there was negligence in getting the ship into the position in which she lay. The court has no jurisdiction to entertain the action:

The Ida, Lush. 6; 1 L. T. Rep. N. S. 417;

The Robert Pow. Br. & Lush. 99; 32 L. J. 164, Adm.;

9 L. T. Rep. N. S. 237.

Clarkson in reply.—*Brown v. Mallet* is an authority to show that a duty does remain attached to the owner as long as the possession is retained. He also referred to the

Sarah, Lush. 549, and

White v. Crisp, 10 Ex. 312; 23 L. J. 317, Ex.

Sir ROBERT PHILLIMORE.—The case set up by the plaintiff, the owner of the *Blue Bell*, is as follows: The *Blue Bell*, in the prosecution of a voyage from Shoreham to Hartlepool, was, at five a.m. of the 16th Oct., in the channel leading to the harbour at Hartlepool under close-reefed fore-top-sail and fore-topmast stay-sail, steering N.W. by N. $\frac{1}{2}$ N. The morning was dark, the tide was flood, and the wind was a gale from the S.S.W. Whilst the *Blue Bell* was proceeding in these circumstances she was obliged, on account of the *Industrie* being across the fairway of the channel without any

light exhibited, suddenly to port her helm; by this manœuvre she took the ground close under the bows of the *Industrie*, and although her anchor was let go, she dragged it, and drove against the Hartlepool town wall, and thereby sustained damage from, and also did damage to, the wall. It is alleged by the plaintiff that the damage was occasioned by the negligence of those in charge of the *Industrie*, "in having got that vessel across the fair way, and in leaving her there without any light exhibited or other measures taken to warn other vessels of the danger;" and it is alleged that the measures taken by the *Blue Bell* were proper and necessary. The allegations in the petition in fact substantially amount to this: that by the negligence of those in charge of the *Industrie*, the crew of the *Blue Bell* were obliged to run their vessel ashore, and against the Hartlepool town wall. Those articles of the answer to which the present application relates, allege that this court has not jurisdiction to entertain the suit, and that the statements contained in the petition are irrelevant. The 3 & 4 Vict. c. 65, s. 6, enacts that this court shall have jurisdiction "to decide all claims and demands whatsoever in the nature of damage received by any ship." The Admiralty Court Act 1861, s. 7, enacts that this court shall have jurisdiction "over any claim for damage done by any ship." It is undisputed that if the *Blue Bell* had come into actual collision with the *Industrie*, the court would have had jurisdiction to entertain any claim for damage occasioned by the collision; and I am unable to see why there should be any difference in the rights of the parties simply because the *Blue Bell* in order to prevent a collision with the *Industrie* was compelled to go out of the fair way, and in consequence received damage. If the *Blue Bell* can make out that the misconduct or careless navigation of those in charge of the *Industrie* rendered it necessary for the *Blue Bell* to execute the manœuvre which caused her to receive the damage, I think she is entitled to maintain this suit. There has no doubt been some fluctuation in the decisions as to the extent of the jurisdiction of this court in cases of damage, but I think it is now established that this court has jurisdiction where damage has been done or received by a ship, although there may not have been any collision between two or more ships. It has been strongly contended on behalf of the defendant that it does not appear that in this case the damage was caused by any act or default on the part of the crew of the *Industrie* amounting in law to negligence. But the principal upon which the case of *Brown v. Mallet*, referred to in support of this contention, was decided, clearly applies only to cases in which a vessel has been abandoned or has ceased to be under the control or management of her owner or his servants. In the present case the petition does, I think, substantially aver that the acts of negligence complained of were owing to the conduct of those who were on board of or in charge of the *Industrie*, and I am of opinion that the defendants cannot contest their liability upon the suggestion that the *Industrie* had passed out of their control without pleading facts to support that defence. It has been contended that there was no obligation upon those in charge of the *Industrie* to exhibit any light to warn other vessels of her position. But, independently altogether of the "Regulations for preventing Collisions at Sea," I think those in charge of a vessel aground at

ADM.]

THE LORETTA—THE BEAUMARIS CASTLE—THE TUG STRANGER. [AMERICAN REFS.]

night in the fairway of a navigable channel are bound by the general maritime law as administered in this court to take proper means to apprise other vessels of her position. I order the articles in the answer, objected to, to be struck out; but as there have been fluctuating decisions in this court on the question of jurisdiction, I shall make no order as to costs.

Solicitor for plaintiffs, *Cooper*.
Proctor for defendants, *Stokes*.

Tuesday, May 9, 1871.

THE LORETTA.

County Courts Admiralty Jurisdiction Act (31 & 32 Vict. c. 71), s. 9.—Leave to proceed.

The court has no power to grant leave to proceed in the High Court of Admiralty, under the County Courts Admiralty Jurisdiction Act 1868, s. 9, when proceedings have already been instituted.

This was a suit for necessities instituted against the above-named ship. She had been repaired in a Spanish port in March 1870, and had sailed. The plaintiff heard that she was in Falmouth waiting for orders at the end of April in this year, and had her arrested in this court. The amount claimed was under 150*l*.

Webster moved for an order under the County Courts (Admiralty Jurisdiction) Act 1868, s. 9 (a), for leave to proceed with the suit.

Clarkson, contra.—The Court has no power to make such an order, and cannot under the Act bring the defendant here whether he likes it or not.

Sir R. PHILLIMORE.—Where proceedings have been instituted the court has no power to interfere, and parties must proceed on their own responsibility.

Webster.—The section reads as to any proceedings, whether taken at the beginning of a suit or afterwards. Unless the words "take proceedings" mean "institute suit," any proceedings must be meant. It may affect our right to costs, as the court will say that we ought to have applied for leave to proceed.

Sir R. PHILLIMORE.—This was an application to avoid the risk of being condemned in costs at the hearing of the cause. The 9th section of the County Courts Admiralty Jurisdiction Act 1868 provides that, if any person shall take proceedings in the High Court of Admiralty which he might have taken in the County Court, except by order of the judge, and shall not recover over a certain sum, he shall be condemned in costs, unless the judge shall certify. There are two modes of avoid-

(a) Sect. 9.—If any person shall take in the High Court of Admiralty of England or in any superior court proceedings which he might, without agreement, have taken in a County Court, except by order of the judge of the High Court of Admiralty, or of such superior court, or of a County Court having admiralty jurisdiction, and shall not recover a sum exceeding the amount to which the jurisdiction of the County Court in that admiralty cause is limited by this Act, and also if any person without agreement shall, except by order as aforesaid, take proceedings as to salvage in the High Court of Admiralty or in any superior court in respect of property saved, the value of which when saved does not exceed 100*l*., he shall not be entitled to costs, and shall be liable to be condemned in costs, unless the judge of the High Court of Admiralty or of a superior court before whom the cause is tried or heard shall certify that it was a proper admiralty cause to be tried in the High Court of Admiralty of England or in a superior court.

ing being condemned in costs in proceedings which might have been taken below. A plaintiff may come here before proceedings are instituted, or the court may certify at the end of the hearing. The 9th section only gives power to grant orders to proceed in this court before any proceedings have been instituted. The application must be refused.

Solicitors for the plaintiff, *Inghelton and Co.*
Solicitors for the defendants, *Clarkson and Co.*

Wednesday, May 10, 1870.

THE BEAUMARIS CASTLE.

Costs—County Court Admiralty Jurisdiction Act 1868, ss. 9, 21.

The court will certify for costs where it is less expensive to try in London than in a County Court.

This was a cause of salvage, instituted by certain Deal boatmen against the *Beaumaris Castle* for salvage services rendered by them on March 9th 1870. There was a tender of 110*l*., and the court awarded 100*l*. above the tender. At the time of the institution of the suit the ship was at Cardiff, and if the suit had been tried in the County Court it would have been tried at Cardiff.

The Admiralty Advocate (*Clarkson* with him) asked the judge to certify for costs, on the ground that it would have been more expensive to try at Cardiff, as the witnesses and owners were all in or near London.

Milnerd, Q.C. (*Cottenham* with him) objected.

Sir R. PHILLIMORE.—I shall certify for costs in this case on the ground that trying in this court has been a less expense than trying below. At the beginning of this suit the vessel was at Cardiff, and under the 21st section of the County Courts Admiralty Jurisdiction Act the case would have to be tried at Cardiff. The witnesses for the plaintiffs are nearer London than Cardiff, and the owners likewise live in London, and so it is a saving of expense to try in London rather than take all the witnesses down to Cardiff.

Solicitors for the plaintiffs, *Lawless and Nelson*.
Solicitor for the defendants, *Sutton*.

UNITED STATES DISTRICT COURT.

Collected by F. O. CARTER, Esq., Barrister-at-Law.

EASTERN DIVISION OF MICHIGAN.

IN ADMIRALTY.

The Tug STRANGER.

Tugs—Duties of—Duties of tow vessels to avoid injury—Sheering of tow—Dangers of passage.

The doctrine that a tug is liable for an injury to the tow, unless the tug can show that she was not in fault, applies exclusively to cases of injury resulting from the violation or neglect of some duty coming within the scope of the duties devolving upon that class of employment.

Whilst being towed by a tug a schooner sheered out of the course and struck upon a sunken rock:

Held, that it was the duty of the tow to follow directly in the course of the tug, and that the tug, therefore, was not liable for damages resulting from the accident. It is no part of the duty of the tug to take precautions against the sheering of the tow; but if the tow sheers in consequence of a manœuvre of the tug, and thereby sustains damage, the tug is liable.

Quære, whether it is the duty of a tug to inform tow of danger in the passage.

THIS was a libel against the tug *Stranger*, for unskillful towing of the schooner *Monteagle* through the Sanit Ste. Marie canal, on the 24th June 1868, in consequence of which she was caused to strike a sunken rock at the entrance to the canal, near its westerly side, breaking a hole through her bottom, and causing her to sink just below the lower lock. Schooner claims damages for salvage expenses, repairs, detention &c., in the sum of \$746dols. 40c.

The faults alleged against the tug are:—

1. That she entered the canal with her tow at too late an hour.
2. Entered at too great speed.
3. Entered to the right of the centre of the canal instead of the left of the centre, as she should have done, to avoid drawing the schooner upon the sunken rock, the locality of which was well known to the tug and was unknown to the schooner.
4. Failure to inform the schooner of the existence and location of said sunken rock, or to give any information or orders to the schooner as to entering and getting through the canal safely.
5. Let her steam run down, and so failed to handle the schooner properly, in view of her condition, and thereby causing her to strike again below the lower lock.
6. The master of the tug left her after entering the canal, thereby neglecting his duty.
7. The master of the tug failed and omitted to inform himself of how much water the schooner drew, and how much cargo she carried, as was his duty, and as was the custom, before attempting to take her through the canal.

The answer of John R. Gillett, and other owners of the tug, admits the towing as alleged, and denies all the allegations in the libel, of fault on the part of the tug, and charges that if the schooner struck a sunken rock at the entrance of the canal, it was in consequence of her not following in the wake of the tug, caused by the schooner being badly managed, and by her sheering to the westward at the entrance of the canal that the injury caused thereby was slight, and was not the cause of the schooner sinking below the lock; that the sinking of the schooner at that point was in consequence of her striking a rock there, and was caused by the negligence and mismanagement on the part of the schooner, and without any fault on the part of the tug. The evidence will be noticed in the opinion so far as necessary to a decision of the case.

H. B. Brown and W. A. Moore for the tug.

A. Russell for the schooner.

Opinion by LONGYEAR, J.—The towing and salvage services and supplies rendered and furnished by the tug, and the reasonableness of the charges therefore being admitted, nothing remains but to consider and determine the case of the libel against the tug. It may be regarded as now well settled that tugs are not liable as common carriers. They are, however, bound to use ordinary care, skill, and diligence in taking up, arranging, and managing their tows. The vessel being towed has also certain duties to perform, among which are to follow the tug, and in situations of danger, to use all possible means to avoid injury, and when injury ensues, to do all in its power to make the injury as light as possible. The primary injury complained of, and the one from which

all the damages alleged are claimed to have flowed, is that caused by the schooner striking a sunken rock at the entrance of the canal. If the tug is not in fault for this injury, then she is not liable at all. If she is liable for this primary injury, then she is also liable for all subsequent injuries and damages to the schooner necessarily and naturally flowing from or caused by it, and which could not have been avoided by ordinary care and diligence on the part of the schooner. The whole gravamen of the case is contained in the third article of the libel, and is stated in the following words: "Third. That said tug proceeded on said voyage, and while in said canal, towed said schooner out of, and away from the proper and ordinary course in the centre and easterly side of said canal, towards the westerly side thereof, and ran said schooner upon a sunken rock, upon said westerly side, staying a hole in her bottom, whereof she soon sunk just below the lower lock." And further on, in the fourth article, it is alleged, "that the master, mate, second mate, and wheelman were on deck, and kept said schooner directly after said tug, and the damage was occasioned solely by the fault of said tug, and without fault on the part of said schooner," thus recognising the duty of the tow, as above stated, to keep directly after the tug. The first important inquiry, therefore, is, did the tug "run the schooner upon a sunken rock," as alleged, and conceding that the schooner did run upon a sunken rock, did she do so while following directly after the tug, and if not, then was it in any manner occasioned by the fault of the tug? I think these questions are fully answered by a simple statement of the fact clearly appearing by the proofs, and in regard to which there is no controversy, viz., that on entering the canal the schooner took a sheer some distance, how far does not appear, to starboard, and that it was while she was taking this sheer she was struck. The tug is not charged in the pleadings or proofs with being in any manner in fault for the sheering of the schooner, and as it is clear that she struck solely in consequence of such sheering, and would have gone clear if she had been kept as she is alleged to have been, directly after the tug, it is equally clear that the tug cannot be held in any manner responsible for the schooner striking as she did. The case of the *Angelina Corning* (1 Benedict's R.), cited by libellant's advocate, was not one of the sudden sheering of the tow from bad steering qualities or otherwise, as in this case, and consequent running upon a sunken rock, but was that of the sagging or hanging off of the tow to leeward occasioned probably by the change of course of the tug. It is very easy to see how a tug, knowing of the existence and location of a sunken rock, should be held responsible for running a tow upon such rock in consequence of a change of course resulting in the sagging or hanging off of the tow in such a way as to bring her upon the rock. In that case the tug would be in fault for not having made due allowance for the sagging of the tow in consequence of the change of course; which is very different from a case of sheering of the tow solely on her own account, and not on account of any act or manœuvre of the tug, and which the tug could not have anticipated, or guarded against even if anticipated, because it would have been impossible to have known beforehand which way the tow might sheer. In that case it was held that, whether the sagging of the

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tow was chargeable to the pilot of the tug or to the men on the tow was immaterial, for the reason that the danger was not known to either. What would have been the result if the danger had been known to the tug and not to the tow, and the sagging of the tow in consequence of which the injury occurred had been, as in this case, chargeable to the tow, the court does not intimate. The case of the *Quicketop* (9 Wallace R., 670), holding that the tug is liable for an injury to the tow, unless the tug can show that she was not in fault, applies exclusively to cases of injury resulting from the violation or neglect of some duty coming within the scope of the duties devolving upon that class of employment. In that case the primary cause of the injury was the use of imperfect and insufficient towing lines, and the court held that it was among the duties of the tug to see that the lines were sufficient, and she was therefore held liable. But it certainly cannot be considered among the duties of a tug to anticipate and guard against the tow taking a sudden sheer to the right or to the left, as it might happen. [Having found the first three charges unsupported, the Court as to the fourth said:] That the tug failed to inform the schooner of the existence and location of the sunken rock, or to give the schooner any information or orders in relation to entering and getting through the canal safely. Without stopping to argue the question whether it was or was not the duty of the tug to give such information, under the circumstances of this case, or in any case of towage through the Sault canal, a channel perfectly familiar to all the navigators of the upper lakes, and through which those in charge of the schooner had frequently passed, it is a sufficient answer to this charge, that under the proofs in this case it is evident that such failure to give the information specified did not in any manner contribute to the catastrophe. Besides, this charge is inconsistent with the theory of the libel and the proofs in the case. The theory of the libel is that the accident happened while the schooner was following directly after the tug, and that it so happened in consequence of the tug drawing her against or upon the rock. The proof shows that it did not so happen, but, on the contrary, that if the schooner had so followed the tug she would have passed in perfect safety. Under this theory and these proofs it was entirely a matter of indifference whether such information was given or not. On all other points the Court found that the proofs failed, and dismissed the libel.

SUPREME COURT OF THE UNITED STATES.

Collected by F. O. CROMP, Esq., Barrister-at-Law.

Monday, March 27, 1871.

NEW ENGLAND MUTUAL MARINE INSURANCE COMPANY v. DUNHAM.

Admiralty jurisdiction—Maritime contract—Marine insurance—Damage to ship—Claim on policy. The contract of marine insurance is a maritime contract, and a claim in personam arising out of it is cognizable in admiralty.

A libel in personam was filed by D. against the N. E. M. I. company, to recover a loss on a policy on the Albina. The vessel was run into by another vessel owing to the negligent navigation of the latter, whereby she sustained damage, and the cost of repairs formed the subject of the claim;

Held, that the district court of admiralty had jurisdiction to entertain the claim, under the constitution of the United States, declaring that the judicial power should extend to "all cases of admiralty and maritime jurisdiction."

The opinion of Story, J., in De Lovio v. Boit (2 Gallison 398), approved and adopted.

Seemingly, that having regard to the maritime codes of all European countries, admiralty jurisdiction ought to embrace all maritime contracts, and that contracts the subject-matter of which is maritime are not the less maritime contracts because they are made and are to be performed elsewhere than on the high seas.

The English rule to the contrary criticised and disapproved.

This was an appeal from a divided opinion of the Judges of the Circuit Court of the United States for the District of Massachusetts.

A libel in personam was filed in the District Court for the district of Massachusetts by Dunham against The New England Mutual Marine Insurance Company, on a policy of insurance, dated at Boston on the 2nd March 1863, whereby the insurance company, a corporation of Massachusetts, agreed to insure Dunham, the libellant, a citizen of New York, in the sum of 10,000 dolls., for whom it might concern, on the vessel called the *Albina*, for one year, against the perils of the seas and other perils in the policy mentioned; and the libellant alleged that within the year the said vessel was run into by another vessel on the high seas, through the negligence of those navigating the said other vessel, and sustained much damage, and that the libellant had expended large sums of money in repairing the same, of which he claimed payment of the insurance company; and the question was, whether the district court, sitting in admiralty, has jurisdiction to entertain a libel in personam on a policy of marine insurance to recover for a loss.

BRADLEY, J.—This precise question has never been decided by this court. But, in our view, several decisions have been made which determine the principle on which the case depends. The general jurisdiction of the district court in admiralty and maritime cases has been heretofore so fully discussed, that it is only necessary to refer to them very briefly on this occasion. The constitution declares that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction," without defining the limits of that jurisdiction. Congress, by the Judiciary Act, passed at the first session, 24th Sept. 1789, established the districts courts, and conferred upon them, among other things, "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction." As far as regards civil cases, therefore, the jurisdiction of these courts was thus made co-extensive with the constitutional gift of judicial power on this subject. Much controversy has arisen with regard to the extent of this jurisdiction. It is well known that, in England, great jealousy of the admiralty was long exhibited by the courts of common law. The admiralty courts were originally established in that and other maritime countries of Europe for the protection of commerce and the administration of that venerable law of the sea which reaches back to the sources long anterior even to those of the civil law itself; which, Lord Mansfield says, is not the law of any particular country, but the general law of nations; and which is founded on the broadest principles of equity and

justice, deriving, however, much of its completeness and symmetry, as well as its mode of proceeding, from the civil law, and embracing, altogether, a system of regulations embodied and matured by the combined efforts of the most enlightened commercial nations of the world. Its system of procedure has been established for ages, and is essentially founded, as we have said, on the civil law; and this is probably one reason why so much hostility was exhibited against the admiralty by the courts of common law, and why its jurisdiction was so much more crippled and restricted than in any other state. In all other countries bordering on the Mediterranean or the Atlantic, the marine courts, whether under the name of admiralty courts or otherwise, are generally invested with jurisdiction of all matters arising in marine commerce, as well as other marine matters of public concern, such as crimes committed on the sea, captures, and even naval affairs. But in England, partly under strained constructions of Parliamentary enactments, and partly from assumptions, of public policy, the common law courts succeeded in establishing the general rule that the jurisdiction of the admiralty was confined to the high seas, and entirely excluded from transactions arising on waters within the body of a country, such as rivers, islets, and arms of the sea as far out as the naked eye could discern objects from shore to shore, as well as from transactions arising on the land, though relating to marine affairs. With respect to contracts, this criterion of locality was carried so far that, with the exception of the cases of seamen's wages and bottomry bonds, no contract was allowed to be prosecuted in the Admiralty unless it was made upon the sea, and was to be executed upon the sea; and even then it must not be under seal. Of course, under such a construction of the admiralty jurisdiction, a policy of insurance executed on land would be excluded from it. But this narrow view has not prevailed here. This court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world as well as to that of England. "Its boundary," says Taney, C. J., "is to be ascertained by a reasonable and just construction of the words used in the constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government." (1 Black, 527.) "Courts of admiralty," says the same judge, in another case, "have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the States bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes and the great navigable streams which flow through the Western States." (12 How, 455.) In accordance with this more enlarged view of the subject,

several results have been arrived at widely differing from the long established rules of the English courts. First as to the locus or territory of maritime jurisdiction. [Having discussed this point as to jurisdiction in American waters he proceeded:—] Secondly, as to contracts, it has been equally well settled that the English rule which co-opts jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making locality the test) is entirely inadmissible, and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions. Even in England the courts felt compelled to rely on this criterion in order to sustain the admiralty jurisdiction over bottomry bonds, although it involved an inconsistency with their rules in almost every other case. In *Menstone v. Gibbons* (3 Term Rep. 269), Lord Kenyon makes this sensible remark: "If the admiralty has jurisdiction over the subject-matter, to say that it is necessary for the parties to go upon the sea to execute the instrument, borders upon absurdity." In that case there happened to be a seal on the bond, of which a strong point was made. Buller, J., answered it thus: "The form of the bottomry bond does not vary the jurisdiction; the question whether the Court of Admiralty has or has not jurisdiction depends on the subject-matter." Had those views actuated the common law courts at an earlier day, it would have led to a much sounder rule as to the limits of admiralty jurisdiction than was adopted. In this court, in the case of *The N. J. Navigation Company v. Merchants' Bank* (6 Howard, 344), which was a libel in personam against the company on a contract of affreightment to recover for the loss of specie by the hoisting of the steamer *Lexington* on Long Island Sound, Justice Nelson, delivering the opinion of the Court, says: "If the case is a maritime cause, subject to admiralty cognisance, jurisdiction is complete over the person as well as over the ship. . . . On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved, it will be found that the inquiry has been, not into the jurisdiction of the Court of Admiralty in England, but into the nature and subject matter of the contract, whether it was a maritime contract, and the service a maritime service, to be performed upon the sea or upon waters within the ebb and flow of the tide." 6 How. 392. [The last distinction, based on tide, as we have seen, has since been abrogated.] Jurisdiction in that case was sustained by this court, as it had previously been in cases of suits by ship carpenters and material men on contracts for repairs, materials, and supplies, and by pilots for pilotage; in none of which would it have been allowed to the admiralty courts of England: (see cases cited by Justice Nelson, 6 How. 390, 391.) In the subsequent case of *Moreswood v. Eniquet*, decided in 1850 (23 How. 493), which was a case of charter-party and affreightment, Grier, J., who had dissented in the case of the *Lexington*, but who seems to have changed his views on the whole subject, delivered the opinion of the court, and, amongst other things, said, "Counsel have expended much learning and ingenuity in an attempt to demonstrate that a court of admiralty in this country, like those in England, has no jurisdiction over contracts of charter-party or affreightment. They do

not seem to deny that these are maritime contracts, according to any correct definition of the terms, but rather require us to abandon our whole course of decision on this subject, and return to the fluctuating decisions of English common law judges, which, it has been truly said, 'are founded on no uniform principle, and exhibit illiberal jealousy and narrow prejudice.' " *Morwood v. Enquist* (23 How. 383). He adds that the court did not feel disposed to be again drawn into the discussion; that the subject had been thoroughly investigated in the case of the *Lexington*, and that they had then decided "that charter-parties and contracts of affreightment were 'maritime contracts', within the true meaning and construction of the Constitution and Act of Congress, and cognisable in courts of admiralty by process, either *in rem* or *in personam*." The case of *The People's Ferry Company v. Beers* (20 How. 401), being pressed upon the court, in which it had been adjudged that a contract for building a vessel was not within the Admiralty jurisdiction, being a contract made on land and to be performed on land, Grier, J. remarked: "The court decided in that case that a contract to build a ship is not a maritime contract;" but he intimated that the opinion in that case must be construed in connection with the precise question before the court; in other words, that the effect of that decision was not to be extended by implication to other cases. In the case of the *Moses Taylor* (4 Wall. 411), it was decided that a contract to carry passengers by sea as well as a contract to carry goods, was a maritime contract and cognisable in admiralty, although a small part of the transportation was by land, the principal portion being by water. In a late case of affreightment, that of the *Belfast* (7 Wall. 624), it was contended that admiralty jurisdiction did not attach, because the goods were to be transported only from one port to another in the same State, and were not the subject of inter-state commerce. But as the transportation was on a navigable river, the court decided in favour of the jurisdiction, because it was a maritime transaction. Clifford, J., delivering the opinion of the court says: "Contracts, claims, or duties, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognisable in the admiralty courts. Torts or injuries committed on navigable waters, of a civil nature, are also cognisable in the admiralty courts. Jurisdiction in the former case depends entirely upon the locality:" (7 Wall. 627.) It thus appears that in each case the decision of the court and the reasoning on which it was founded have been based upon the fundamental inquiry, whether the contract was or was not a maritime contract. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depended, not on the place where the contract was made, but on the subject-matter of the contract. If that was maritime the contract was maritime. This may be regarded as the established doctrine of the court. The subject could be very copiously illustrated by reference to the decisions of the various district and circuit courts; but it is unnecessary. The authoritative decisions of this court have settled the general rule, and all that remains to be done is to apply the law to each case as it arises. It only remains, then, to inquire whether the contract of marine insurance, as set forth in the present case, is or is not a maritime con-

tract. It is objected that it is not a maritime contract because it is made on the land, and is to be performed (by payment of the loss) on the land, and is, therefore, entirely a common law transaction. This objection would equally apply to bottomry and *respondentia* loans, which are also usually made on the land and are to be paid on the land. But in both cases payment is made to depend on a maritime risk—in the one case upon the loss of the ship or goods, and in the other upon their safe arrival at their destination. So the contract of affreightment is also made on land, and is to be performed on the land by the delivery of the goods and payment of the freight. It is true that in the latter case a maritime service is to be performed in the transportation of the goods. But if we carefully analyze the contract of insurance we shall find that, in effect, it is a contract or guaranty, on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and its many casualties to the port of its destination; and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained. So in the contract of affreightment, the master guarantees that the goods shall be safely transported (dangers of the sea excepted) from the port of shipment to the port of delivery, and there delivered. The contract of the one guarantees against loss from the dangers of the sea; the contract of the other against loss from all other dangers. Of course, these contracts do not always run precisely parallel to each other, as now stated; special terms are inserted in each at the option of the parties. But this statement shows the general nature of the two contracts. And how a fair mind can discern any substantial distinction between them on the question whether they are or are not maritime contracts, is difficult to imagine. The object of the two contracts is, in the one case, maritime service, and in the other maritime casualties. And then the contract of insurance, and the rights of the parties arising therefrom, are affected by and mixed up with all the questions that can arise in maritime commerce—jettison, abandonment, average, salvage, capture, prize, bottomry, &c. Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom. It was unknown to the common law; and the common law remedies, when applied to it, were so inadequate and clumsy that disputes arising out of the contract were generally left to arbitration until the year A.D. 1601, when the statute of 43 Eliz. was passed creating a special court, or commission, for hearing and determining causes arising on policies of insurance. The preamble to that Act, after mentioning the great benefit arising to commerce by the use of policies of insurance, has this singular statement, "And whereas, heretofore such assurers have used to stand so justly and precisely upon their credits as few or no controversies have arisen thereupon, and, if any have grown, the same have, from time to time, been ended and ordered by certain grave and discreet merchants appointed by the Lord Mayor of the City of London, as men by reason of their experience fittest to understand and speedily to decide those causes, until of late

years that divers persons have withdrawn themselves from that arbitrary course, and have sought to draw the parties assured to seek their moneys of every several insurer by suits commenced in her Majesty's courts, to their great charges and delays." The commission created by this Act was to be directed to the judge of the Admiralty for the time being, the Recorder of London, two doctors of the civil law, and two common lawyers, and eight grave and discreet merchants. The act was thus an acknowledgment of the jurisdiction to which the case properly belonged. Had it not been for the jealousy exhibited by the common law courts against the Court of Admiralty, in prohibiting its cognizance of policies of insurance half a century before (4 Inst. 139), the latter court, as the natural and proper tribunal for determining all maritime causes, would have furnished a remedy at once easy, expeditious, and adequate. It was only after the common law, under the influence of Lord Mansfield and other judges of enlightened views, had imported into itself the various provisions of the law maritime relating to insurance, that the courts at Westminster Hall began to furnish satisfactory relief to suitors. And even then, as remarked by Sir W. D. Evans, "the inadequacy of the existing law to settle, *proprio vigore*, complicated questions of average and contribution, is very manifest and notorious. Such questions are, by consent, as matter of course, and from conviction of counsel that justice cannot be attained in any other way, referred to private examination; but a law can hardly be considered as perfect which is not possessed of adequate powers within itself to complete its purpose, and which requires the extrinsic aid of personal consent." (Evans's Statutes, vol. 2, p. 226, 3rd edit.) The contrivances to which Lord Mansfield resorted to remedy in a measure these difficulties, are stated by Park, J. in the introduction to his work on insurance. These facts go to show, demonstrably, that the contract of marine insurance is an exotic in the common law. And we know the facts, historically, that its first appearance in any code or system of laws was in the law maritime as promulgated by the various maritime states and cities of Europe. It undoubtedly grew out of the doctrine of contribution and general average, which is found in the maritime laws of the ancient Rhodians. By this law, if either ship, freight, or cargo was sacrificed to save the others, all had to contribute their proportionate share of the loss. This division of loss naturally suggested a provisional division of risk; first, amongst those engaged in the same enterprise; and, next, amongst associations of shipowners and shipping merchants. Hence it is found that the earliest form of the contract of insurance was that of mutual insurance, which, according to Pardessus, dates back to the tenth century, if not earlier, and in Italy and Portugal was made obligatory. By a regulation of the latter kingdom, made in the fourteenth century, every shipowner and merchant in Lisbon and Oporto was bound to contribute 2 per cent. of the profits of each voyage to a common fund from which to pay losses whenever they should occur: (2 Pardes. Lois Mar. 369; 6 ib. 303.) The next step in the system was that of insurance upon premium. Capitalists, familiar with the risks of navigation, were found willing to guarantee against them for a small consideration or premium paid. This, the final form of the con-

tract, was in use as early as the beginning of the fourteenth century, and the tradition is, that it was introduced into England in that century by the Lombard merchants who settled in London and brought with them the maritime usages of Venice and other Italian cities. Express regulations respecting the contract, however, do not appear in any code or compilation of laws earlier than the commencement of the fifteenth century. The earliest which Pardessus was able to find were those contained in the Ordinances of Barcelona, A.D. 1435; of Venice, A.D. 1468; of Florence, A.D. 1523; of Antwerp, A.D. 1537; &c. (Pardessus, vol. 5, p. 493; vol. 4, p. 598, 37.) Distinct traces of earlier regulations are found, but the ordinances themselves are not extant. In the more elaborate monuments of maritime law which appeared in the sixteenth and seventeenth centuries, the contract of insurance occupies a large space. The *Guidon de la Mer*, which appeared at Ronen at the close of the sixteenth century, was an elaborate treatise on the subject; but, in its discussion, the principles of every other maritime contract were explained. In the celebrated Marine Ordinance of Louis XIV., issued in 1681, it forms the subject of one of the principle titles (Lib. 3, tit. 6.) As is well known, it has always formed a part of the Scotch maritime law. Suffice it to say, that in every maritime code of Europe, unless England is excepted, marine insurance constitutes one of the principal heads. It is treated in nearly every one of those collected by Pardessus, except the more ancient ones, which were compiled before the contract had assumed its place in written law. It is, in fact, a part of the general maritime law of the world; slightly modified, it is true, in each country, according to the circumstances or genius of the people. Can stronger proof be presented that the contract is a maritime contract? But an additional argument is found in the fact that in all other countries, except England, even in Scotland, suits and controversies arising upon the contract of marine insurance are within the jurisdiction of the admiralty or other marine courts: (See Benedict's Admiralty, § 294, edit. 1870.) The French Ordinance of 1681 touching the marine, in enumerating the cases subject to the jurisdiction of the judges of admiralty, expressly mentions those arising upon policies of insurance, and concludes with this broad language: "And generally all contracts concerning the commerce of the sea." (See Laws, 294.) The Italian writer, Roccos says: "These subjects of insurance and disputes relative to ships are to be decided according to maritime law, and the usages and customs of the sea are to be respected. The proceedings are to be according to the forms of maritime courts and the rules and principles laid down in the book called the Consulate of the Sea, printed at Barcelona in the year 1502." (Roccos on Insurance, Note, 80.) It is also clear that, originally, the English admiralty had jurisdiction of this as well as of other maritime contracts. It is expressly included in the commissions of the admiralty: (Benedict, sect. 48.) Dr. Browne says: "The cognizance of policies of insurance was of old claimed by the Court of Admiralty, in which they had the great advantage attending all their proceedings as to the examination of witnesses beyond the seas or speedily going out of the kingdom." (2 Bro. Civ. & Adm. Law, 52.) But the intolerance of the

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common law courts prohibited the exercise of it. In the early case of *(Irons v. Bell* 38 Hen. 8 (1546), a prohibition was granted for this purpose: (See 4 Co. Inst. 139.) Mr. Browne says, very pertinently, "What is the rationale, and what the true principle which ought to govern this question, viz.: What contracts should be cognizable in admiralty? Is it not this? All contracts which relate purely to maritime affairs, the natural, short, and easy method of enforcing which is found in the Admiralty proceedings;" (2 Browne, 88.) Another consideration bearing directly on this question is the fact that the commissions in admiralty issued to our colonial governors and admiralty judges, prior to the Revolution, which may be fairly supposed to have been in the minds of the convention which framed the Constitution, contained either express jurisdiction over policies of insurance or such general jurisdiction over maritime contracts as to embrace them: (Benedict, c. 9.) The discussions that have taken place in the district and circuit courts of the United States have not been adverted to. Many of them are characterised by much learning and research. The learned and exhaustive opinion of Justice Story in the case of *De Lovio v. Boit* (2 Gallison, 386), affirming the admiralty jurisdiction over policies of marine insurance, has never been answered, and will always stand a monument of his great erudition. That case was decided in 1815. It has been followed in several other cases in the first circuit: (see 2 Curtis, 332, 333.) In 1842 Story, J., in reaffirming his first judgment, says that he had reason to believe that Marshall, C.J., and Washington, J., were prepared to maintain the jurisdiction. What the opinion of the other judges was he did not know: (2 Storey's Rep. 183.) Doubts as to the jurisdiction have occasionally been expressed by other judges; but we are of opinion that the conclusion of Justice Story was correct. The answer of the court, therefore, to the question propounded by the circuit court will be, that the District Court for the District of Massachusetts, sitting in admiralty, has jurisdiction to entertain the libel in this case.

COURT OF EXCHEQUER.

Reported by H. LEIGH and H. F. FOULST, Esqrs.,
Barriers at Law.

Monday, May 1, 1871.

(Before MARTIN and BRAMWELL, BB.)

WRIGHT v. WARD.

Mutual Shipping Assurance Association—Liability of individual shareholder—Assessment by committee—Adjustment by average-stater.

The rules of a Mutual Shipping Assurance Association provided that "in case of its becoming necessary to make any payment in respect of any loss or damage happening to any ship insured, the amount to be borne and paid by each member of the association should upon each and every such occasion be assessed and apportioned by the committee upon and amongst the members of the association liable to contribute thereto," &c.

In an action for loss the declaration set out the policy and the above rule, and averred that the plaintiff had "always been ready and willing that the amount to be borne and paid by each respective member of the said association in respect of the said loss should be assessed and apportioned by the committee of the association according to the regu-

lations of the said policy," and that the plaintiff had "requested the defendant and the said committee to assess and apportion the same, but they had neglected and refused so to do, although a reasonable time for that purpose had long since elapsed." And that "except as aforesaid all conditions had been fulfilled," &c. It then alleged as a breach the nonpayment by the defendant of his proportion of the sum insured.

Held, on demurrer, that the declaration did not show any liability on the part of the defendant.

To the above declaration the defendant pleaded (sixthly), "That by the regulations annexed to the said policy it was declared that a committee 'tenth' should be appointed, who should meet quarterly, at the discretion of the managers, to audit the accounts, settle claims, and order payment of the same by the managers' draft; and that the managers should have full power to settle all claims on policies; and that the claim of the plaintiff had not been settled in manner provided, &c., nor had payment of the same by the managers' draft been ordered;" and (seventhly), "that by the said regulations it was declared that all average claims should be adjusted by a professional average-stater, according to the usage of Lloyd's, &c.; and that the only claim of the plaintiff was an average claim within the meaning of the said regulation, and that the same had never been adjusted as provided for, and the plaintiff had never been ready and willing to have the same adjusted."

Held, on demurrer, that the pleas were good.

THE first count of the declaration stated:—For that the plaintiff, before and at the time of making the policy of insurance hereinafter mentioned, was, and still is a member, together with the defendant and divers other persons, of a certain association called the National Mutual Shipping Assurance Association, and the ship or vessel hereinafter mentioned was, before and at the time of the making of the policy of insurance hereinafter mentioned, admitted, and entered in the said association. And the plaintiff, on the 20th March 1869, caused to be made a certain policy of insurance, purporting thereby, and containing therein, that the plaintiff, as well in his own name as for and in the name and names of all the assured to whom the same did, might, or should appertain, in part or in all, did make assurance, and cause himself and them, and every one of them, to be insured, lost or not lost, at and from meridian of the 20th March 1870, upon the body, tackle, apparel, ordnance, manition, artillery, boat, and other furniture of and in the good ship or vessel called the *Cherub*, or by whatsoever other name the said ship was or should be named, &c., and so should continue and endure until the said ship, with all her ordnance, tackle, &c., should be arrived as above, upon the said ship, &c., until she had moored at anchor twenty-four hours in good safety, and that it should be lawful for the said ship in the said voyage to proceed and sail to, and to touch and stay at any port and place not excepted in the rules annexed to the said policy, and without prejudice to that insurance, and the said ship, &c., for so much as concerned the assured by agreement between the assured and assurers in that policy were and should be valued at 1000*l*. And touching the absolute perils of the sea which the assurers were contented to bear, and did take upon them in that

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voysage, they were of the sea, men of war, fire enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraint, and detentions of all kings, princes, and people of what nation, condition or quality soever, barratry of the master or mariners, and of all such aforesaid perils, losses, and misfortunes that should come to the hurt detriment or damage of the said ship, &c., or any part thereof, according to the rules annexed to the said policy. And in case of any loss or misfortune it should be lawful to the managers, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said ship, &c., or any part thereof, without prejudice to that insurance, to the charges whereof they of the association would each one contribute according to the rate and quantity of that sum therein assured. And it was agreed by them the insurers that the said writing or policy of assurance should be of as much force or effect as the surest writing or policy of assurance theretofore made in Lombard-street, or in the Royal Exchange, or elsewhere in London. And so they, the association, were contented, and did thereby promise and bind themselves, each one for his own part, their heirs and executors, and goods, to the assured, their executors, administrators, and assigns for the true performance of the premises, confessing themselves paid the consideration due unto them at and after the rate of 2*N*. per cent., and by a certain memorandum thereunder written, it was mutually agreed that the regulations annexed to the said policy of assurance should form part of the said policy. And it was by the said regulations annexed to the said policy of assurance, amongst other things, declared—first, that the members of the said association severally and respectively, not jointly or in partnership, nor the one for the other of them, but each only in his own name, insured each other's ships or shares of ships from noon of the 20th March, 1869, or from the date of entry of such vessel respectively, until noon of the 20th March then next, and from that time until noon of the 20th March in the next succeeding year, and so on from year to year, unless notice to the contrary should be given as hereinafter mentioned, against all losses, perils, and damages of what nature or kind soever which might be sustained or received by their respective ships, or caused or done by them to other ships or craft, except when on the voyages in the trade, or under the circumstances hereinafter particularly excepted. And it was thereby further declared, secondly, that for the better regulation and more equitable adjustment of claims on the said association, there should be established four classes of assurances, and in case of its becoming necessary to make any payment in respect of any loss or damage happening to or by any ship or ships insured in the said association, the amount to be borne and paid by each respective member of the association should upon each and every such occasion be assessed and apportioned by the committee upon and amongst the members of the association liable to contribute thereto in the manner hereinafter mentioned. And it was thereby further declared, fourthly, that the managers of the said association should subscribe and sign all policies of assurance in the name of the said association, and that the signature of either of the managers should be binding and conclusive on all

and every member, and have the same operation as if each and every member had signed such policies, subject to their being countersigned by one or more of the committee or two members. And it was thereby declared sixth, that ships should not be insured when employed in any unlawful trade with the knowledge or consent of the assured, nor when loading or unloading on any main shore or beach when being in the Solway Firth or in the port of Dundalk, Annan, Dumfries, Preston, or Lytham, nor when or after proceeding higher than Glasgow Dock in Lancaster River, and that ships being employed in any case contrary to the said rule should not be entitled to recover for any loss by the sea risk of any subsequent voyage until surveyed in a safe port by some person appointed by the committee and re-admitted. And it was thereby further declared, eighthly, that any ship sailing on any voyage prohibited by the said association should thenceforth cease to be insured, but on notice in writing being given to the managers might be exempted from contribution to any losses or averages which might occur after the date of such notice, but not otherwise. And it was further declared, fourteenthly, that all drafts for claims written off by the committee should be duly accepted and returned to the managers within one month from date, and punctually paid, and if any member should neglect or refuse to pay such contributions, his respective ship or ships should immediately cease to be insured in or by the said association, but that he should still be liable to contribute to all losses and averages which might occur during the continuance of the assurance. And that the solicitors should be directed to sue immediately for the amount due on behalf of the association in the name of one of the managers to whom the assured or holder of the said policy covenanted to pay all contributions ordered by the committee. And it was thereby further declared, (twenty-third), that the managers, unless they received ten days' notice to the contrary, should renew each policy on its expiration, except in cases where it might be deemed expedient not to renew the same. And the plaintiff says that the said policy of assurance was then subscribed with the name of the defendant and divers other persons, and was then duly subscribed by either of the managers and countersigned by two of the members of the said association, according to the said regulations, as agents for the said several persons, as insurers for the sum of 1000*l*. upon the premises in the said policy of assurance mentioned. And the said policy was so subscribed and countersigned as aforesaid for procuration of the several members of the said association, every member bearing his equal proportion according to the sums mutually insured therein. And the plaintiff further says that, the said policy of assurance was so made by the plaintiff as aforesaid for and on behalf of the plaintiff and one John Melvin, and for the use and benefit of them or either of them, and the plaintiff and the said John Melvin were or either of them was at the time of the commencement of the risk and from thence continually afterwards until and at the time of the loss hereinafter mentioned, interested in the said ship to a large value and amount, to wit, to the value in the said policy mentioned. And the plaintiff further says, that the said ship or vessel, during the time covered by the said policy, was not employed in any unlawful trade nor in loading or unloading on any main shore or beach, nor was the said ship or

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vessel in any port or place prohibited by the said regulations annexed to the said policy, nor was the said ship or vessel sailing on any voyage prohibited by the said association, and the said ship or vessel at the time of the loss hereinafter mentioned remained and was insured in the sum of 1000*l.* by the said association for the period in the said policy mentioned. And the plaintiff further says that the said ship or vessel during the said time, and whilst she was attempting to prosecute a voyage which was protected by the said policy of insurance, to wit on the 8th March 1870, was, by the perils insured against, wholly lost; and by reason of the premises the defendant, as a member of the said association, became and was liable to pay to the plaintiff the defendant's proportion of the said sum of 1000*l.*; and the plaintiff has always been ready and willing that the amount to be borne and paid by each respective member of the said association in respect of the said loss, should be assessed and apportioned by the committee of the said association according to the regulations annexed to the said policy. And the plaintiff requested the defendant and the said committee to assess and apportion the same, but they have neglected and refused to do so, although a reasonable time for that purpose has long since elapsed. And except as aforesaid all conditions have been fulfilled, and all events and things existed, and all times elapsed to entitle the plaintiff to the payment of the defendant's proportion of the said sum of 1000*l.*, and to maintain this action; yet the defendant has not paid the same.

The defendant demurred to the declaration, on the ground that the plaintiff could not on the facts disclosed, sue the defendant on the policy declared on to recover a proportion of the sum insured. He also pleaded the following pleas (*inter alia*): Sixth, that by the said regulations annexed to the said policy, as in the said first count mentioned it was declared as follows: 10th, that a committee (not exceeding ten, three to be a quorum) should be appointed for superintending the affairs of the association, who should meet quarterly, at the discretion of the said managers, on the days therein mentioned, to audit the accounts, settle claims, and order payment of the same by the managers' draft; 24th, that the managers (*vide* rule 10) should have full power to settle all claims on policies. And the defendant says that the claim of the plaintiff has not been settled in manner provided by the said regulations, or either of them, nor has payment of the same by the manager's draft been ordered; seventh, that by the said regulations annexed to the said policy as in the said first count mentioned it was declared as follows: 12th, that all average claims be adjusted by a professional average, stater, according to the usage of Lloyd's, and delivered at the office of the manager, fifteen days previous to the periodical meeting of the committee (*vide* rule 10), to entitle the claimant to a settlement at such meeting; but should the committee or the assured be dissatisfied with each, they shall within ten days, notice being given to the managers, refer the same to two arbitrators, one to be chosen by the committee, and the other by the assured, who shall have the power to call in a third person to their aid, and the award of any two of such three persons shall be final, otherwise the decision of the committee to be conclusive. And the defendant says that the only claim

of the plaintiff is an average claim within the meaning of the said regulations, and that the same has never been adjusted as provided for by the said regulations, and the plaintiff has never been ready and willing to have the same adjusted.

Demurrer to these pleas, the ground being that they confessed without avoiding, and joinder.

Herschell, for the defendant, cited:

Redway v. Seething, L. Rep. 2 Ex. 400; 16 L. T. Rep. N. S. 485.

Butler (*J. Temple* with him), for the plaintiff, cited:

Strong v. Harrey, 3 Bing. 304;

Scott v. Avery, 5 Ho. L. 811;

Tredrea v. Holman, 1 H. & C. 72;

Harvey v. Beckwith, 2 H. & M. 429; 10 L. T. Rep. N. S. 632.

Herschell having been heard in reply, the court gave judgment as follows:—

MARTIN, B.—My brother Bramwell and I both think that the defendant is entitled to the judgment of the court. First, my impression is that the declaration is bad by reason of the omission to satisfy in some way or other the statement of the rule of the association, that in case of its becoming necessary to make any payment in respect of any loss or damage, "the amount to be borne and paid by each respective member of the association should upon each and every such occasion be assessed and apportioned by the committee upon and amongst the members of the association liable to contribute thereto." The plaintiff does not show either that that rule was satisfied, or that anything occurred which would entitle him to recover without an assessment being made. Secondly, I think the pleas are good. The seventh plea is identical with a plea in *Tredrea v. Holman*, which was held bad, and by that case we are bound. I think it is a sufficient answer to Mr. Butler's able contention that if people choose to make written contracts of this kind they must abide by them. No doubt it is an evil that there should be this excessive difficulty in maintaining an action, but the difficulty arises from the terms of the contract.

BRAMWELL, B.—I am of the same opinion. Mr. Butler has said all that could be said, but he is concluded both by the reason of the thing and by authority. I will first quote the beginning of my brother Martin's judgment in *Tredrea v. Holman*: "The case of *Scott v. Avery* decided that the insurer and underwriter may contract that no right of action (to be enforced in a court of law) shall accrue until an arbitrator has decided, not merely as to the amount of damages to be recovered, but upon any dispute that may arise upon the policy. The question, therefore, is one of construction, and we think the parties to this policy have so agreed." It is clear to my mind that the parties never contemplated that actions might be brought by one member against another. The suffering member was to make his claim to the committee, and they were to assess and apportion the amount according to the rules. *Tredrea v. Holman* is no authority for holding the declaration good, because there was an averment that all conditions precedent had been fulfilled. But here there is an exception—"except as aforesaid"—in the averment of the performance of the conditions precedent. Then we were pressed by the case of *Strong v. Harrey* (3 Bing. 304). That is certainly a remarkable case, and it was commented upon and distinguished by Wood, V.C., in *Harvey v. Beckwith* (2 H. & M. 429; 10 L. T. Rep. N. S. 632).

The Vice-Chancellor says, "In *Strong v. Harvey* a policy had been granted, and the terms thereof were that the claim was to be paid within three months after it had been adjusted by a committee, named in the body of the policy itself; the action was brought against a member of the committee, who was also one of the underwriters of the policy, and all that was held was that he could not plead his own laches in not having made the adjustment in bar of the claim." *Harvey v. Beckwith* is really a strong authority in favour of our decision for the defendant, because the policy there was almost identical with that in the present case. The Vice-Chancellor's observation is applicable here. "The whole scheme is that the insurers are not to pay the insured directly, but the committee is to make an order, and the secretary is to draw upon the members in accordance therewith, and a fund is to be thereby raised out of which the losses are to be made good. One word as to the seventh plea. I think it is perfectly good. The only undertaking by the defendant was that he would pay according to the adjustment of the professional average-stater, or if the committee or the assured were dissatisfied with such, then that he would pay a sum to be fixed by arbitration.

Judgment for the defendant.

Attorneys for the plaintiff, *Chester and Urquhart*, for *Wright, Stockley, and Beckett*, Liverpool.

Attorney for the defendant, *Thos. Cooper*, 153, Leadenhall-street, E.C.

JUDICIAL COMMITTEE BY THE PRIVY COUNCIL.

Reported by DOUGLAS KINGFORD, Esq., Barrister-at-Law.

Feb. 8, 9, and 11, 1871.

(Present: The Right Hon. Sir JAMES W. COLVILLE, Sir JOSEPH NAPIER, and Lord Justice JAMES.)

THE FREEDOM.

Damage to cargo—Right to sue—24 Vict. c. 10, s. 6—18 & 19 Vict. c. 11—"Dangers of the seas"—

Ventilation of ship's hold—Onus of proof.

In a suit for damage to cargo, and for improper delivery thereof by the consignee, who were also assignees of the bill of lading:

Held (affirming the judgment of the Court of Admiralty) that the legal title having been transferred to and vested in the plaintiffs, the right of suing upon the contract was also transferred to them by force of the statute (18 & 19 Vict. c. 11). It was intended by this statute (that) the right of suing upon the contract under a bill of lading should follow the property in the goods therein specified—that is to say, the legal title to the goods as against the indorser.

The proximate cause of damage to oil-cake was that from the nature and collocation of a cargo of animal, vegetable, and (to some extent) putrescible matter, from sea-damage done to a portion of the cargo, from the packing and cramming of the ship so as to prevent any circulation of air, and from the closing of the hatches, the atmosphere in the ship's hold being without means of escape, became damp, heated, and vitiated:

Held that this proximate cause was not within the legal import of the exception "dangers of the seas":

Held, further, that it was enough for the plaintiffs to have established that the defendants had not

performed their contract, since the defendants had failed to produce sufficient evidence of due provision for ventilation of the ship's hold, so as to throw the onus on the plaintiffs of proving that the damage might have been prevented by reasonable care and skill on the part of the defendants as shipowners.

THIS was an appeal from a judgment of the Court of Admiralty in a cause of damage to cargo instituted under sect. 6 of the Admiralty Court Act 1861 (24 Vict. c. 10), to recover damages on account of alleged breaches of contract and duty on the part of the appellants with respect to certain parcels of oil-cake, which were laden on board the *Freedom* at New York, for carriage to and delivery in London.

The petition filed by the respondents alleged (so far as material) as follows:—

On or about Dec. 9, 1868, Messrs. Campbell and Thayer, of New York, caused to be shipped six parcels of goods, consisting each of 500 bags of oil-cake, marked respectively with certain marks and numbers, on board the *Freedom*, then lying at New York, to be conveyed from New York to London, upon the terms of six bills of lading, comprising respectively the said six parcels. These bills of lading were duly signed and delivered to Messrs. Campbell and Thayer, and were in form exactly similar to one another, the following being the material passage:—"Shipped in good order and well-conditioned by Campbell and Thayer on board the ship called the *Freedom*, whereof — is master, now lying in the port of New York and bound for London, to say (500) five hundred bagwinesed-cake, being marked and numbered as in the margin, and are to be delivered in the like order and condition at the port of London (the dangers of the seas only excepted) unto order or to assigns, he or they paying freight for the said merchandise 17s. 6d. sterling per ton, with 5 per cent. primage and average accustomed of 2240lb. gross. In witness whereof the master or purser of the said vessel hath affirmed to three bills of lading, all of this tenour and date, one of which being accomplished, the others to stand void. Dated in New York, Sept. 3, 1868. Weight unknown."

The bills of lading were afterwards indorsed by Campbell and Thayer to the respondents, who thereupon became the consignees of the oil-cake, and the assignees of the bills of lading within the true intent and meaning of sect. 6 of the Admiralty Court Act 1861 (24 Vict. c. 10). The oil-cake was (as the petition alleged) delivered much damaged and in much worse order and condition than when shipped, though this was not occasioned by dangers of the seas. And the six parcels were not delivered to the respondents separately; but 3000 bags were, by the master of the *Freedom*, mixed up without regard to marks or numbers, and without the damaged portion being separated from the undamaged.

The appellant's answer denied the aforesaid statements in the petition, and also alleged that the damage, if any, was occasioned by the dangers of the seas, only the natural qualities of the oil-cake, and not by any breach of contract or by any negligence or breach of duty on the part of the master or crew of the *Freedom*. The cause was heard in the court below in Jan. 1870, and on March 4, 1870, Sir R. Phillimore gave judgment (reported 22 L. T. Rep. N. S. 175) in favour of the respondents, and directed the usual reference to the registrar and merchants.

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Butt, Q.C. and Clarkson for the appellants.

Mileward, Q.C. and Cohen for the respondents.

The authorities cited are noticed in the judgment.

Judgment was delivered by Sir JAMES W. COLLIER.—In this case a proceeding was instituted in the Court of Admiralty, under 23 Vict. c. 10, s. 6, by which jurisdiction has been given to the court over any claim by the owner or consignee, or assignee of any bill of lading, or any goods carried into any port of England or Wales in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct, or for the breach of any duty or breach of contract on the part of the master, owner, or crew. By this section a new remedy has been given to those who have a right of suit in any of the cases specified. By the 18 & 19 Vict. c. 111, the consignee of goods named in a bill of lading and the indorsee of a bill of lading, to whom the property in the goods mentioned shall have passed upon or by reason of such indorsement, shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract in the bill of lading had been made with himself. The transaction in the present case between the plaintiffs and the shippers of the goods in respect of which the suit was instituted, was one of a class described in the elaborate opinion of Mr. Justice Buller, delivered in the House of Lords, in which he shows that the nature of the dealing requires that the property in the goods specified in the bills of lading should be transferred to and vested in the indorsee thereof: (6 East, 29, n.) The plaintiffs were consignees for sale, but, as part of the transaction, a bill of exchange was drawn by the consignors for nearly the full value of the goods, the bills of lading were indorsed by them and forwarded to the plaintiffs, by whom the draft of the consignors was accepted and paid in due course. The legal title to the property in the goods specified in the bills of lading was thus transferred to and vested in the plaintiffs; the right of suing upon the contract in the bills of lading was transferred to them by force of the statute (18 & 19 Vict. c. 111). It was suggested in the argument that the applicability of this enactment was doubtful, in consequence of some words reported to have fallen from one of the learned barons in the Court of Exchequer, in the case of *Fox v. Knott* (6 H. & N. 305). But having regard to the facts of that case, and looking at the report in 30 L. J. 259, Ex., it would seem to have been intended to decide no more as to the construction of the 18 & 19 Vict. c. 111, than that it had no application to the case, and that to entitle the indorsee of a bill of lading to have transferred to and vested in him a right of suit as thereby enacted, the circumstances under which the bill of lading shall have been indorsed must be such that the property in the goods shall have passed to the indorsee by reason of the indorsement. The plaintiff in that case was the charterer, and, as such, the carrier. He had taken an assignment of the bill of lading upon the terms that freight should be paid. It was attempted on the part of the defendant to use the statute as having extinguished the right of the shipowner to freight, if he took an assignment of the bill of lading, whereby (it was argued) he had lost his remedy against the shipper for the freight. The court decided in favour of the plaintiff. Their Lordships are satisfied that it was intended by

this Act that the right of suing upon the contract under a bill of lading, should follow the property in the goods therein specified; that is to say, the legal title to the goods as against the indorser. They entertain no doubt that in the present case the legal title was transferred to and vested in the plaintiffs, and that the subordinate right under the contract was transferred to them by the statute. The plaintiffs have brought their suit for non-performance of the contract stated in the bills of lading. There were six parcels of goods, each consisting of 500 bags of linseed cake; there was a separate bill of lading for each parcel. They are all in the same form, containing an acknowledgment of having received each parcel "in good order and well conditioned, and an undertaking to deliver them in like good order and condition at the port of London, the dangers of the sea only excepted." It was not disputed that the goods, for the damage to which the suit was brought, were not delivered in the order and condition in which they were shipped. But the question raised by the answers of the defendants is, whether this default was caused either by "the dangers of the seas," or by "the natural qualities of the oil-cake?" The onus of proving either branch of this defence lay upon the defendants. The former is founded on the express stipulation in the contract; the latter, on the implication of law. It would be unreasonable to make the shipowners responsible for deterioration or damage caused by latent imperfection or defects in the oil-cake, which could not be supposed to have been known to them at the time of the shipment. It was properly observed by Mr. Justice Neilson, in delivering the judgment of the court in the American case (*Clark v. Barnwell*, 12 Howard N. S. 272), cited in the argument, "that the acknowledgment in the bill of lading can only mean that as far as they had an opportunity of judging, the goods were sent in a perfectly good condition." The defendants in this suit were not precluded from showing (if they could) that the damaged oil-cake was imperfectly manufactured or insufficiently prepared for the voyage; or that it had some intrinsic defect, at the time of shipment, which caused the damage. A notice was served upon the defendants, on the part of the plaintiffs, before sending out a commission to America to take evidence on the subject. Having considered the evidence that was taken there, as well as that which was given in the Court of Admiralty, their Lordships are satisfied that the oil-cake was in good order and well-conditioned at the time of shipment. This disposes of one branch of the defence. The learned judge of the Court of Admiralty came to the conclusion upon the evidence, especially that of Dr. Letheby, that the damage complained of was mainly caused by the bones that formed part of the cargo. But at the same time he held that it was not necessary to found his judgment upon this, inasmuch as the onus was on the defendants to show, and that they had not shown, that this damage was caused by "dangers of the seas." Their Lordships are not prepared to say what may have been the actual or the relative effect of the bones, considered as a distinct item in the combination of concurrent causes, which led to and resulted in the damage to the oil-cake. The cargo was made up (amongst other things) of beef and pork below, and a large number of bags of oil-cake, some below and some above; clover seed behind; bones in the forehold, loose and in bulk, about 3t.

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from the oil-cake; a portion strewed about the hags of oil-cake, and some amongst tobacco. Every place was filled up so that no space was left in which any part of the cargo could be put. One of the witnesses for the defendants was asked his opinion as to the stowage with reference to allowing the air to circulate. His answer was—"I did not fancy she could have been stowed better. The ship was as full as she could possibly be stowed." That is to say, she was well stowed in the sense of being well crammed and closely packed; but (as the result showed) so as to prevent the circulation of air. At a subsequent stage, when there was no ventilation, and no outlet was left for heat and damp to escape, the boxes may have gradually contributed to upset the atmosphere. That in such circumstances the oil-cake would be liable to become mouldy, is stated by competent witnesses on both sides. It is difficult, if not impracticable, to come to any satisfactory conclusion as to the relative effect of each of the concurrent causes that by their combination brought about the proximate cause of the damage. Causes mix in themselves may be intensified in combination with others. The words in the bills of lading—"dangers of the seas"—must, of course, be taken in the sense in which they are used in the policy of insurance. It is a settled rule of the law of insurance not to go into distinct causes, but to look exclusively to the immediate and proximate cause of the loss. In the present case, the remote causes are not only distinct from the proximate cause, but they are, for the most part, unconnected with dangers of the seas. If a shipowner undertakes to convey such a cargo, under the ordinary contract set forth in the bills of lading, he takes upon himself the risk of consequences and contingencies other than those which are within the express exception, or that which is implied by law. The question here is not one of negligence, but of breach of contract, as explained in the judgment delivered by Sir John Patterson in *Troun v. Dent* (8 Moore's P. C. C. 433). The extent of sea damage done to some other parts of the cargo, so far as it was distinctly proved, was but limited, and the indirect effect of this damage is but a matter of conjecture. Some of the principal witnesses for the defendants (including the master) do not notice it at all, and some allude to it without relying much upon it. As to the closing of the hatches, the master assents to the suggestion made to him, that this may have had a share in causing the damage to the oil-cake, but he does not put it forward in the first instance. During the early part of the voyage (he says) he occasionally kept the hatches open, but during the last two-thirds of the voyage the weather was so tempestuous that he was under the necessity of closing them. He has not stated at what date this necessity arose, nor (except in this vague form) for what periods it continued. The log was not referred to; he did not make a protest after arrival at the port of London. The necessity must have ceased for some considerable period before the hatches were opened, on the third day after arrival, when there was such a rush of steam and heat as plainly indicated the absence of any means of escape for the confined and vitiated air during the time that the hatches were closed. One of the witnesses for the defendants says he thought it would have exploded the decks. Their Lordships have referred to the surveys and reports that were given in evidence, and have considered all the evidence relating thereto. They are of

opinion that the conclusion proper to be drawn from the evidence is this, that from the nature and collocation of this cargo of animal, vegetable, and (to some extent) putrescible matter, the sea damage done to a portion of the cargo, the packing and cramming of the ship so as to prevent any circulation of air, and the closing of the hatches, the atmosphere in the ship's hold became heated, damp, and vitiated, without means of escape, and that this atmosphere was the proximate cause of the damage to the oil-cake, which is the subject of this suit. This proximate cause cannot be brought within the legal import of the exception of damages of the seas. In the American case (*Clark v. Barnwell*) (ubi sup.) that was referred to, it is said that where the defendants have brought their case within an exception in the contract, this shifts the onus upon the plaintiffs to prove that the damage might have been provided against and prevented by reasonable care and skill on the part of the shipowners. But in order to make this applicable, the defendants should first have given sufficient evidence to bring their case (*prima facie* at least) within such an exception. Their Lordships think that they have failed to do so in the present case. The simple truth is, that they did not make provision sufficient to enable them to fulfil their contract. They ought to have known that there were portions of the cargo which if deprived of ventilation, without circulation of air, and without an outlet for heated, damp, or vitiated air to escape, the result would be, in the natural course of things, that the oil-cake would be damaged. As they did not in fact provide sufficiently against such a natural, if not necessary, consequence, they imposed upon themselves the disability to fulfil the express contract into which they had entered under the bills of lading. In this view, it is not material to the plaintiffs whether the defendants are or are not chargeable with neglect, default, or improvidence. It is enough for the plaintiffs to have established that the defendants have not performed their contract, and have not sustained either of the defences which they have pleaded as a legal excuse for nonperformance. In this conclusion their Lordships agree with the learned judge of the Court of Admiralty. There was another part of the case, but of minor importance, as to the expenses incurred in the sorting and weighing, &c., in consequence of the state in which the goods were delivered and the mode of delivery. Whatever these expenses were, they will be ascertained and allowed by the proper officer of the Admiralty, and it is not necessary to give any further direction. Their Lordships will therefore, humbly advise Her Majesty that the judgment appealed against should be affirmed, and that the appeal be dismissed with costs.

Judgment affirmed.

Proctor for the appellants, *Thomas Cooper*,
Proctors for the respondents, *Thomas and Hollams*.

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THE GLENDUROR.

[PRIV. CO.]

Wednesday, Feb. 8, 1871.

(Present : the Right Hon. Sir James W. Colville,
Sir Joseph Napier, and Lord Justice James.)

THE GLENDUROR.

*Salvage—Appraisal as quantum awarded—Difference
justifying interference of court of appeal—Division
of salvage service.**Salvage services, rendered with very great danger,
materially contributed to save property worth
46,000L., and twenty-seven lives. The Court of
Admiralty awarded 1000L., as compensation :**Held (varying the judgment of the court below), that
2000L. would be a fair compensation ; the salvors
under the circumstances, being entitled, on the rule
stated in The Clifton (3 Hagg. 121), to a "large
and liberal" reward.**In appeals as to quantum awarded, the difference
ought to be very considerable (to the extent of
one-third at least), in order to induce the court of
appeal to interfere upon a question of mere dis-
cretion. The Chetah (19 L. T. Rep. N. S. 622),
followed and approved.**The defendants contended that the real meritorious
service was on one night in saving life, and that
what was done in the course of several subse-
quent days to the ship, in anchoring, unloading,
pumping, and bringing her into port, con-
sisted of ordinary services that any person might
have rendered :**Held, that it would not be right to split up the
service of the salvors, or to treat it as other than
one continuous salvage service rendered to life and
property.*

THIS was an appeal from a decree of the judge of the High Court of Admiralty in a cause of salvage instituted against the ship or vessel *Glenduror*, the cargo laden on board thereof, and the freight due for the transportation of the same, and against the owners of the said vessel.

In their petition the plaintiffs (the appellants) Jarvis Arnold, boatman, of Kingsdown, and others, alleged:—That at about eight o'clock p.m., on the 12th Feb. 1870, the *Glenduror*, a full rigged iron ship of 994·53 tons burden, after making signals of distress, came stern on to the shore a little to the northward of Kingsdown, having parted her cables in a tremendous gale which was then blowing.

That the Kingsdown lifeboat was manned several times by the plaintiffs, who, with great danger and with the help of some sixty or seventy men, rescued twenty-nine persons from the *Glenduror*.

That during the whole of the following week, the plaintiffs, eighty in number, besides the owners of the life boat, the lugger and the other boats mentioned in the petition, were engaged, succeeded, by lightening the ship, landing and carefully warehousing part of her cargo, and by means of anchors and chains skillfully disposed, in getting the ship off and bringing her safely to London.

That the *Glenduror*, her cargo, and freight as saved were of the total value of 46,000L.

The answer filed by the defendants (the respondents) admitted the saving of the twenty-nine persons, but alleged that the discharge of the cargo and salvage of the vessel was not performed by the plaintiffs, but by the master under the advice and assistance of the owner's agent and the crew of the vessel. The answer also alleged a tender of 500L. to the plaintiffs (the appellants), in full satisfaction and discharge of their services.

The evidence offered on behalf of the plaintiffs went to show that the whole of the statements contained in the petition were true, and that the crew of the *Glenduror* were discharged and took no part in saving the ship and cargo.

The defendants called no evidence to rebut the plaintiffs' case or to support their own.

The learned judge in the court below found for the plaintiffs (the appellants), and awarded them the sum of 1000L. with costs.

This was the subject of appeal.

Dr. Deane, Q.C., and Clarkson, for the appellants.

Bull, Q.C., and Cohen, for the respondents.

Judgment was delivered by Sir James W. Colville.—This is an appeal in a case of salvage from the Court of Admiralty, the salvors being dissatisfied with the quantum of remuneration which that court has thought fit to award them. Their Lordships have had to consider the question with that difficulty which has pressed upon this board in all those salvage cases, the great difficulty of laying down any principle by which they are to overrule what to a great extent must be considered as in the discretion of the court below, as a matter of individual estimate and opinion as to the value of certain services rendered, or the money which ought to be paid by the person to whom the services have been rendered, under all the circumstances of the case. In some cases (*The Carrier Dove*, 2 Moo. P. C. N. S. 254; *The Fusilier*, 10 L. T. Rep. N. S. 699; 3 Moo. P. C. N. S. 69; *The Cuba*, Lash. 14) which have been referred to in the course of the argument, the difficulty has been put in very strong language; that is to say, that this committee would not enter into the question of quantum where there has been nothing to shock the conscience, nothing gross, nothing extravagant. In the case of *The Chetah* (19 L. T. Rep. N. S. 622; 38 L. J. 1, Adm.), in which this expression is quoted, there follows a more accurate expression of the rule according to their Lordships' view, that is to say, "It is, however, a settled rule, and one of great utility, particularly with reference to cases of this description, that the difference ought to be very considerable to induce the Court of Appeal to interfere upon a question of mere discretion." Now the facts of the case are really not in dispute. The judgment on the facts of the learned judge of the Court of Admiralty has not been questioned before us by either side, and it is not necessary for their Lordships to refer to the facts in any other terms than those which the learned judge himself has used in stating the nature of the case, and the circumstances under which the matter came before him for decision. The judgment ends thus:—"Seeing, then, that these services saved life while they were attended by certainly very great danger, which deterred the crew who went in the first from going in the other expeditions, the question is whether 500L. is a sufficient remuneration for having materially contributed to save property of the large value of 46,000L." (it should be 46,000L.), "and having saved the lives of twenty or twenty-two men" (it ought to be twenty-seven, including the woman and child) "who were on board; and having also to some extent perilled their own lives in the services which they rendered; and I am of opinion that it is not," in which conclusion their Lordships entirely agree. But taking that as the true state of the case, their Lordships have to apply the rule which is probably best laid down in

the case of *The Clifton* (3 Hagg. 121), where Lord Stowell expresses himself as follows: "Now, salvage is not always a mere compensation for work and labor. Various circumstances upon public considerations, the interest of commerce, the benefit and security of navigation, the lives of the seamen render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are—first, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures, and to rescue the property of their fellow subjects; secondly, the degree of danger and distress from which the property is rescued, whether it were in imminent peril or almost certainly lost, nothing out of it rescued and preserved; thirdly, the degree of labour and skill which the salvor incurred and displayed, and the time occupied; lastly, the value. Where all those circumstances concur, a large and liberal reward ought to be given." But he goes on: "Where none or hardly any, then the thing ought to be *pro opere et labore*." Applying that to the facts as stated by the judge of the Court of Admiralty in his judgment, their Lordships are of opinion, under all the circumstances of the case—not forgetting that to a great extent there possibly was not that very great peril of life which was stated in the case of the salvors, and that that peril was diminished after the first few hours; but still, having regard to all the circumstances which have been admitted and proved,—that the "large and liberal" reward in this case ought certainly to be something more than 1000*l.*, which the learned judge has awarded; and they have on the whole, having regard to the very large value of the property saved, and to the long list of cases in none of which do they find such a small proportionate remuneration as this given, come to the conclusion that 2000*l.* would be a fair sum to award to the salvors. They have not omitted to weigh what was much pressed on them, that the real meritorious service was, on the first night, in saving the lives, and that what was done afterwards to the ship—the anchoring, the unloading, the pumping, and the going round to the Thames—were ordinary services which any person might have rendered. But their Lordships do not think it right to split up the services of salvors in this way, or to treat it as other than one continuous salvage service rendered to life and property. They have, moreover, showed in this case, that according to the evidence of the salvors (wholly uncontradicted), the ship was left entirely to their care for several days; that what was devised and done was devised and done by them, and that they acted with great promptitude at a time when every hour might have been of vital importance. With respect to the amount of difference of estimate which would justify their Lordships to review the decision of the learned judge, they were referred to a case in which this court differed to the extent of one-third. Unless the difference amounted at least to that they would not have interfered, but they think in this case the difference is so considerable as to induce their Lordships to differ and to express that difference in the judgment which they have pronounced. The appellants to have the costs of the appeal.

Judgment varied.

Solicitors: For the appellants, *Lowless, Nelson, and Jones*; for the respondents, *Westall and Roberts*.

COURT OF ADMIRALTY.

Reported by H. F. FURCELL, Esq., Barrister-at-Law.

March 1 and 28, 1871.

THE TEUTONIA.

Outbreak of war—Liability of shipowner for not delivering cargo—His right to freight pro rata itineris.

A state of war may exist de facto between two countries, although there has been no formal declaration of war by their governments.

A Prussian ship, carrying a cargo of nitrate of soda (contraband of war) arrived off Dunkirk, to which port she had been ordered by the consignees of cargo, and whilst lying there waiting for the tide, her master heard that war had broken out between France and Prussia, and he thereupon put back to the Downs, where he arrived on July 17, to make inquiries, but hearing nothing more, and being stopped by his owner, he put into Dover on the 18th, and there getting intelligence, refused to proceed to Dunkirk. The ship was running under charter entitling her to be sent to a safe port. War was not actually declared till July 19, but was imminent on July 16.

Held, that the ship on July 16 was not bound to go to Dunkirk, as she would have been liable to penalties for trading with the enemies of her country and capture by French cruisers; that even if war did not actually exist till July 19 that the master was justified in pausing for a reasonable time to make inquiries, and that under the circumstances he did not exceed that time by staying in Dover till after the declaration of war.

Whilst the ship was lying at Dover, the consignees demanded the delivery of cargo without any payment of freight. The master refused to deliver without payment.

Held, that the master was entitled to freight pro rata itineris.

This was a cause instituted under the 5th section of the Admiralty Court Act 1861, by Messrs. Duncan, Fox, and Co., of Liverpool, consignees of bill of lading of cargo laden on board the *Teutonia* against the said ship and her freight, and against David August Köster, of Hemilwürden, in Hanover, merchant, the owner of the said vessel, for damages consequent on the non-delivery of 2742 bags of nitrate of soda, the property of the plaintiff, then forming the cargo of the said ship.

The *Teutonia* was a Prussian vessel, and her owner was a Prussian subject, and in April 1870, she was at the port of Pisagua, where she shipped the above mentioned cargo under the following bill of lading, signed by her master.

Shipped in good order and condition, by Sawers, Duncan, and Co., of Valparaiso, under the ship *Teutonia*, whereof Köster is master for this present voyage, and now lying in the port of Pisagua, and bound for Cork, Cowee, or Falmouth, for orders 2742 bags, weighing in all 7023 quintals net Spanish weight, being marked and numbered as per margin, to be delivered in the like good order and condition at port of discharge, the act of God, the Queen's enemies, fire, and all every other dangers and accidents of the sea, rivers, and navigation of whatever nature and kind soever excepted, unto Messrs. Duncan, Fox, and Co., or assigns, freight for the said goods to be paid as per charter party, with primage and average accustomed. In witness whereof the master or purser of the said ship or vessel hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished the others to stand void.—Dated in Pisagua, this 5th day of April 1870.

[2742 bags in all, 7023 quintals net Spanish weight

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Weight and contents unknown. Not responsible for breakage of bags. All on board to be delivered.]

The vessel was then running under a charter party, which is set out in the judgment. She proceeded to Falmouth, where she arrived on July 10th, 1870, and on the following day received orders to proceed to Dunkirk, which is a French port. On July 16th she arrived off Dunkirk, but, the master having heard that war had broken out between France and Prussia, put back to the Downs, and arrived there on July 17th. Getting no information he telegraphed to his owner, and received an answer forbidding him to go to Dunkirk; and on Tuesday, July 19th, he took the ship into Dover, as the safest place. War was not actually declared by the French until July 20th, as from July 19th, but the relations between France and North Germany were disturbed some days before. The ship could not have got into Dunkirk before the evening of July 17th, as the tide did not serve. The cargo was contraband of war, and would have been liable to have been seized both by French and Prussian cruisers. The master refused to proceed to Dunkirk, and also declined to deliver the cargo at Dover when it was demanded by the consignees, after the formal declaration of war, unless on payment by the consignees of the whole freight, or the whole freight less the amount of expense in proceeding to Dunkirk. The master further offered to take the cargo to London, on the payment of the whole freight, but the consignees demanded the cargo without any payment whatsoever.

The defendants answer contained the following articles amongst others:

3. By reason of the premises, and of war having been declared and having broken out between Prussia and France after the making of the charter party and after the sailing of the *Teutonia* from Valparaiso, it became and was illegal according to the laws of Prussia, as well as the law of nations, for the master of the said vessel to proceed with the said cargo to Dunkirk; wherefore the master refused, as he lawfully might, to proceed with the said cargo to Dunkirk, and to deliver the same there, and proceeded to Dover, being a proper port in that behalf.

So, if war between Prussia and France had not been declared or had not broken out at the time when the said master made default, as in the fourth article of the petition alleged, the said war was imminent and reasonably believed by the said master to have broken out and to have been declared; wherefore the said master, as he reasonably might, proceeded to a place, which was a reasonable place in that behalf, for the purpose of making inquiries and for the safety of the ship and cargo; and before a reasonable time for making such inquiries and for proceeding, as ordered, to Dunkirk had elapsed, war had broken out and been declared between France and Prussia; wherefore the master, as he lawfully might, refused to proceed with the said cargo, and to deliver the same there, which is the default in the said fourth article alleged.

To this the plaintiffs demurred, and further pleaded the ship might have proceeded to Dunkirk on July 18th, before war was declared, and did not in consequence of orders received from the owner.

The evidence of the declaration of war and the disturbance of relations between France and Prussia, is fully set out in the judgment.

March 1.—Butt, Q.C. (Clarkson with him), for the plaintiff.—It must be admitted that by the law of Prussia it is unlawful to trade with an enemy, but at the time that the ship ought to have gone into Dunkirk, Prussia was not at war with France. The first breach was, not going into Dunkirk on July 17th when the tide

served; the second, not going there on July 18th and in putting into Dover, when there had been opportunity to know that war had not been declared; the third, in not delivering the cargo at Dover. When war breaks out the contract becomes illegal, and is therefore dissolved; but the defendants must show that war has broken out before they can be excused from performance: (*Paradine v. Jane*, Aleyn's Rep. 26.) This case shows that where a person has by his own contract created a duty or charge upon himself, he is bound to make it good if he can; notwithstanding any accident or inevitable necessity, because he might have provided against it by his contract. Here the master could have proceeded to Dunkirk, and he is therefore bound to do so as long as he is not physically prevented. There was nothing to prevent him from proceeding before the outbreak of the war, the defendant is bound to show that he is excused from the contract. He would have been if war had broken out on July 16th, but it did not until July 19th. It will be contended that the master is entitled to reasonable delay and time to make up his mind: (*Pole v. Cateovich*, 9 C. B., N. S., 430; 3 L. T. Rep. N. S. 438; 30 L. J. 102, C. P.) This is no authority either way. No authority for saying masters may wait if war is imminent. *Atkinson v. Ritchie* (10 East, 530), shows that a master must have something more than a fear that war will break out and that his ship may be seized. Clear default on July 18th, even if war had broken out on July 19th, as the master might then have put into Dunkirk without danger. The charterers might send the ship to other ports. Orders were given and accepted on July 11th to proceed to Dunkirk. Defendant must contend that the contract is rescinded by outbreak of war. If so, the plaintiffs are entitled to delivery of cargo at once without freight:

Avery v. Bowden, 6 E. & B. 933; 26 L. J. 3, Q. B. (Ex. Ch.).

Reid v. Hoskins, 6 E. & B. 933; 26 L. J. 5, Q. B. (Ex. Ch.).

Esposito v. Bowden, 27 L. J. 17, Q. B.; 7 E. & B. (Ex. Ch.) 763.

Abbot on Shipping, 9th edit. p. 485.

It is laid down here that a contract is dissolved on the outbreak of hostilities, even in the case where they commence, after the voyage was begun, and where there is no contract no freight can be earned. There is no implied promise to pay compensation for carrying goods a part of a voyage unless they are voluntarily accepted short of their destination. Freight cannot be earned under a charter-party unless the voyage has been completed: (*Osgood v. Groning* (2 Camp. 466)). A shipowner has no claim to freight *pro rata itineris*, except the consignee accepts the goods short of the destination, so that the law may imply a new agreement, and no freight is payable, nor can the shipowner claim freight if the owner of cargo is compelled to take the cargo at a port short of the chartered port. There must be a voluntary acceptance of the goods to sustain a claim for a *pro rata* freight, so as to show that the further carriage was dispensed with:

The Newcastle, Swab. 335;

The Schomstein, L. Rep. 1 Adm. 296; 36 L. J. 5, Adm.; 15 L. T. Rep. N. S. 993.

Milward, Q.C. (Cocks with him) for defendant.—War actually existed before July 19th, and subjects of belligerents were bound to act accordingly. Affairs were such that the defendant's own

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government would have punished him for his acts if he had gone to Dunkirk. The ship was liable to be seized by German cruisers as well as French: (*Oyden v. Groning*, 2 Camp, 465.) Although this is the decision of Lord Ellenborough, it was only at Nisi Prius, and it was a case where the jury found that the master unreasonably failed to perform his contract. There was no request to give up goods short of destination. If consignee demands goods, he must pay *pro rata*. The ship is entitled by the charter-party to go to a port safe by law as well as by nature: (*Oyden v. Graham*, 31 L. J. 26, Q. B.; 1 B. & S. 733; 5 L. T. Rep. N. S. 396.) If charterer does not send ship to such port, he is in default, and must pay whole freight and demurrage. The master was justified in using reasonable precautions: (*Pala v. Cetosich*, 9 C. B., N. S., 430.) *Paradine v. Jane* and *Ritchie v. Atkinson* were cited to show that, if a person contracts to do what is impossible, he must perform it or suffer the consequences, even though there be danger. Here, however, the contract is dissolved by becoming illegal through the outbreak of war subsequent to the forming of the contract:

MacLachlan on Shipping, p. 463;

Esposito v. Bowden, 27 L. J. 17, Q. B. (Ex. Ch.); 7 E. & B. 763, Ex. Ch.

Their real cause of action was the deviation on July 16 and 17. The master was entitled to deviate in this case to make inquiries. His contract was not, not to deviate, but not to deviate without necessity. He did not mean to abandon his contract, but went to Dover to make inquiries.

Clarkson, in reply.—Deviation is always a breach of contract. It avoids a contract of insurance. A person who has bound himself to do a thing must do it, and is not excused by its impossibility:

Barker v. Hodgson, 3 M. & S. 267;

Holt v. Wright, 29 L. J. 43, Q. B.; 1 L. T. Rep. N. S. 230.

If a contract is dissolved by the outbreak of war, it cannot be revived so as to give the shipowner the right to set up an implied contract to *pro rata* freight. There is now no contract on which freight can become payable.

March 28.—SIR B. PHILLIMORE.—This is a case instituted under the 6th section of the Admiralty Court Act 1861, on behalf of Messrs. Duncan, Fox, and Co., of Liverpool, the consignees of a bill of lading of cargo laden on board the ship *Teutonia*, against that ship and her freight, and against Daniel Angast Köster, of Hamelnwörden, a merchant and owner of the said vessel. The plaintiffs pray that the ship and freight, if any, may be condemned in damages for breach of contract. The *Teutonia* was a German or Prussian brig, subject to the laws of Prussia, and her master and crew were subject to the King of Prussia. In the month of April, 1870, she was lying in the port of Pisagua, on the coast of Bolivia. On the 1st Feb. her master had entered into a charter-party with Messrs. Sowers, Duncan, and Co., a branch at Valparaiso of the Liverpool firm, who are the shippers in this court, by which he undertook that the brig should "proceed to the port of Iquique where, or at one adjacent port, she shall receive and take on board a full and complete cargo of nitrate of soda in bags not exceeding what she can reasonably stow and carry over and above her cabin tackle, apparel, provisions, and furniture;" and it was "thereby mutually agreed that the vessel should not load more than 7800 quintals Spanish weight." It was

farther stipulated as follows: "That, after receiving on board the said cargo, stowing it in the customary manner, and being duly cleared out at the Custom House, the said vessel shall proceed either to Cork, Cowes, or Falmouth, at the option of the master, where he shall receive orders from charterers' agents, within three days after his arrival, to proceed to any one safe port in Great Britain or on the Continent between Havre and Hamburg, both included, and there, according to bills of lading and charter party, deliver the cargo, which is to be discharged and taken from alongside as fast as the customs of the port will admit. The freight to be paid, in manner hereinafter mentioned, on a true and right delivery of the cargo in the port of discharge, at, and after the rate of 45s. British sterling." The bill of lading, dated the 5th April, was as follows: [His Lordship here read the bill of lading before set out.] It appears from the evidence taken before me that the cargo, nitrate of soda, though used for agricultural purposes, is an ingredient in gunpowder, and that the prospect of war would raise the price of it in the market, but that no report of any war between France and Prussia had reached the Valparaiso firm at the time when this article was put on board the *Teutonia*. The brig arrived at Falmouth on the 10th July, and there, on the 11th July, received orders to take the cargo to Dunkirk. She arrived at a distance of about fourteen miles off that port at twelve o'clock at night of the 16th, which was a Saturday; and the master says that, after laying to for about two hours, a regular pilot in official uniform came on board; that he (the master) asked the pilot about the war, of which he had heard rumours at Falmouth; that the pilot told him it had been declared two days ago; that he asked the pilot where he could bring him in safely, so that he might ascertain whether war was declared or not; that the pilot offered to take him to Flushing or the Downs, or wherever he liked. According to the evidence there would not have been water enough for the *Teutonia* to have entered the port of Dunkirk till after four o'clock on the evening of the 17th. It is not unimportant to observe that she could not have entered that port before that time. The master elected to go to the Downs, and he anchored there on Sunday morning, the 17th, at ten o'clock. He says that on that day he could obtain no advice or information; that on the Monday, the 18th, he telegraphed to the owner (who was his father), and received an answer forbidding him (this came out on cross-examination) to go to Dunkirk; and that on Tuesday the 19th, he took the ship into Dover as the nearest or safest place. He added that he did not go to Dunkirk because war had broken out, being afraid for the safety of his ship, himself, and his crew in a French port, and also being afraid of punishment when he returned to his own country. On the Monday he was on shore at Deal, and the German consul told him that war had broken out. Upon this state of facts, the first question of law is raised in this case. It is averred by the plaintiffs that the master made default in obeying the proper orders given to him, and that on this account the owners of the ship are liable in damages. On the other hand, it is contended by the defendants, upon the pleadings as amended, "first, that war having been declared and having broken out between Prussia and France after the making of the charter-party, and after the

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sailing of the *Teutonia* from Valparaiso, it became and was illegal, according to the laws of Prussia, as well as the law of nations, for the master of the said vessel to proceed with the said cargo to Dunkirk, wherefore the master refused, as he lawfully might, to proceed with the cargo to Dunkirk and to deliver the same there, and proceeded to Dover, being a proper port in that behalf; and secondly, it was contended "that if war between Prussia and France had not been declared, or had not broken out at the time when the said master made default as in the 4th article of the petition alleged, the said war was imminent and reasonably believed by the said master to have broken out and to have been declared, wherefore the said master, as he reasonably might, proceeded to a place which was a reasonable place in that behalf for the purpose of making inquiries, and for the safety of the ship and cargo, and before a reasonable time for making such inquiries, and for proceeding as ordered to Dunkirk had elapsed, war had broken out, and been declared between France and Prussia, wherefore the master, as he lawfully might, refused to proceed with the said cargo, and to deliver the same there, which is the default in the said fourth article alleged." The reply stated the arrival of the ship off Dunkirk on the 16th, and charged that "in order of entering the seaport, as she could and ought to have done, for the purpose of discharging her said cargo, she sailed thence to the Downs, and there anchored on the morning of the 17th July 1870, and whilst she was so anchored and before war had been declared or broken out as alleged in the said answer, the defendant on the 18th July 1870, who at such time knew, or had the means of knowing, that the said war had not been declared or broken out, ordered the master of the said ship not to proceed with his vessel and her cargo to Dunkirk, but to put back to Dover, and thereupon and before the said war had been declared or broken out, the master of the said ship wrongfully and in breach of the terms of the said charter-party and bill of lading proceeded with his vessel to Dover." It was admitted during the course of the argument by the counsel for the plaintiffs that on and after the 19th, the date of the formal declaration of war by the French Government, the *Teutonia* was not bound to carry cargo to Dunkirk. I am, therefore, relieved from the necessity of considering whether any relaxation of the strict laws of war by the order of the French Government after or at the same time with the declaration of war, would affect this case. It was proved, as I have already stated, that the *Teutonia* could not have entered the port before the afternoon of the 17th. The charge against her therefore of making default in delivering of the cargo is narrowed in point of time to the period elapsing between the afternoon of the 17th and the morning of the 19th. It is during this interval that this *utile tempus* occurred during which it is maintained that she ought to have delivered her cargo at Dunkirk. It is argued that two distinct breaches of contract took place during this interval: the first breach is, the not going into Dunkirk on the 17th, the second is not returning from Dover to Dunkirk on the 18th. As it seems to me that no substantial distinction exists as to the principle of law upon which these two breaches are charged, I shall endeavour to deal with them together, and not separately. It must be remembered that the *Teutonia* is a Prussian ship, subject to Prussian

municipal law, as well as to general international law, and it has been admitted before me that, though no formal proof of the Prussian law has been given in evidence, it may be assumed that the maxim that a ship trading with the enemy of the state to which it belongs incurs the severest penalties, is a part of that law. The principal contention of the plaintiffs upon this part of the case has been, that war between France and Prussia was not declared until the 19th; but I think there can be no doubt that war may exist *de facto*, so as to affect at least the subjects of the belligerent state, either without a declaration on either side, or before a declaration, or with a unilateral declaration only. This is a position fortified by the opinions of great international jurists down to the judgments of Lord Stowell in our own time: (*The Nagado*, 4 Rob. 251, 253; *The Eliza Jane*, 1 Dod. 244, 247), as well as by historical precedents relating both to foreign countries and to our own during the last century. To take only one instance, when, in 1761, in a negotiation which preceded the close of one of the most memorable wars which England ever waged, France demanded that "captures before the declaration, except King's ships, should be restored, or a recompense made, because taken contrary to the law of nations," it was replied on behalf of England that "the demand of restitution of captures before the war cannot be admitted, for it is not founded upon any particular convention, nor yet resulting from the law of nations; for the right of hostilities does not result from a formal declaration of war, but from the hostilities which the aggressor first offered." (5 Ann. Reg. (1761), p. 280; 4 Ann. Reg. Art. 10; 3 Phil. Inter. Law, p. 87.) In 1854 the British declaration of war against Russia was not issued until the 29th March, but the Russian ambassador left England on the 8th Feb. It is notorious that the relations between France and Russia had been seriously disturbed from the 5th July. On that day Lord Lyons wrote to the Government of this country that the French Government had learnt that the Crown of Spain had been offered to and accepted by Prince Leopold of Hohenzollern, and that they had signified to the Prussian ambassador that they would not permit the establishment of any Prussian prince upon the throne of Spain. On the 8th July it was communicated from the same quarter to the British Government that the French Government found it impossible to refrain any longer from making military preparations, and at the time when the *Teutonia* arrived at Falmouth, namely, on the 12th, the apparent imminence of war was such as to alarm all Europe, and must have been perfectly well known to the charterers when they ordered this vessel to sail for Dunkirk, where the market for her cargo would, as the evidence shows, be raised by the probability of its being used for the manufacture of gunpowder. On the 15th July it was publicly announced in the French newspapers, that the French Government had made a formal declaration, both in the Corps Legislatif and in the senate, that the Prussian Ambassador had been told to demand his passport; that further attempts at conciliation were impossible. "Nous n'avons rien négligé pour éviter une guerre, nous allons nous préparer à celle qu'on nous offre." On the 16th July Lord Granville telegraphed to Lord Lyons, "The mercantile people in this country are anxious to know whether neutral vessels will be allowed by the belligerent

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powers to sail to and from French and German ports with cargoes for a specified time. Many ships, I am informed, are now loading in British ports for both countries. Ascertain this point without delay." And on the same day Lord Granville wrote to Lord Lyons, "Her Majesty's Government cannot doubt that the principles recorded in the declaration of Paris on the 16th April 1856, will be scrupulously acted on by the belligerents in the present war; but the Imperial Government may perhaps be disposed formerly to announce that, for its part, they will form the rule of its conduct in prosecution of hostile operations by sea." On the same date Lord Granville wrote, that the French Ambassador had called upon him and said that his Government intended on breaking off relations with North Germany; to place French subjects in the North German Confederation under the protection of the British Ambassador, ministers, and consuls. For these facts I have hitherto relied upon the correspondence presented to both Houses of Parliament, by command of her Majesty; I now advert to the telegram of the Prussian Minister, Count Bismarck, to the Prussian Ambassador at London, which was put in evidence before me.

No. 30.

Telegram.

Berlin, the 16th July 1870.

1.45 a.m.

In consequence of the news of the open declaration made this day by the French Ministry, which declaration appears to be equal to a declaration of war, the mobilisation of the whole of the North German army has been ordered, and a request has been addressed to the Governments of North Germany to place their forces on a war footing.

(Signed) BISMARCK.

To His Excellency
The Royal Minister of State,
The Count Bernstorff.

London.

It appears from the evidence of Mr. Von Schimidt that he telegraphed this intelligence to the Prussian Consul at Dover, and communicated it the same day to the Prussian Consul-General in London. On the same date the French newspaper, the *Journal Officiel*, contained a further statement of the French Government to the Senate as to the preparations for war. In this state of facts I am of opinion that the *Trutonia* would have incurred a double risk in proceeding to Dunkirk; she would have been exposed to the peril of being seized by a French cruiser on the ground of her Prussian nationality, and of being seized by a Prussian cruiser on the ground of her trading with and carrying contraband of war to the enemy. The information which the pilot gave her off Dunkirk was substantially correct. War had in fact broken out, or was so imminent as to render Dunkirk an unsafe port for a Prussian vessel. In the case of the *Ariel* decided by the Privy Council in 1857, their Lordships said "it is argued that war cannot be said to be imminent unless there be an embargo, or some similar act of the country about to be belligerent, and cases are cited in which such circumstances have occurred, but none of those cases go the length of laying down any positive rule as to the necessity of such circumstances: (11 Moo. P. C. Rep. 129; 3 Phill. Inter. Law p. xviii, add.) The old case of *Paradyne v. Jane* (Ayleyn's Rep. p. 27), and others founded upon the principle therein contained have been cited to me as authorities for the contention that the *Trutonia* was guilty of a breach of contract in not proceeding to Dunkirk, even in the circum-

stances which I have stated. The propositions of law in *Paradyne v. Jane* are, "where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; . . . but when the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." But assuming that this is at present a correct exposition of the law of England (though the last proposition is, I think, not in harmony with the jurisprudence of any other European state), it does not seem to me to affect this case. Indeed it has not been denied that if the contract has become illegal in virtue of a law subsequent to it, the non-execution of the contract is no breach. Item: quod leges fieri prohibent, si perpetuum causam servatorem, cessat obligatio: (Dig. lib. xlv. Tit. I. c. 35.) This doctrine of the civil law is also laid down by Lord Ellenborough in the case of *Atkinson v. Ritchie* (10 East, 534). "Neither can it," he says, "be questioned that if from a change in the political relations and circumstances of the country, with reference to any other contracts which were fairly and lawfully made at the time, they had become incapable of being any longer carried into effect without derogating from the clear public duty which a British subject owes to his sovereign and the state of which he is a member, the non-performance of a contract in a state so circumstanced is not only excusable, but a matter of peremptory duty and obligation on the part of the subject. But in order to found the new public duty, which is to supersede the performance of his former private one, it is necessary that an actual change in the political relations of the two countries should have taken place; and that the danger to result to the public interests of his own country from an observance of the contract should be clear, immediate, and certain. In short, such a state of circumstances must be shown to exist, as that the contract is no longer capable of being performed by him without a criminal compromise of his public duty. Can anything of this kind," he continues, "be said with truth to exist in the present case? No actual change in the political relations of Great Britain and Russia had then taken place. The danger to result from remaining at Cronstadt was neither immediate nor certain, in point of fact it attached only at the distance of many weeks afterwards, and no one can venture to suggest, even in argument, that the loading in question might not have been completed without any criminal compromise of public duty." This was a case in which the impediment to the fulfilment of the contract was the apprehension of an embargo, the future effect of which is always doubtful, and to which considerations apply other than those which apply to a state of actual war, the end of which cannot be foreseen. Whereas an ordinary embargo imposes only a temporary restraint upon the performance of the contract. It is "an act," as Lord Stowell says, "boistful enough in the mere execution, but equivocal as to its effects, and liable to be varied by subsequent events, and by the conduct of the Government, the property of whose subjects is so detained:" (*The Boedes Lust*, 5 Rob. 233, 245.) But when an embargo is imposed in the nature of reprisals and partial hostility, the merchant, it is laid down

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by Lord Tenterden, may put an end to the contracts if the voyage is likely to be defeated by the delay: (Abbott on Shipping, p. 429, 10th edit.) In the subsequent case of *Barker v. Hodgson* (3 M. & Selw. Ren. 267, 270), Lord Ellenborough said: "If indeed the performance of this covenant had been rendered unlawful by the Government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages." These and other cases were fully reviewed and confirmed in the more recent judgment of the Exchequer Chamber, in the case of *Erpositi v. Bowden* (1857, 7 Ell. & Bl. 763). In that case Mr. Justice Willes said: "The principal question in the case is as to the validity of the plea. It is in effect, whether a charter-party, made before the late Russian war between an English merchant and a neutral shipowner, whereby it was agreed that the neutral vessel should proceed to Odessa, a port of Russia, and there load from the freighter's factors a complete cargo of wheat, seed, or other grain, and proceed therewith to Falmouth, with usual provisions as to laying days and demurrage, was dissolved by the war between England and Russia, alleged by the charterer in his plea, which is to be taken as true for the purpose of the present discussion to have broken out before the vessel arrived at Odessa, and to have continued up to and during the time when the loading was to have taken place, it being further alleged in the plea that, from the time war was declared, it became and was impossible for the charterer to perform his agreement without dealing and trading with the Queen's enemies." The court, reversing the sentence of the Queen's Bench, held the plea to be valid. Willes, J., concludes the judgment in these words: "The plea alleges that the contract could not have been fulfilled without such dealing and trade. That, as we have already shown upon grounds not considered in the judgment of the Court of Queen's Bench, may be true. If it may, then, inasmuch as the law justifies what it commands, and effects that purpose, in cases like the present, by dissolving contracts which presumably cannot be executed without dealing and trading with the enemy, the plea is sufficient." In the case before me the law of France, the state to which the port belonged, did not, it is true, prevent the unloading at Dunkirk; but the law of Prussia, the state to which the ship belonged, prevented it. "The contract," as Lord Ellenborough says, "was no longer capable of being performed by the master without a criminal compromise of his duty;" for I think it might be reasonably maintained that the prohibition was as stringent in the one case as in the other, and that the same legal consequences flow from either state of things. I think that on the 16th July the *Teutonia* could not have entered Dunkirk with her cargo without being exposed to the penalties of trading with the enemy of her country. But if this be an erroneous application of the law to the facts at this date, the next question which arises is whether the circumstances did not justify her pausing and making further inquiries before she entered the port. I am of opinion that they did justify her in so doing, and that she was entitled to take reasonable measures within a reasonable time for this purpose. The law would

be most unreasonable, I think, if it considered such a cause to be breach of contract; and I derive confirmation of my opinion on this point from the judgment of the Common Pleas in the case of *Pole v. Cleeve* (2 F. & Fin. Rep. 104; 9 C. B., N. S., 430). Now what were the steps taken by the master of the *Teutonia*? He goes back to Dover on the 17th, which was a Sunday, and when, he says, he could obtain no advice or information. On Monday (the 18th) he telegraphed to his owner, and was ordered not to go to Dunkirk, and on the 19th he went into Dover, on which day, as I have already said, it is admitted that the law prevented him from executing his contract. It is said that he did not communicate with the charterers, but I am unable to see how any communication from them could, having regard to the facts and dates which I have already mentioned, have required him to go to Dunkirk on the 18th or even on the 17th, if he could have communicated with them on that day. I must add that the telegram which was received at Dover on the 23rd, shows that the master had probably not taken a wrong view of his duty to his own country. It was as follows: "From Bernstorff to North German Vice-Consul, Dover.—Try immediately to prevent North German ship *Teutonia*, Captain Koster, from going to Dunkirk." I am of opinion that the master of the *Teutonia* was entitled to pause and take a reasonable time for making further inquiries as to the existing relations between his own country and France, and that he did not exceed the limits of a reasonable time in making the inquiry, and after the inquiry had been made, it is admitted that the contract could not on account of the war be executed. I now come to the second branch of the case, namely, whether the owner of the ship is liable in damages because the master did not deliver the goods to the plaintiffs at Dover. It appears from the evidence that various attempts at negotiation on this subject passed between the master and the charterers; but that on the part of the charterers it never assumed the shape of a definite offer of *pro rata* freight, and that on the part of the owner the master offered on the 24th July to deliver the cargo on payment of freight and receipt of an indemnity against all consequences of not proceeding on the voyage; and on the 1st Aug. he offered to remit so much of the freight as would equal his expenses at Dunkirk (somewhere about 50*l.*), or to take the cargo to London for the same freight as to Dunkirk. On the same day the charterers proposed to tranship the cargo on billyboys if the master would pay the expenses, and he refused. It does not appear that the charterers required him to proceed to any port mentioned in the charter party, except Dunkirk, at any time. The question of law arising on these facts is, whether the master was bound to deliver the cargo without any payment in respect of freight. The general rule that freight is due only where the goods are delivered at the port of destination, is subject to exceptions and modifications: and these exceptions or modifications may arise out of the terms of an express contract, out of an implied contract, or out of the equity between the parties. The law of England as administered in the courts of common law, requires the master to carry the goods to the place of destination unless prevented by an unavoidable casualty, and requires the merchant, if the goods be so delivered, to pay the stipulated freight. If the ship be disabled from

completing her voyage, the master may still earn the whole freight by making, within reasonable time, the necessary repairs to the ship, or by sending the goods in another ship to the place of their destination; but if he declines to do this, the merchant is entitled to do this without payment of freight, the contract not having been performed; on the other hand, if the merchant refuse to allow the reasonable time for repairs, or the transmission of the goods at once, he must pay the whole freight, having prevented the performance of the contract. But if the ship be by inevitable necessity forced into a port short of her destination and is unable to prosecute her voyage, and if the merchant voluntarily accepts the goods at that port, he must pay a *pro rata* freight. The cases in which this principle is laid down are those in which a physical impossibility has prevented the execution of the contract. But where a moral or legal impossibility supervenes, the contract is dissolved. Here the law of England and the general law are in harmony. Donellus says, "Placet casus fortuitus nullo bonæ fidei iudicio itemque a nemine prestanti." . . . "casus fortuitus, definitur casus qui previdari non potest aut prævisio resisti non potest." (De Jure Civili, l. xvi., c. 6, §§ 11, 12.) And here the maxim of the Roman law, "Nemo tenetur ad impossibilia," derived from common sense and natural equity, is adopted and applied by the law of England. It has, however, been argued that the contract was dissolved by the supervening circumstance of the war, and that the consequence from this premise is that the merchant had a right to take his goods out of the ship without payment of any freight at Dover. I do not scruple to say, that if such be the law it appears to me at variance with evident justice. But I do not find any case which goes the length of saying that where a supervening moral impossibility, arising out of the prohibition imposed by a law not applicable, or not existing at the time of the making of the contract, has prevented its fulfilment, the merchant is entitled to have his goods carried by the ship almost, as in this case, the whole length of the voyage, without any compensation to the shipowner. I find no authority for the position that the contract is dissolved in the sense of rendering null all that has been previously done under it, though it is dissolved as to all future consequences. The law, as Willes, J., says (*Exposito v. Bowden*, 7 El. & Bl. 763) justifies what it commands, if, on the one hand, it commands, in these circumstances, the dissolution of the contract, does it not, on the other hand, justify the command by placing the parties as nearly as possible in *status quo ante contractum*? does it give to one party, both being equally innocent, a manifest advantage over the other? does it say to the merchant, you shall receive your goods greatly enhanced in value by their having been carried across the ocean within the neighbourhood of the place of destination, without any remuneration to the owner of the vehicle which has conveyed them? This may be the doctrine of the common law where a physical unexpected obstacle, which might have been guarded against in the contract, prevents the completion of it; but in this instance the completion is prevented by the act of the law itself. Moreover, in the present case, the merchant has, at the port of call, selected, out of several ports mentioned in the charter party, one to which access has become morally or legally impossible.

Has the merchant being apprised of this fact, not choosing to mention himself at any other port, and not making any tender of partial freight, but receiving an offer from the master to take the goods to one of the other ports mentioned in the charter party which did not belong to a belligerent, and was not far distant, a right to refuse this offer; and by this refusal, to escape the payment of all freight for the goods which he demands? I think not. But if such were, which I greatly doubt, the law to be administered in a court of common law, dealing with the subject exclusively on the narrow footing of a special contract express or implied, and not on the general principles of legal obligation, of which, according to the civil law, contract is a branch, it would not necessarily be the law administered by a court of equity or by the Admiralty Court. In the case of *Osgood v. Goring* (2 Camp. 466; *Abbott on Shipping*, 344, 345, 10th edit.), an American ship the *Neptune*, in the year 1807, being under a charter party bound to Rotterdam, refused (the earlier history of the case is immaterial) to go there, being apprehensive of confiscation under the French decree then in force; and her master offered to deliver up her cargo, on being paid freight and charges, to the agents of the charterers in London. They refused to receive it, and required him to complete his voyage, according to the charter party. The master proceeding to sell the cargo, was restrained by an interim injunction of the Court of Chancery. The Lord Chancellor then directed two questions to be tried in a court of law; first, whether the master be entitled to any and what sum of money for freight on his cargo; and secondly, whether he was entitled to any and what sum of money by way of compensation for the carriage of the goods from Charleston to London. Lord Ellenborough tried the case, and is reported—to use Lord Tenterden's cautious phrase—to have said, "that the shipowner had no claim for freight, the goods being brought short of their destination, and there being no express contract for compensation in this event, and no implied contract, as there had been no acceptance of the goods to found a promise to pay *pro rata* freight." Lord Tenterden proceeded to remark that "the Lord Chancellor afterwards directed the second question to be tried again in a court of law, and ordered the merchant to admit that he had accepted the goods in the port of London, if it should appear that the master could not reasonably have been required to proceed on the voyage; considering that if the master could not reasonably have been required, the merchant ought to have accepted the goods, and his refusal to accept them was an act against conscience, and a proper subject for the jurisdiction of a court of equity, which, on many occasions, places parties in the situation in which they would stand, if that which ought to have been had been actually done." The principle of this equity seems to have been adopted by my predecessor in the case of *the Sobolomstein* (L. Rep. 1 Adm. 293; 15 L. T. Rep. N. S. 393; 36 L. J. 5 Adm.) to which I think my attention was not drawn during the argument. The same principle as might be expected in a jurisprudence founded on the civil law, seems to have governed the following case in the courts of Scotland. In the case of *Wilson v. Bennett* (15 Pac. Cell. 251), decided March 10, 1869, a ship freighted from Dundee to Bridport with grain, was stranded off Portland Island. The shippers

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abandoned to the underwriters, who took delivery of the greater part of it, and had it sold. The master did not claim his lien for freight, but an action was afterwards brought against the shippers. The Judge Admiral decreed for "such proportion of the stipulated freight as shall correspond to the part of the voyage performed and the quantity of grain received . . . in respect that the master, where the partial non-fulfilment of the contract does not arise from any fault on his part, is entitled to such proportion of the freight as may correspond to the part of the stipulated voyage which the vessel has performed, and to the quantity of goods delivered, though not at the port of destination." This was affirmed in the Court of Session (Bell's Commentaries, edited by McLaren, vol. 1, pt. 2, p. 618.) Lord Tenterden in his chapter on freight (p. 646, 10th edit.), observes, "The authority of the Court of Admiralty being exercised upon the ship and cargo in specie or (which is, in effect, the same thing) upon the proceeds of a sale made under its own decree, is very different from that of a court of common law," and he cites the following case, the judgment in which, on account of its importance, I will state at length. Lord Stowell, in the case of *The Friends* (Edwards Adm. Rep. p. 246), said that "was a case of a British vessel which had been chartered at Camperdown for the purpose of delivering a cargo at Lisbon. The ship had successfully prosecuted her voyage to the very entrance of the Tagus, when she was warned off by the blockading squadron. Upon receiving this information she continued for some days with the fleet, but a gale coming on which blew her out to sea, she was picked up by a Spanish privateer, and was soon afterwards retaken by a British cruiser and carried to Madeira, where the ship and cargo were sold by the recaptors to pay the salvage. A claim has since been given for the ship and cargo, which was decreed to be restored, and the court has now to consider what freight is due under the circumstances of the case. On the part of the owner of the ship it is contended that the whole of the freight is due, as the ship had actually gone up to the mouth of the port to which she was destined. On the part of the owner of the cargo, it is contended that no freight is due, as the cargo was not delivered according to the terms of the charter party. Several cases from the courts of common law have been cited, but I confess it does not appear to me that any principle is to be extracted from them that is applicable to the present question, although I should have thought that some cases of British ships which had come up to the very port of their destination, and were prevented from discharging their cargoes there by the act of the sovereign authority of their own country, must have occurred in those courts, among the multiplicity of cases which the present extended system of blockade has given rise to. In the case of the American ships bound to France or Holland, which were brought into the ports of this country under the prohibitory law, the full freight was pronounced to be due where the owners of the cargoes elected to sell here; where they did not elect to sell here, the court left it to them to settle the freight with the owners of the ships. The court considered a voyage from America to this country very nearly the same in effect as a voyage to those contiguous countries to which these vessels were originally destined. In all probability the

markets of this country were not less favourable than in the blockaded ports, and no doubt the sale was effected with every attention to the interests of the cargo. In those cases the court gave the master of the ship the full benefit of the freight, not by virtue of his contract, because, looking at the charter party in the same point of view as the courts of common law, it could not say that the delivery at a port in England was a specific performance of its terms. But there being no contract which applied to the existing state of facts the court found itself under an obligation to discover what was the relative equity between the parties. This court sits no more than the courts of common law to make contracts between the parties; but as a court exercising an equitable jurisdiction, it considers itself bound to provide, as well as it can, for that relation of interests which has unexpectedly taken place under a state of facts out of the contemplation of the contracting parties in the course of the transaction." The learned judge then again adverts to the circumstances of the case and concludes, "Under these circumstances I shall direct a moiety of the freight to be paid." It is true that the decision was given in the Admiralty Court exercising a prize jurisdiction; but Lord Tenterden makes no distinction on this head in citing the authority of the case, and the practice of the Admiralty Court, and I think rightly, because the court only applied to subjects of prize the general power, which, as the history and origin of its jurisdiction show, it always possessed. Thus Lord Stowell, then at the bar, in his celebrated argument before the Court of King's Bench, which established the jurisdiction of the Prize Admiralty Court on freight claimed by a neutral master against the captor, observed: "It may be admitted that no such power as this is to be found in the Prize Acts, but there are many undoubted privileges of the Court of Admiralty which are not given by them. The Prize Acts are of modern date, and form indeed a very small portion of the law of the Admiralty. They were drawn up principally for the Vice-Admiralty Courts, in which a jurisdiction over questions of prize was thereby for the first time given. But a great part of the admiralty jurisdiction is founded on the established usage, and, as it were, on the common law of the admiralty." *Smart v. Wolf* (3 Durn. and East, 389). The modern statute which has given the Admiralty Court jurisdiction in the present case, has given it without restraint as to the exercise of that jurisdiction, according to its usual principles and practice. The general maritime law on the subject now before me is laid down in the well known French ordonnance, Art. XV. of this ordonnance was as follows: (Valin Ordonnance de la marine, l. 3, t. 3, Art. XV.) "S'il arrive interdiction de commerce avec le pays pour lequel le vaisseau est en route, et qu'il soit obligé de revenir avec son chargement, il ne sera dû au maître que le fret de l'aller, quand même le navire aurait été affrété allant et venant." The commentary on Valin is as follows: "Le cas où avant le départ du navire, il survient une interdiction de commerce avec le pays pour lequel il est destiné, est prévu par l'art. 7, tit. premier de ce livre. 3. Ici il agit de la même interdiction de commerce arrivée depuis le départ du vaisseau, et il est décidé que si le navire est obligé par-là de revenir avec son chargement au port d'où il était

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perti, le frêt de l'aller sera dû au maître mais aussi il faudra qu'il s'en contente, quand même le navire aurait été affrété allant et venant. Et rien n'est plus juste, puisque c'est la loi qui forçait, et procédant de force majeure, dont l'affrètement ou le marchand chargeur ne peut être garant; c'est bien assez qu'il paie tout le frêt de l'aller à cause que le voyage est commencé, par où il se fait une espèce de compensation de la perte causée par cet événement entre lui et le maître du navire." Emerigon remarks, "Dans ce cas la charte-partie subsiste. Il n'est cependant dû que le frêt d'aller; c'est par équité que la chose est ainsi décidée entre maître et chargeurs." He cites Pothier to the same effect: (Des Charte-Parties, No. 69, t. 2, page 394.) Bouley-Paty, in his chapter: "Du Frêt, s'il arrive interdiction de commerce avec le pays pour lequel le navire est en route" (Titre, 8, sect. 10, t. 2, p. 424), expresses the same opinion, and cites the 209th article of the modern Code de Commerce, which contains substantially the same regulations as the ordinance. The American courts have recognised this authority as binding in the absence of any positive law or decision to the contrary. The case in which this authority was followed bore a considerable resemblance to the one now before me. In this case *Morgan v. Insurance Company of North America* (4 Dallas Rep. 421), Tilghman, C.J. said, "This is an action on a policy of insurance on freight of the brig *Amazon*, from Philadelphia to Surinam, valued at 35000 dols. The brig sailed from Philadelphia on the 7th Aug. 1799, with a cargo consisting of provisions and merchandise, and arrived in the river Surinam, on the 17th Sept. following. During the voyage, the colony of Surinam was conquered by the forces of the King of Great Britain. Permission was obtained from the British commander for the brig to go up to the town of Paramaribo, and she arrived there with her cargo on the 20th Sept. On her arrival the captain of the brig, in pursuance of instructions from the owners, as well as in pursuance of an agreement between the owners and a certain J. A. Richter, who was a passenger in the said ship, offered to deliver the cargo to the said Richter upon his paying, or giving security to pay, 25,310 dols. Richter agreed to pay that sum as soon as possible after the delivery of the cargo, and actually gave good security for the money. But the British collector of customs refused permission to land any article of the cargo except the provisions, nor could such permission be obtained, although repeated petitions were presented to the Government. The consequence was that the cargo was not landed, and the captain entered his protest. The brig remained at Paramaribo till the 27th Sept. The plaintiffs were owners both of brig and cargo. The question is, whether the plaintiffs are entitled to recover, either for a total loss, or for a partial loss, on this policy. The plaintiffs' counsel contend that they are entitled to recover for a total loss; that the landing and delivery of the cargo is an essential part of the contract between the owner and the freighter, and not being complied with, no part of the freight has been earned; and that the circumstance of the same person being owners of the brig and cargo is immaterial in a question between the owners and the assured. On the other hand, the defendants' counsel say that there has been no loss, because the freight was completely earned. No adjudged case,

in point, has been cited on either side. The defendants' counsel relied on the case of *Bright v. Page* (3 Bos. and Pull., p. 295, note); but I do not think that case applicable." The learned Judge then deals with the case, and continues: "No conclusion can be drawn from this case under what circumstances freight may be earned or not earned, for it was not an action for the recovery of freight, but of damages for not being permitted to earn freight. But although there is no adjudged case, the subject has not escaped the notice of writers on the marine law. In one of the Ordinances of Louis XIV. (A.D. 1681) (1 vol. Louis XIV. 656, Art. 15, title Freight, cited by Abbot) (Shipping, 9th edit., p. 548), it is declared that on a charter-party to carry goods out and in, if during the voyage the commerce is prohibited and the vessel returns, the outward freight only is earned; and Valin, in his commentary on the article, says the law is the same if the vessel is freighted out only. These ordinances, and the commentaries on them, have been received with great respect in the courts both of England and the United States; not as containing any authority in themselves, but as evidence of the general marine law. Where they are contradicted by judicial decisions in our own country they are not to be respected; but on points which have not been decided they are worthy of consideration. I am strongly inclined to adopt the rule laid down by Valin, because I think it reasonable." The learned judge then proceeded to apply the law as laid down by Valin to the facts of the case. After as careful a consideration as I have been able to give to the general principles of jurisprudence applicable to the circumstances of the case, in the absence of any direct judicial precedents, I have arrived at the following conclusion:—That the owners of the *Tenelon* have not committed any breach of the contract contained in the charter party and bill of lading, either, first, by refusing in the circumstances to carry the cargo to the port of Dunkirk; or, secondly, by refusing to deliver up the cargo to the plaintiffs at Dover without any payment of freight whatever, either *pro rata itinere*, or by way of compensation, for the carriage of the goods from Pisagua to Dover. I therefore dismiss the suit with costs.

Solicitors for plaintiffs, *Hillyer and Fowcick*.

Solicitors for defendants, *Thomas and Hollams*.

Wednesday, Feb. 15, 1871.

THE TWO ELLENS.

Transfer of mortgage—Material man—Priority of lien.

The transferee of a mortgage, although the transfer be not registered, has a locus standi in a cause of necessities instituted against the ship.

The material man has no maritime lien. The mortgagee has priority over the material man. The Pacific (Bro. & Lush. 245, 10 L. T. Rep. N. S. 541) followed, but doubted.

This was a case instituted against the ship *Ten Ellens*, and John Alexander Black intervening, to recover a debt of 3051 3s., with interest thereon, from the 19th Feb., 1868, for necessities supplied to the said ship, and by the consent of the parties the following case was stated for the opinion of the court:—

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1. The plaintiffs are shipbuilders, carrying on business at Millwall.

2. The defendant is a merchant, who is agent of Messrs. Black Brothers and Co., hereinafter mentioned.

3. The *Two Ellens* is a British colonial vessel, belonging to the port of Digby, Nova Scotia, of which no owner or part owner was at the time of the institution of this suit domiciled in England or Wales.

4. Cornelius McBride, Dennis Falvey, and William Hogan, all of Weymouth, N.S., were the duly registered owners of the vessel which was commanded by the said Dennis Falvey.

5. By an instrument of mortgage in the form prescribed by the Merchant Shipping Act 1854, dated 9th March 1867, and executed by the said registered owners, the said registered owners mortgaged their $\frac{1}{2}$ share in the said vessel to George John Troop, a member of the said firm of Black, Brothers, and Co., Halifax, in consideration of gain, for the purpose of securing the repayment of the sum of 5000 dols. advanced by the said firm to the said owners, together with interest on the said sum. This mortgage has been duly registered.

6. About the month of Feb. 1868, the said vessel which had arrived in the port of London, shortly previous to the said date, and completed her then voyage, was lying in that port, and the said Dennis Falvey being the master, and part-owner of the said vessel, applied to the plaintiffs to do certain work and furnish certain supplies to the said vessel, which the plaintiffs accordingly did and made. It has been agreed that the plaintiff's account shall be taken to contain a correct statement of the items of the said plaintiff's claim. There is now due and owing to the plaintiffs for and in respect of such account a certain sum of money.

7. By an instrument of transfer, dated the 16th July 1868, in the form prescribed by the Merchant Shipping Act 1854, and executed by the said George John Troop, in consideration of the sum of 5000 dols. alleged in the said instrument of transfer to have been paid by the defendant, the said George John Troop transferred to the defendant the said mortgage. This instrument has never been registered according to the provisions of the said Merchant Shipping Act 1854.

8. In point of fact, no money was paid by the defendant to George John Troop in consideration of the transfer of the said mortgage, but such transfer was only made to enable the defendant to take charge of the vessel for and on behalf of the firm of Messrs. Black, Brothers, and Co.

9. The plaintiffs were never informed and did not know that the said vessel was mortgaged.

10. In the month of July 1868, the defendant took possession of the said vessel, and shortly afterwards the said sum of 5000 dols. being still unpaid, put her up for sale, when she was bought in by Messrs. Cannon, merchants of Liverpool, as agents for the said firm of Black, Brothers and Co.

11. This cause was instituted on the 23rd Dec. 1868, as a cause of necessities, but the plaintiffs did not then extract a warrant for the arrest of the said vessel. On the following day two of the crew of the said vessel instituted a cause of wages and caused her to be arrested, whereupon the plaintiffs amended the *precipe* by which they had instituted the said cause, by striking out the words

"of necessities" and leaving a blank, and they, on the 26th of the same month, issued a citation *in rem* which was duly served whilst the said vessel was under arrest in the said wages suit.

12. The printed evidence of Charles Black, one of the partners in the said firm of Messrs. Black, Brothers, and Co., is to form part of this case.

The question for the opinion of this court is whether the plaintiffs are entitled to recover in the said cause in respect of the aforesaid matters out of the proceeds of the said vessel before the said sum of 5000 dollars is paid to the defendant.

If the court shall be of opinion in the affirmative then the court is to pronounce for the claim of the plaintiffs, with costs of suit. It being referred to the registrar and merchants to ascertain what sum is due to the plaintiffs in respect of the aforesaid matters.

If the court shall be of opinion in the negative, then the plaintiffs suit is to be dismissed with costs.

The printed evidence of Chas. Black, above referred to, tended to prove that the repairs supplied to the ship, were not sanctioned either directly or indirectly by the mortgagees, and that the mortgagees were not aware that the plaintiffs supplied these necessities to the ship on the credit of the ship, and not on the personal credit of the owners. The defendant was the agent of the mortgagees and claimed priority over the plaintiffs by virtue of the transfer of mortgage which he held. The plaintiffs had given up possession of the ship, and she was afterwards taken and sold by the defendant under the mortgage. Witnesses were called at the hearing to prove that what was supplied to the ship were necessities, this being disputed by the defendant.

Objections for the plaintiffs—The defendant is a bare trustee, and cannot be admitted to intervene in this cause. He has no *locus standi* on legal grounds, for the transfer was not registered in accordance with the Merchant Shipping Act, and yet the mortgagee divested himself by the transfer of his legal title; and no *locus standi* on equitable grounds, for the registrar does not present a faithful account, the transfer not being mentioned, and no valuable consideration was given for the transfer. The plaintiff have a maritime lien on the ship, and, therefore, priority over the mortgagees. The court has jurisdiction over claim of material man for necessities: (24 Vict. c. 10, s. 5.) There is an implied authorisation by the mortgagee for the ship to be put in an efficient state (*Williams and another v. Aeopon*, 30 L. J., N. S., 353, C. P.; 4 L. T. Rep. N. S. 550), and the Merchant Shipping Act 1854, sect. 70, was there held not to conflict with this. The principle laid down in *Bristow v. Whitmore* (31 L. J. 467, Ch.; 4 L. T. Rep. N. S. 622) applies to this case. The mortgagees cannot avail themselves of the repairs which have been made by the material man, and which have enabled them to navigate the ship and have improved the value of their security. If they do they must discharge the debt incurred by these repairs, or at any rate allow him a lien upon the *res*.

Built, Q.C. and Clarkson, for the defendant.—The title to a ship passes by the execution of a bill of sale, and not by registration: (Merchant Shipping Act, ss. 55 and 57.) And in *Staplehurst v. Hayman and another* (33 L. J. 170, Ex; 9 L. T. Rep. N. S. 655), it was distinctly laid down that the property of a ship passes as between the vendor

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and his assignees and the vendee, by a bill of sale, although the transfer be not registered pursuant to the Merchant Shipping Act. In like manner, all rights under this deed of mortgage are vested in the defendant, although the transfer is not registered. The material man has no maritime lien on the ship under 24 Vict. c. 10, the ship not being a foreign ship. As ruled by Dr. Lushington in the case of the *Pacific* (Br. & Lush. 254; 10 L. T. Rep. N. S. 541) In the case of *Williams v. Alsopp*, cited by the plaintiffs, the material man had a possessory common law lien on the vessel for the repairs; he had repaired the ship on his own premises and retained it. In *Bristow v. Whitmore* certain unauthorised alterations were made by the master in order to enable the ship to carry a certain number of troops, and thereby earn a certain freight. But the owner or mortgagee in that case directly approved of the alterations by claiming the freight. The mortgagees did not in any way sanction these repairs. The material man supplied them not on the credit of the ship, but on the personal credit of the owners. The master or owners were not in any way acting as agents of the mortgagee. The mortgagee has priority of lien over the material man.

The Pacific, Bro. & L. 245; 10 L. T. Rep. N. S. 541; *The Troubadour*, L. Rep. 1 Adm. 309; 16 L. T. Rep. N. S. 119.

Feb. 15.—*SIR R. PHILLIMORE*.—This is a case instituted by certain shipbuilders at Millwall to recover a debt of 305*l.* 3*s.* and interest on account of necessities supplied by them to a vessel called *The Two Ellens*, which belonged to the port of Dighy, in Nova Scotia, and of which no owner or port owner was at the time of the institution of this suit domiciled in England or Wales. The defendant is a transferee of a registered mortgage from the owners. The facts are to be derived partly from a special case agreed upon by the parties, in which the averments are to be taken as admitted, and partly from evidence received upon certain disputed points. I am satisfied that the articles supplied and the repairs effected do fall under the category of "necessaries," which was the principal matter upon which evidence was taken. The owners on the 9th March 1867 mortgaged their sixty-four sixty-fourth shares to George John Troop, a member of the firm of Black, Brothers, and Co., of Halifax, for securing the repayment of 5000 *dols.* advanced by that firm to the said owners, together with interest thereon. This mortgage was duly registered. In Feb. 1868 the necessities were supplied by the plaintiffs to the vessel in the port of London. On the 16th July, in the same year, George John Troop transferred to the present defendant, John Alexander Black, who is not, however, a member of the firm of Black, Brothers, and Co., this mortgage for the alleged consideration of 5000 *dols.*; but no money was, in fact, ever paid by the defendant to Troop, and the transfer was only made to enable the defendant to take charge of the vessel in trust for and on behalf of the firm of Black, Brothers, and Co. This transfer was never registered, and the plaintiffs did not know and were never informed that the vessel was mortgaged. The proceeds of the vessel are insufficient to satisfy the claims of the plaintiffs and defendant, and the question for the decision of the court is whether the plaintiffs are entitled to recover whatever sum the registrar and merchants may find to be due

to them out of the proceeds of the vessel, before the sum of 5000 *dols.* is paid to the defendants; in other words, which of the two parties has the prior lien upon these proceeds. On the part of the plaintiffs, the first proposition contended for was that the defendant had no *locus standi* either on legal or equitable grounds—not on legal grounds, because the transfer had not been registered according to the provisions of the Merchant Shipping Act, and yet the mortgagee had diverted himself by the transfer of his legal title; and not on equitable grounds, because the register in its present condition did not present a faithful account, no mention being made of a transfer of the mortgage; and because no valuable consideration was given for the transfer. But to this it was replied that the title to the ship passed by the execution of a bill of sale, and not by the registration, whatever consequences might flow from the neglect of the purchaser to register; and the court was referred to the sects. 55 & 57 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) and to the case of *Stapleton v. Haymen and another* (33 L. J. 170, Ex.; 9 L. T. Rep. N. S. 655), in which it was distinctly laid down by the Court of Exchequer, in 1864, that the property in a ship passes as between the vendor and his assignees and the vendee, by a bill of sale, although the transfer be not registered pursuant to the Merchant Shipping Act 1854. Moreover, I must consider that the practice of this court has been, especially of late years, to be liberal in admitting parties who can show any interest whatever in a suit; and the evidence in this case shows that the defendant is the agent of the original mortgagees. Upon all these grounds, I am of opinion that he has a *locus standi* before the court, and I proceed to consider the next and principal question, namely, whether, as the law now stands, the material man has a maritime lien upon the ship, and therefore, on the principle usually applied to liens of this description, a priority over the lien of the mortgagee? The law previous to the passing of the admiralty jurisdiction statute, is set out in the case of *The Neptune* (3 Knapp, 94), by which it was decided that the Admiralty Court had ceased to have jurisdiction over the claims of material men, differing in this respect from the general law of commercial countries, which, founded upon the Roman law, gave to material men a lien on the ship enforceable in courts of admiralty. The 3 & 4 Vict. c. 65, however, by sect. 6, enacted that this court should have jurisdiction to decide all claims and demands for necessities supplied to any foreign ship or seagoing vessel. This statute was passed in 1840, and in 1863 my predecessor decided, after hearing a very elaborate argument, and correcting a previous judgment of his own in *The Alexander* (1 W. Rob. 294), that this section conferred upon claimants under it, a maritime lien: (*The Ella A. Clark*, Bro. & Lush. 32; 8 L. T. Rep. N. S. 119.) This judgment, it will be seen, referred only to foreign ships. In 1861, the 24 Vict. c. 10, s. 5, provided that this court should have jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales. The decision in the *Ella A. Clark*, though it turned principally upon the construction of 3 & 4

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Vict. c. 65, was given after consideration of 24 Vict. c. 10; and in the course of the judgment the learned judge said (p. 36), "Looking through the several recent statutes, I am led to the general conclusion that when the Legislature has appointed the proceeding *in rem*, they intended to give the same remedy as heretofore was in use in this court in the administration of justice in cases of maritime lien, though no express words may be used to that effect." Nevertheless, in 1864, Dr. Lushington ruled, in a considered judgment, that a material man, claiming under 24 Vict. c. 10, in the case of a ship not a foreign ship, had not a maritime lien, but only a right of action *in rem*, which gave no lien upon the ship "until the time of the institution of the cause" (sect. 5); (*The Pacific*, Bro. & Lush. 243; 10 L. T. Rep. N. S. 541.) In this case he held that the mortgagee was entitled to be paid in preference to the material man who supplied the materials after the date of the mortgage. This case seems to have overruled the previous case of *The Shipwreck* (2 Mar. Law Cas. 20; 10 Jnr. N. S. 445). To this judgment he adhered in the subsequent case of *The Troubadour*, in 1866 (L. Rep. 1 Adm. 306; 16 L. T. Rep. N. S. 156.) I think I am bound to say that I am unable to acquiesce with the reasoning upon which the judgment in the *Pacific* was founded, or to reconcile that reasoning with the judgment in the *Ellis A. Clark*. The two statutes ought, I should have ventured to think, to have been construed as being *in pari materia*, and the argument which gave the maritime lien in the case of the foreign ship, ought to have given the same privilege in the case of the British ship. In *The Bold Buccleugh* (7 Moo. 264), supported by the judgment in *The Europa* (Bro. & Lush. 89; 8 L. T. Rep. N. S. 368,) the Privy Council said (p. 284): "Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process; and Story, J. (1 Sm. Rep. 78), explains that process to be a proceeding *in rem*, and adds that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and, indeed, is the only court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists a proceeding *in rem* may be had, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process. This claim or privilege travels with the thing, into whosever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding *in rem* relates back to the period when it first attached." The proceedings, in this case, of the material men are proceedings *in rem*; and the language already cited from the *Ellis A. Clark* seems to me as applicable to their claim in the case of a British as of a foreign ship; and I should have thought that in such a case the maritime lien was inchoate before the institution of the suit, though the power of enforcing it would depend upon the fact of the owner not being domiciled in England or Wales at that time. But I do not think that it would be right or proper, having regard to the usage

which prevails in our courts of justice on this subject to reverse the careful and deliberate judgment of my predecessor, even if he were a less distinguished judge than Dr. Lushington. Only one other point remains for consideration; namely, whether there are any special circumstances proved in this case which would take it out of the application of the *Pacific*. I have been referred to two cases: *Williams and another v. Allsup*, decided in 1861, in the Court of Common Pleas (30 L. J., N. S., 353, C. P.; 4 L. T. Rep. N. S. 550), the marginal note of which appears to me to be correct, and is as follows:—"The plaintiffs, mortgagees of a ship having permitted the mortgagor to remain in possession for upwards of four years, and during that time to use and navigate the ship for his own profit, the latter, without the knowledge of the plaintiffs, delivered her to the defendant, a shipwright, for the purpose of having reasonable and necessary repairs done to her, which the defendant did; the plaintiffs having demanded possession of the defendant, the latter refused to deliver her up until his bill for the repairs was paid. Held, that the plaintiffs must be taken to have implicitly authorised the mortgagor to keep the vessel in an efficient state, and for that purpose to order necessary repairs to be done upon the ordinary terms, one of which was, that the shipwright should have his lien upon the ship for the repairs. Held, also, that sect. 70 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), which enacts that the mortgagor shall not be deemed to have ceased to be the owner of the mortgaged ship, except in so far as may be necessary for making such ship available as a security for the mortgage debt, did not conflict with this view." Willes, J., said, "The mortgagor is permitted by the mortgagees to remain in possession of the vessel for the purpose of using it in the ordinary way, and he cannot use it in the ordinary way, unless it is repaired. That seems to me to involve the permission of the mortgagees to get the vessel repaired upon the ordinary terms, though not to pledge the mortgagee's credit. Then, the shipwright who does the repairs is entitled to his lien as incident to his employment;" (16 p. 355.) These expressions were strongly pressed by counsel upon my attention, but upon examination of the case the decision only amounts to this: that the material man having a possessory common law lien upon the *res* which he had repaired in his own premises, was justified in retaining it until his debt was paid; and that this lien was not taken away by the Merchant Shipping Act. The next case was also decided in the year 1891 by the House of Lords: (*Bristow v. Whitmore* 31 L. J. 467, Ch.; 4 L. T. Rep. N. S. 622), the marginal note is as follows:—"The master of a vessel at the Mauritius, in April, entered into a charter party under seal (therein describing himself as master and owner) with the commissariat officer there for the conveyance of troops to Gravesend, and paid certain moneys, and incurred liabilities for fitting up the vessel for the purpose. In the following month he entered into another charter party, not under seal, at the Cape of Good Hope for the conveyance of other troops, and thereupon paid further sums, and incurred further liabilities to enable him to perform the contract. The owner became bankrupt, having previously mortgaged the vessel. Upon its arrival in the Thames the mortgagees seized it. The master

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fled a bill against the owner's assignees, praying a declaration that he was entitled to be repaid and indemnified out of the fund due from the Admiralty on account of the freight. The Commissioners of the Admiralty paid the amount into court: Held, reversing the decision of the Lord Chancellor, and restoring that of Vice-Chancellor Wood, that the master was entitled to be reimbursed out of the fund." In this case Lord Kingsdown observed that "there did not appear, on the general rules of law, to be much difficulty. A master of a ship had not a lien on freight for advances made by him on account of the ship; but if a trustee incurred expenses in the discharge of a trust, he was entitled to retain them out of the trust property. So, if an agent made a contract, the principal could not both approve and reprobate it. The contract here was *prima facie* unwarranted by the master's general authority; the owner (or mortgagee) adopted it, and now insisted on receiving all the benefit, leaving the agent to pay the expenses incurred in carrying it into effect, and acquiring the money earned by it." It was strongly contended that I ought to apply the principles here stated to the case before me, and to hold that the mortgagees or their transferees could not approve and reprobate the implied contract of the material man—could not avail themselves of the repairs which he had effected, by which they were enabled to navigate the ship, and to improve the security of their mortgage, without discharging the debt incurred by these repairs, or allowing him a lien upon the repaired *res*. I confess that I should not have been sorry to apply the principle of this decision to the case before me, because I think that the plaintiff has been hardly treated, but I am unable to do so. That judgment related to freight, which was acquired in consequence of the unauthorized alterations made by the master of the ship, which freight the owner or the mortgagee claimed to receive while refusing to pay for the expense of the alterations; and I must remember that it is expressly provided by the Merchant Shipping Act 1854 that the mortgagee is not to be considered in the legal category of owner (sect. 70), and the evidence before me does not sustain the position either that the mortgagee was aware that these repairs were supplied by the material man upon the credit of the ship, and not on the personal credit of the owner, or that the mortgagee stood by or looked on giving directly or indirectly any sanction to the supply of these necessities on the credit of the ship; and according to the decision in the *Troubadour* the mortgagee in possession would not be liable for necessities supplied to the ship unless the master, in ordering the necessities, was acting as the agent of the mortgagee. I am therefore brought back to the consideration of the character of the lien conferred by the statute upon the material man, and I find, as I have said, the judgment of my predecessor directing that the material man has not a maritime lien, and therefore in this case not a claim entitled to priority over that of the mortgagees or transferees of the mortgage. I have ventured to state my doubts as to the grounds upon which these judgments are grounded. I must await their revision and alteration—if they are to be altered—by the appellate tribunal. I must dismiss this suit with costs.

Solicitors for the plaintiffs, *Wentall and Roberts*.
Solicitors for the defendants, *Dyke and Stokes*.

Jan. 24 and Feb. 1, 1871.

THE MARKLAND.

Practice—Payment out of court—Priority—Power to revoke decree—Caveat—Costs.

The rule that a suitor who first obtains a decree shall have priority in order of payment only applies where suitors are in pari conditio.

Where the court in a suit in rem has made, per incuriam, an order directing payment out of court to satisfy the claim of a suitor, the court has power before payment to vary or rescind the order.

Where the plaintiff in a cause of necessities obtains a decree, and the mortgagees neglect to enter a caveat until after the order for payment out of court has been made, the court will grant costs to the plaintiff.

On the 21st Oct. 1870 a cause of co-ownership (No. 5495) was instituted on behalf of Thomas Ellis, the owner of 48 64th shares of the vessel *Markland*, against the said vessel. On the 24th Oct., Robinson Inglis and Co. the first mortgagees in possession, entered an appearance. On the 27th Oct. an appearance was entered on behalf of Sidney Toppin, who held a second mortgage on the ship. On the 3rd Nov. an order of court was made in the cause, under which the *Markland* was appraised and sold, subject to certain charter-parties before entered into by her owners, and the proceeds of the sale were brought into the registry by the marshal. On the 16th Dec. a cause of wages (No. 5575) was instituted on behalf of the crew of the *Markland* against the proceeds of the sale. On the 21st Dec. a cause of necessities (No. 5560) was instituted on behalf of John Dawson, shipwright, against the *Markland*. On the 10th Jan. 1871, the court pronounced the sum of 30*l.* to be due to the plaintiffs in the suit, instituted on behalf of the crew (No. 5575), and ordered the said sum and costs to be paid out of the proceeds in the registry to the said plaintiff's solicitors, and this was accordingly done. On the 17th Jan. 1871, the cause of necessities (No. 5560) came on for hearing, and the claim being unopposed, the court, on hearing proof, pronounced for the sum of 57*l.* 5*s.* 5*d.*, the amount of the claim with costs, and further ordered the same to be paid out of the proceeds in court to the plaintiff's proctor. Before this money was paid out, the proctors for the first mortgagees filed a *præcipe* for a caveat against the payment of any sum out of the proceeds of the *Markland*, and a caveat was entered accordingly. On the 23rd Jan., a cause of wages (No. 5619) was instituted on behalf of the master of the *Markland*, against the proceeds of the vessel.

The amount in court was insufficient to satisfy the unpaid claims of the several suitors, and the question arose whether the decree obtained by the plaintiff in the cause of necessities (No. 5560), entitled him to be paid the amount pronounced due to him out of the proceeds, in priority to the claims of the several mortgagees.

Jan. 24.—*E. C. Clarkson*, for the plaintiff in the cause of necessities (No. 5560), moved the court to overrule the caveat entered by the several mortgagees, and to condemn the mortgagees in costs. This plaintiff is entitled to priority as he has obtained a decree in this suit which is in *rem*: (*The Saracen*, 2 W. Rob. 451; 6 Moo. P. C. C. 6; *The Gustaf*, Lush. 506; 31 L. J. 207, Adm.; 6 L. T. Rep. N. S. 660.) The following is the practice of the court:—"According to the priority of time in

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which each claimant has obtained his decree, pronouncing for his claim and costs, so will be his right to be paid, in preference to others where there are several notions, out of the fund in court." (Coote's Admiralty Practice, 2nd edit. p. 133.) The court sometimes, where there are several causes against the same vessel, will make an order for payment in one of the causes, when the others are not ready for hearing, and the order is always made expressly without prejudice to the rights of the other snitors who may be entitled to priority, but here the order was made absolutely, and without any reservation of rights of the mortgagees. The court found that this plaintiff was entitled to be paid, and even signed the order for the payment of the decreed sum out of court. The court has now no power to recall that order. The mortgagees have lost their right in priority by their own laches in not taking steps before this decree in favour of the plaintiff. The court will grant to the plaintiff in this cause the costs he has incurred in consequence of the neglect of the mortgagees to enter their caveat before the order of court was made.

Feb. 1.—Butt, Q.C., and Gibson, for the first mortgagees, opposed Clarkson's motion, and moved the court to direct the amount due to the first mortgagees to be paid out of court. The plaintiff in the cause of necessities is not in *pari conditione* with the mortgagees, and therefore the rule that preference will be given to the diligent snitor does not apply to this case: (*The William F. Safford*, Lush. Rep. 69; 2 L. T. R. p. N. S. 301; 29 L. J. 109, Adm.) [Sir R. PHILLIMORE.—At the date of the decree in the cause of necessities no caveat was entered by your clients. Were they not thereby guilty of laches? If a caveat had been entered, the first mortgagees would not have been in any different position. It is not the practice in this court for a party entering a caveat to receive notice of an application by other parties for a payment of money out of court. This practice is unsatisfactory. He does not receive notice until an order for the payment of money out of court is made, and is about to be acted upon: (Williams and Bruce's Admiralty Practice, p. 230, n. 5.) [Sir R. J. PHILLIMORE.—The court would have had notice if a caveat had been entered.] Even so it is not too late to give the first mortgagees their just rights. The court still holds the proceeds, and has power to rectify any order made *per incuriam*.

W. G. F. Phillimore for the second mortgagees.
Dr. Tristram for the plaintiff in suit No. 5495.
Pritchard for the plaintiff in suit No. 5619.
Clarkson in reply.

Sir R. PHILLIMORE.—The claimant for necessities in this case does not dispute that the mortgagees have a prior lien upon the funds in court, but he maintains that the advantage of that priority has been taken away from them by reason of his obtaining a decree, which took the form of a signed order, for the payment of his claim. The cases of the *Saracen* and the *Gustaf*, which have been cited, apply to claimants of equal degree, and do no more than enforce a well-known principle that a diligent creditor shall have the advantage of his diligence over a remiss creditor; but there is no authority, that I am aware of, which has decided that this doctrine can be extended to a case where the parties are not in *pari conditione*,

but where one has a distinct legal priority over the other. The contrary, I think, appears to have been laid down in the case of the *William F. Safford*, referred to by Mr. Butt. With regard to the fact that the order for payment in this case was actually signed by me, I cannot hold that upon that ground the court is *functus officio*. The court has not parted with the funds: and after it has been apprised that by so doing it would be inflicting an injustice upon parties who have a prior legal claim over those funds, it would be strange indeed if the court had not power to prevent the execution of the order. I am clear that I have power, and ought to exercise it, to prevent the execution of that order, the effect of which would be to do a wrong to a party who has established priority in his claim: *The Monarch* (1 Wm. Rob. 21). With regard to the question of costs, I must refer to the 13th rule of the court: "A proctor desiring to prevent the payment of moneys out of the registry shall file a *procepis*, and thereupon a caveat shall be entered in a book to be kept in the registry, called the Caveat Payment-book: (Williams and Bruce's Adm. Prac. App. xii.) No such caveat was filed by the mortgagees at the time the order was made for the payment of the claim for necessities; and I am of opinion that in this case the want of compliance with the rule, and the other circumstances, justify Mr. Clarkson in his application for the costs to which he has been put, and I shall, therefore, give him the costs. I may observe that, after the discussion which took place the other day with respect to the rule of court to which I have referred, I have thought it right, after conferring with the registrar, to issue an order to the effect that for the future any person who has entered a caveat against the payment of money shall receive a notice previously to any application by any other party for the payment of money in the matter in which the caveat has been entered. I direct that the claim pronounced for in the case for necessities shall rank in order of payment after the claims of the master and mortgagees. I reject Mr. Clarkson's motion to overrule the caveat, and I condemn the first mortgagees in the costs occasioned by their delay in entering a caveat against the payment of the claim for necessities.

Proctors for the plaintiff in suit No. 5560, Clarkson, Son, and Greenwell.

Proctors for the first mortgagees and for the plaintiff in suit No. 5619, Pritchard and Sons.

Solicitor for the second mortgage, H. J. Hubbard.
Solicitors for the plaintiff in suit No. 5495, Lee and Saunders.

Tuesday, Feb. 17, 1871.

THE GAUNTLET.

The Foreign Enlistment Act 1870 (33 & 34 Vict. c. 90) ss. 8 and 19—Practice—Bail—Consent of the Crown.

Where a vessel is arrested under the provisions of the *Foreign Enlistment Act 1870*, the court will admit her to bail with the consent of the Crown.

Samble, the consent of the Crown is not necessary. The court will only require bail to be given to the extent of the value of the ship and her equipment, and not any further sum for costs.

This was a case instituted under the *Foreign Enlistment Act 1870*, by the Attorney-General on

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behalf of Her Majesty against the steaming *Gauntlet*, and against all persons having or pretending to have any right, title, or interest in or to the said vessel.

The affidavit to lead the warrant for the arrest of the vessel set out the following facts:—That the said steam tug *Gauntlet* was, on or about the 26th Nov. 1870, and on certain days following, employed in the Naval Service of France, that is to say, in towing from the Downs, and from within three miles of the shore of England, to the port of Dunkirk, in France, a certain vessel (belonging to subjects of the North German Confederation), which last-mentioned vessel had lately been captured and taken at sea by a French vessel of war, and was then in possession of the Government of France; that the institution of the proceedings against the *Gauntlet*, under the provisions of the Foreign Enlistment Act 1870 has been duly sanctioned by Her Majesty's Secretary of State for Foreign Affairs.

The *Gauntlet* was arrested on a warrant directed to be issued on the 28th Jan. by the court on the motion of *Archibald*.

The *Admiralty Advocate* (Dr. Deane, Q.C.), *Edwyn Jones* and *T. J. A. Palmer*, moved the court for an order to release the *Gauntlet*, on bail being given for the full value of the vessel. The Foreign Enlistment Act 1870 (33 & 34 Vict. c. 90), sect. 19, enacts that the Court of Admiralty shall, in addition to any power given to the courts by the Acts, have in respect of any ship or other matter brought before it in pursuance of the Act, all powers which it has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction. The court has full power to release ships in other cases, and therefore can release on bail, in cases arising under this Act.

The *Attorney-General* (Sir R. Collier), the *Solicitor-General* (Sir John Coleridge), the *Queen's Advocate* (Sir Travers Twiss), and *Archibald*, for the Crown.—By the above Act, sect. 8 "the ship in respect of which any such offence is committed, and her equipment, shall be forfeited to her Majesty." We must assume for the purposes of this application that such an offence has been committed, and, therefore, as the object of this suit is to obtain possession of the ship, in this respect suits under this Act resemble suits of possession. It is doubtful whether in suits of possession the defendant may substitute bail for the ship, although of course this may be done by consent: (*Wms. & Bruce Adm. Pract.* 210 n. (b) [Sir R. J. Phillimore.—The court will allow a ship to be released on bail in cases of possession, where the object of the suit will not be thereby defeated.] If the court considers it has power to order the vessel to be released on the crown giving its consent, the Crown will do so on the proper bail being given.

Sir R. J. PHILLIMORE.—I incline to the opinion that I have power to order this vessel to be released on bail without any consent on the part of the Crown; but I entertain no doubt that I have power to do so with the consent of the Crown; and as the Crown has given its consent I shall order the vessel to be released on bail being given for the full value of the vessel and her equipment.

The *Attorney-General*.—We are also entitled to have bail given for costs.

Sir R. J. PHILLIMORE.—No; I think you are not

entitled to have security beyond the full value of the vessel, (a)

Proctor for the Crown: The *Queen's Proctor*.

Solicitors for the defendants: *Lowless and Nelson*.

June 5 and 6, 1871.

THE MOROCCO.

Rival salvors—Right to begin—Right to cross-examine each other's witnesses—Consolidation of cases.

In a salvage suit where there are rival salvors, the salvor who first enters his suit has the right to begin, unless special circumstances be shown.

Rival salvors have a right to cross-examine each other's witnesses, but only on a point at which they are at issue. A salvor who saves life in addition to the services rendered by him in connection with the other salvors, is not bound to consolidate where the salvors cannot agree as to the conduct of the cause.

FOUR causes of salvage were instituted by four Liverpool tugs—the *Empress*, the *Knight Commander*, the *Rock Light*, and *Fire King*—for concurrent services rendered by them to the steamship *Morocco* in the River Mersey. The ship, owing to an accident, was in danger of sinking, and she was beached by the tugs. The *Empress* took off her passengers. An application for consolidation had been made before the registrar, and the *Empress* claimed the conduct of the consolidated causes on the ground that she was the first salvor in point of time, but this was objected to by the other salvors, and the *Empress* proceeded alone, the others being consolidated. The suits came on for examination of witnesses and hearing on the same day, and were heard together.

Aspinall, Q.C. (Clarkson with him) for the *Empress*, claimed the right to begin, as the services of the *Empress* were first in point of time.

The *Admiralty Advocate* (Jones with him) objected on the ground that one of his causes had been entered before that of the *Empress*, and by the practice of the court he was therefore entitled to begin.

Sir R. J. PHILLIMORE.—It is the rule that those who first entered their cause should begin unless special circumstances be shown.

The only question between the two sets of salvors as to the services rendered was as to which of them reached the ship first, and one set of salvors wishing to cross-examine the witnesses called by the other, application was made to the court to determine the course as to this point.

Aspinall, Q.C. cited the *Philadelphia*, Br. & Lush, Rep. 28.

Butt, Q.C. (*Gully* with him), for the ship and cargo, contended that no such cross-examination ought to be allowed unless there was a real rivalry, and submitted that great injustice might arise if friendly salvors could cross-examine each other's witnesses, and so ask questions which could not be asked on examination in chief.

Sir R. J. PHILLIMORE.—I shall allow Mr. *Aspinall* to cross-examine on the question upon which the two sets of salvors are at issue, and that only.

Aspinall, Q.C., contended that the *Empress* was justified in not consolidating with the other salvors

(a) The vessel was released on the required bail being given: the bond was conditioned that the defendants should restore the vessel and her equipments, or the value thereof, when ordered by the court to do so.

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as she could not have the conduct of the cause. She was a salvor of life, and also the first in point of time.

Bull, Q.C. submitted that there was no real difference between the different services, and that the refusal by the solicitor for the *Empress* before the registrar to consolidate must have been caused by his having been wrongly instructed by his clients, and if that were so it was not right that the defendants should have to bear the consequent costs in case of a decision against them.

Sir R. J. PHILLIMORE.—The *Empress* rendered services above those of the other tugs. She was alongside the ship first, and afforded the means of escape for those on board, and so in some sense may be said to be a salvor of life, as there was danger of the ship sinking in the river. Under these circumstances I consider she was justified in not consolidating.

Proctor for the *Empress*, *Alfred Ayton*.

Solicitors for the other salvors, *Netheralls and Speechley*.

Solicitors for the defendants, *Pritchard and Sons*.

Wednesday, April 19, 1871.

THE WAVERLEY.

Contract to render salvage services—Competent parties—Tender.

A steamer which contracts to render salvage services to a disabled vessel for a fixed sum, will be held strictly to her agreement when it is entered into by competent parties.

It is no ground for claiming extra salvage remuneration, that the service was prolonged, and became more difficult.

Where the master of the disabled vessel—under pressure, being at the mercy of the salvors—consents to abandon the contract, the court will uphold the agreement if equitable.

Payment into court of a sum of money, above the agreed sum, by way of compensation for damage and extra expenses incurred, and for delay, will not estop the defendant from setting up the agreement.

THIS was a cause of salvage instituted on behalf of the owners, master, and crew of the screw steamship *London* against the screw steamship *Waverley*, and against Donald Macgregor, her owner, intervening, to recover remuneration for salvage services rendered by the steamship *London* to the steamship *Waverley*. The *London* is a large steamer, regularly running between the ports of London and Cadiz with passengers and cargo, and on the 27th Jan. 1871 she left Cadiz on her homeward voyage. On the following day, hearing that there was a steamer (the *Waverley*) off the coast which had lost her screw propeller, and required to be towed to Lisbon, the *London* went in search of her, and on Jan. 29th, about 5.30 a.m., she fell in with her and found that she had already dispatched the chief officer and some men to Lisbon for assistance. The mate of the *London* was sent on board the *Waverley*, and entered into an agreement with the master to tow the ship to Lisbon for 400*l*. The lifeboat of the *London* then brought a warp belonging to the *Waverley* on board the *London*, and the *London* commenced towing. The wind was then moderate from the N.W., with a heavy cross sea, but about 9 a.m. the wind and sea increased in force, and the hawser parted, and the *Waverley* got across the sea and drifted S.E. The *London*

got another hawser on board the *Waverley*, and began towing again at 10.30 a.m., but the rope again parted almost immediately. The *London* succeeded in getting another hawser on board the *Waverley*, and also took one from her, and with the two hawsers continued to tow until 1.30 p.m., when the wind and sea being very high, one of the hawsers parted, and whilst they were trying to get another hawser on board the *Waverley* the second hawser went, and she was again adrift. The hawsers were again got on board of the *Waverley*, but at 4.30 p.m. both hawsers had parted, and it was then too dark to make fast again that night. By the advice of the master of the *London*, the *Waverley* then let go her anchors, and her master and crew went on board the *London*, leaving the *Waverley* to ride to her anchors through the night, as they were afraid of her breaking loose and going ashore, in consequence of the wind being very squally from the N.W., and of the heavy sea then running. The *London* remained under steam near the *Waverley* all night and until 6 a.m. on the morning of Jan. 30, and then the master and crew of the *Waverley* went on board her again with the mate and carpenter of the *London*; but before doing so the master of the *London* informed the master of the *Waverley* that he considered the aforesaid agreement, which had been entered into by the mate of the *London* on the previous day for the towage of the *Waverley* by the *London* for 400*l*. to be at an end, and the master of the *London*, on his examination, said that the master of the *Waverley* assented to this, but the master of the *Waverley* denied having assented to it, although he admitted that the master of the *London* did make the statement to him.

The *London*, on the morning of Jan. 30th, again took the *Waverley* in tow, and the *Waverley* slipping her anchors, she was taken into Lisbon, where she arrived at 120 p.m., the same day. Whilst there, the passengers of the *London* had to go to quarantine in consequence of the crew of the *Waverley* having been on board of the *London*, and she was detained two days in consequence; and it was found that she had suffered some damage to her ropes, gangway, and boat in the course of the services rendered to the *Waverley*.

The petition contained, amongst others, the following paragraphs:

29. The *London* performed services and incurred risks and expenses beyond the scope of the said agreement.

30. The sum of 400*l*. is not an adequate remuneration for the services, risks, and expenses rendered and incurred by the plaintiffs.

The defendants' answer contained, amongst others, the following paragraphs:

3. As to the withdrawal of the master of the *London* from the said agreement, they further submit to the court whether he could or not legally so acquiesce, and whether his acquiescence would or would not have any legal effect in the circumstances.

8. They deny the several allegations in Articles 29 and 30, and they further say that Article 30 is bad in substance and in law.

9. They have paid into court the sums of 400*l*. and 123*l*. 11*s*. 8*d*., which they have tendered to the plaintiffs; the said sum of 400*l*. being the full amount of the sum contracted for on behalf of the *London*, and the sum of 123*l*. 11*s*. 8*d*. being full remuneration for the expenses and damages incurred by the owners of the *London* in consequence of their having received the crew of the *Waverley* on board of her, and the said sum of 123*l*. 11*s*. 8*d*. being made up of the two following items, to wit, 6*l*l. 6*s*. 8*d*., quarantine expenses, and 62*l*. 5*s*., being

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demurrage at the rate of 9d. per ton on the registered tonnage of the *London* for the space of two days, which is the detention pleaded in the petition. The said tenders have been rejected by the plaintiffs.

10. They submit that the agreement pleaded in the petition was and is a valid agreement, and that the same has never been rescinded.

The value of the *London*, her cargo and freight is 94,700*l.*, of the *Waverley*, her cargo and freight 65,384*l.* It appeared that the weather was so bad that the tugs sent for to Lisbon were unable to put out to sea, but that it moderated on the morning of Jan. 30, the second day of the service.

Milward, Q.C. and *Clarkson* for the plaintiffs.—The agreement was originally inequitable, and the court will set it aside: *The Enchantress* (2 L. T. Rep. N. S. 574; 1 Lush. 96). It was necessary for the plaintiffs to take hold of the *Waverley* at once, and the agreement was made without due time for consideration. Greater difficulty and risk arose after the agreement, and the *London* is therefore entitled to further remuneration: (*The Minchaka*, 1 Lush. 347; 4 L. T. Rep. N. S. 811.) This danger was not in contemplation of the parties, and, therefore the agreement falls.

The Galatea, 2 W. Rep. 340;

The White Star, L. Rep. 1 Adm. 68.

The master of the *Waverley* consented to abandon the agreement. The defendants have made a tender over the sum alleged to be agreed upon and are therefore estopped from saying that the plaintiffs are not entitled to more than that sum.

Butt, Q.C. and W. G. F. Phillimore for the defendants.—There was nothing inequitable in the agreement. It was entered into after due consideration and by competent parties:

The Betsy, 2 W. Rep. 170;

The True Blue, 2 W. Rep. 176, 179.

This was a contract not for mere towage but for salvage services, and was entered into as such. The defendants are not entitled to abandon their contract because the service becomes more difficult. The *London* did no more than she was bound to do in remaining by the *Waverley* all night.

The True Blue, 2 W. Rep. 176;

The Minchaka, 1 Lush. 347; 4 L. T. Rep. N. S. 811.

There was no element of serious danger in the circumstances which supervened, and the *London* was not entitled to abandon her contract: (*The J. C. Potter*, L. Rep. 1 Adm. 68; 23 L. T. Rep. N. S. 603.) The master of the *Waverley* did not assent to abandon the contract, and if he did, the plaintiffs are not entitled to take advantage of his assent, as it was given under pressure, he being entirely at the mercy of the master of the *London*. The tender made by defendants is merely compensation for damage sustained during the service, and not in the nature of reward for salvage.

Milward, Q.C., in reply.

April 19.—Sir R. PHILLIMORE.—This is a cause of salvage instituted by a screw steamship the *London* against another vessel of the same kind, the *Waverley*. The value of the latter with her cargo and freight is 65,384*l.*, of the former 94,700*l.* The *Waverley* has made a tender composed of two sums—400*l.* as the alleged amount contracted for on behalf of the *London*, and 123*l.* 11*s.* 8*d.* as a full remuneration for expenses and damages incurred by her having received the crew of the *Waverley* on board of her. The *London* was a powerful screw steamer of 830 tons, engines of 120 nominal horse-power, a crew of thirty hands and a master, bound from Cadiz to London, with

passengers and merchandise. About one p.m. on the 28th Jan. in this year, on her arrival off Cape Sagres, she was informed that there was a steam ship without a propeller near the coast to the south of Cape Espichel, which required to be towed to Lisbon. The *London* proceeded in that direction, and found on the following day (the 29th) about five miles from Cape Espichel the *Waverley* steamship, laden with tobacco, of 644 tons register, and engines of ninety horse-power; she was under sail, having lost her propeller; her chief officer and some of her crew had gone to Lisbon to procure a steam tug. At the time when the *London* came up there was a very heavy sea, but the weather, which had been very boisterous, had moderated. The master of the *London* caused a lifeboat to be lowered, and dispatched his chief officer in her, with a line to take off a warp from the *Waverley*, and with directions to ask 500*l.* for towing her to Lisbon—the distance of which was, I think, between twenty and thirty miles from the place where the towing began—if an agreement was insisted upon by the master of the *Waverley*. When the lifeboat came alongside of the *Waverley* her master insisted on an agreement, and offered 300*l.* After some discussion it was agreed to split the difference, and that 400*l.* should be given. The towing began at about eight o'clock a.m. of the 29th; a very heavy cross sea was running from N.N.E. and N.N.W. at the time. After an hour the wind increased, and violent squalls came on. The hawsers by which the *Waverley* was towed, parted several times. At 4.30 the *Waverley* got across the sea, and drove within three or four miles of the shore. It was dark, and the *Waverley*, under the advice of the *London*, let go her anchors. She had then made a progress of little more than six miles. The *London* was kept under steam during the night, and the crew of the *Waverley* came on board of her; they returned to the *Waverley* at six the next morning. At 7.15 she slipped her anchor, and was towed without any further parting of hawsers into Lisbon by 1.30 p.m. The passengers of the *London* were made to go into quarantine; she was detained two days longer than she would otherwise have been, and she suffered some damage to her ropes and port gangway ladder. It is admitted—the course pursued by the defendants has been very right and proper in making admission—that, as in article 21 of petition, "The *Waverley* and her master, and those of her crew who were on board her when she was fallen in with by the *London*, were saved by the aforesaid services from being lost." It appears also that steamships had not set out from Lisbon to assist the *Waverley*, and been compelled by the weather to return without reaching her. I have no doubt that a very meritorious salvage service was performed by the *London*, and that having regard to the value of the *Waverley* and the principles of private right and public policy upon which the court proceeds in these cases, the *London* would, if no contract had been made, have been entitled to a remuneration exceeding the sums of 400*l.* and 123*l.* 11*s.* 8*d.* The question in this case is whether the contracts made before the towing began was afterwards set aside by the parties to it, or from circumstances became null. I must now advert to a fact in the history of this case, the mention of which I have reserved for this place. On the morning of the 29th, when the crew of the *Waverley* returned to her, the master of the *London* had a con-

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versation with the master of the *Waverley*, of which the following account is given by the former: "I said, my ship is too valuable to risk with the agreement we made yesterday. I would go to work and save his ship, but it would have to be settled by higher powers." He added that the master of the *Waverley* said: "Yes, I can do no more; I have done all I could." The master of the *Waverley* deposed that the master of the *London* said: "The agreement of yesterday I consider as null and void;" to which he made no reply." That the master of the *London* said: "I consider we have done quite sufficient yesterday for 400*l*." He replied: "Captain, you have done your duty well;" and he repeated here that the captain had up to this time behaved very well, and I think there can be no doubt of the fact. The master of the *Waverley* said: "I knew I was at the mercy of the captain," and he thought, but is not certain, that he said nothing in answer to what was said about the agreement being at an end; he could not remember. The protest which has been put in evidence contains the original agreement, but says nothing about the abandonment of it. It is contended on the part of the *London* that the court ought to award salvage without reference to the contract; and upon these grounds: First, that it was originally inequitable; secondly, that circumstances of such a character as to vacate it supervened; thirdly, that the abandonment of it was acquiesced in by the *Waverley*; fourthly, that the tender in this case puts the *Waverley* out of court. The principles which govern the peculiar question of this kind of agreement have been very carefully considered and consistently enforced by this court and the Privy Council. I shall endeavour to observe those principles in this case as I did in that of *The J. C. Potter* (L. Rep. 1 Adm. 297; 23 L. T. Rep. N. S. 603). There is no doubt that such an agreement as the present was legally binding when it was made: (*The Betsy*, 2 W. Rob. 170; *The Repulse*, 1b. 397.) There is equally no doubt that this court exercises an equitable jurisdiction with respect to such an agreement, and will set it aside if inequitable in its origin: *The Enchantress*, 1 Lush. 96; 2 L. T. Rep. N. S. 574.) I cannot think that the circumstances of this case bring it within the principle of a contract originally inequitable. I must look, as was said by the Privy Council in the *Jonge Andrius* (Sw. 303), "at the circumstances in which it was made, and the parties between whom it was made." In this case before me the agreement was made after considerable discussion, and assented to by a person of fully competent knowledge and experience; not an ignorant, uneducated seaman. In the case of the *True Blue* (2 W. Rob. 176) my learned and experienced predecessor said: "The real issue, therefore, which I have to determine in this case is whether or not an agreement to the effect stated was executed between the parties in the suit. But before I consider this point, I will look to the parties themselves, and their capability of entering into such a contract. With respect to the master of the *True Blue*, it is most undeniably clear that he was perfectly competent, acting on behalf of the owners, to enter into any *bond fide* agreement which he might think requisite for the purpose of fixing the remuneration for the services he required. With regard to the salvors, on the other hand, I see no reason to suppose that they were persons so uninformed and

ignorant of their own interests as not to be equally capable of hindering themselves by an agreement to which both of them had appended their signatures. There was no such imminent emergency as to prevent time for due consideration. The weather was moderate when they came on board, and there was nothing to induce them to enter into the agreement without a just regard to their own interests and the extent of the service to be performed. Of all persons in the world, they were the most competent to form an estimate as to the value of the service which was required of them." In the present case, moreover, and this circumstance is important in its bearing on the other points, it was clearly a contract for salvage service, though it assumed the form of towage; it was not denied that 400*l*. very largely exceeded the usual towage remuneration to Lisbon from the place where the *Waverley* was. Then, as to the next contention, that supervening circumstances annulled the agreement. In the *True Blue* the judge said: "It is no argument against the validity of the contract that in the first instance it was entered into under the impression that the service would be light, but that, in consequence of a change of weather, or other circumstances of that nature, it subsequently became more onerous. It is the very nature of agreements of this kind to fix a stated sum as a compensation for a stated service, and the parties who enter into the engagement take the risk of any change of circumstances which may, in effect, alter the extent of the stipulated service." This question was also fully discussed by the Privy Council in the *Minnehaha* (Lush. 335; 4 L. T. Rep. N. S. 811), in which case the two rules of this court were confirmed; first, that circumstances might supervene which might justify an abandonment of the contract; but secondly, when they did supervene, it was still the duty of the towing vessel to remain by and aid the towed vessel. In the *J. C. Potter* I said (citing *The Galatee*, Sw. Rep. 349, and *The White Star*, L. Rep. 1 Adm. 68): "In my judgment there must be among the supervening circumstances an element of serious danger, not in contemplation of the parties in the contract, in order to justify the abandonment of the contract, and to found a salvage service." I said also, "That the true criterion by which it is to be ascertained whether the towing vessel has become a salvor is whether the supervening circumstances were such as to justify her in abandoning her contract." I adhere to my ruling on these two points, and proceed to apply it to the circumstances of the present case. When the agreement was made the sea was very heavy, the weather, though moderated, rough, and threatening, such that the steam tugs would not come from Lisbon to assist the *Waverley*. The weather, on the one hand, became worse after the first towing began, and on the other hand, much better when the second part of the towing was accomplished on the next day. The master of the *London*, no doubt, expected to perform the whole service of towing on the first day, and believed that the weather would enable him to do so. He was disappointed, but this was the very risk which he undertook by his agreement. Had the weather become suddenly fine, and his task become comparatively easy, the *Waverley* would not have demanded a shilling by way of reduction of the 400*l*. which she had promised to give. The contract was not, in my opinion, annulled by any

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change in the weather, or by the greater difficulty and delay which therefrom attended the performance of the service, such as the parting of the hawsers, and the like. Then, when the *Waverley* anchored for the night, within little more than fifteen miles of Lisbon, it was the duty of the *London* to remain by her. The coming of the men of the *Waverley* on board of the *London* was a proper precaution to take on behalf of both vessels. The *London* had towed the *Waverley* to a place, in which, if her anchors had parted, both ship and crew would have been in great danger of being lost; but did the *London* herself thereby encounter any sudden and new peril which could not have been expected? The Elder Brethren are most clearly of opinion that she encountered no danger at all in fulfilling her duty by remaining by the *Waverley* that night. It must be carefully borne in mind that it was not till the next morning that the master of the *London* declared the contract to be at an end. On what ground? Why, really that the towage service had turned out a more difficult task than he had expected, and that the interests of his owners required that he should have demanded a larger sum than he had demanded. Possibly he had obtained during the night fuller information than he before possessed as to the value of the cargo of the *Waverley*. But however this may be, I am of opinion that the supervening circumstances in this case were not such as to justify him in abandoning his contract. Some light is thrown upon this matter by the subsequent history. The vessels that morning, when the *Waverley* slipped her anchors, were from fifteen to twenty miles only distant from Lisbon, and the *London* tows the *Waverley* this distance that morning without interruption, or parting with a single hawser. Then as to the alleged acquiescence of the master of the *Waverley* in the new agreement; I cannot construe the evidence so as to support this position. What could the master do, towed near a lee shore in these circumstances, but say, as in effect he did say, "I am at your mercy; if you choose to say the contract is at an end I cannot help myself." I cannot consider there was any voluntary abandonment of the original agreement. It remains only to notice the last point taken on behalf of the *London*, namely, that the *Waverley*, by tendering the additional sum of 125*l.* 8*s.* 8*d.* to cover the expenses of the crew of the *Waverley* while on board the *London*, and the quarantine expenses, have annulled the original agreement for 400*l.* I do not think this inference is correct in point of law. It would surely be very inequitable. It is much the same thing as if he had offered to pay some extra sum for the loss of the *London's* ropes, or some damage inflicted upon her while towing. I feel as strongly as any of my predecessors in this chair have felt the duty and expediency of encouraging, by liberal remuneration, all salvage services; but I feel not less strongly the duty and expediency of not allowing a contract deliberately entered into between perfectly competent parties to be set aside by either of them, because the execution of it has proved more difficult or more easy than was anticipated at the time of making the contract. I pronounce for the tender, with costs from the time it was duly made in the acts of court.

Solicitor for the plaintiffs, *Thomas Cooper*.
Solicitors for the defendant, *J. R. and G. Burchett*.

Saturday, April 1, 1871.

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Collision—Consequential damage—Contributory negligence—Lord Campbell's Act—Child en ventre sa mère.

A child en ventre sa mère is entitled to recover, under Lord Campbell's Act, on the death of its father by negligence. (a)

Two vessels came into collision, and one of them being rendered helpless, was driven ashore by a gale of wind, and three of her crew were killed and others injured. The other vessel was to blame.

Held, that the other vessel was liable to damage for the loss of life and injuries, as they were the natural consequences of the collision. (b)

The crew might have gone on board other vessels before the wreck, but it would have been attended with great risk.

Held, that as they were not bound to run any such risk, they did not contribute to their own loss or injuries.

THIS was a cause of limitation of liability, instituted on behalf of the owners of the brig *George and Richard*, against Robert Alexander, the owner of the large barque *Eleutheria*, and of her cargo, and against her master and the survivors of her crew, and against all other persons who might have any claim against the said brig *George and Richard*, arising out of a collision between the said vessels. On the 15th Jan. 1871, at about five a.m., the two vessels came into collision off the Lizard, and the port main rigging of the *Eleutheria* was carried away, and her maintop gallant mast brought down. The master of the *Eleutheria* jumped on board the *George and Richard* to ascertain what vessel it was, and as the vessel immediately ported was unable to return to his own vessel. The *George and Richard* were round to assist the *Eleutheria*, but could not find her. It was at the time blowing a gale from the S.S.W., and shortly after the collision the helm of the *Eleutheria* was put up, and endeavours were made to square the main yard, but in doing so the mainmast went by the board and was followed by the foremast. The helm was put down and the mizen set, and the barque was thereby brought head to wind and sea. About noon a ship came up with the *Eleutheria* and got a warp on board, but this parting, the ship bore away without doing anything further, and shortly after a brig, at the request of those on board the barque, bore away for Plymouth to fetch a steam tug. The master of the *Eleutheria* had gone into Plymouth on board the *George and Richard*, and despatched a pilot boat to the assistance of his vessel, and she arrived about this time, and attempted to tow her; but in about an hour the warp parted, and Edward Glinn, the master of the pilot boat, arranged that his boat should go for a tug, and remained on board the *Eleutheria*. At 2.30 p.m.

(a) See *Doe v. Clark* (2 H. Bl. 399); *Blason v. Blason* (11 L. T. Rep. N. S. 333; 34 L. J. 18 Ch.). There would be difficulty in applying this doctrine in the common law courts, as there juries have to assess the damages and to divide the amount so assessed among the persons entitled, and if the child should afterwards be born dead, it would be difficult to find an owner for the amount given to it by the verdict, and the representative bringing the action would be entitled to obtain the money from the defendants on signing judgment.

(b) See *Smith v. The London and South Western Railway Company* (L. Rep. 6 C. P., Ex. Ch., 14).

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the master of the *Eleutheria* went out to look for her in a steam tug, and remained searching for her until seven p.m., but could not find her. Towards night the gale increased considerably, and about two a.m. on the 16th inst., the *Eleutheria* went ashore on a rocky coast. Twelve of the seventeen hands on board and the pilot were saved, the others drowned. It appeared in the evidence that the mate, who was in command when the vessel struck, ordered two of the men who were drowned, Holland and Ellis, aft, but they did not come, and the pilot came out to the men to look out for themselves. It was also shown that any attempt to leave the ship whilst the other vessel was near her would have been attended with great risk. The carpenter of the *Eleutheria*, Noyes, had his leg broken by a falling spar, and being unable, as was admitted, to do anything to save himself, was afterwards drowned when the vessel went to pieces. Brown, Newton, and Ellis, three of the seamen, were injured by falling spars.

The plaintiff's petition and conclusions set out these facts substantially, and admitted that the collision was due to the improper navigation of the brig *George and Richard*. There were four several answers; the first on behalf of Elizabeth Noyes, the widow of Phillip Noyes, the carpenter of the *Eleutheria*, and the child of the said Philip Noyes, *en ventre* of the said Elizabeth Noyes; the second, on behalf of the said Robert Alexander, the owner of the late barque *Eleutheria* and her cargo (the plaintiff in a cause against the said *George and Richard*, No. 5612), and the master and others, the surviving of the crew of the said barque, proceeding for their money, clothes, and private effects (the plaintiff in a cause against the said *George and Richard*, No. 5630); the third, on behalf of Catherine Sarah Holland, the mother and administratrix of the said Henry William Holland, deceased, and Sarah Rasbrook Ellis, the mother and administratrix of the said Frederick Edward Ellis, deceased; the fourth, on behalf of Joseph Brown, Thomas Newton, and James Higgins, the seamen injured.

The plaintiffs contested their liability for the loss of life as not arising immediately from the collision, and being partly caused by the defendants' own acts, and for the injuries sustained as being the result of the negligence of those on board the *Eleutheria*, and maintained that the child *en ventre sa mère* was not entitled to recover. The plaintiffs prayed to be only held liable to the extent of 8l. per registered tonnage of the *George and Richard*, as not having caused loss of life under the Merchant Shipping Amendment Act 1862 (25 & 26 Vict. c. 63), s. 54. The defendants prayed that the plaintiffs might be held liable to the extent of 15l. per registered ton.

Brace for the plaintiffs.—The deaths of Holland and Ellis were not caused by the collision. A gale afterwards rose and drove the ship ashore. This was not a direct consequence. The law looks only at the results which in the common course of events would have followed, in consequence of the wrong done. When the results would not have followed, but for the happening of other things, then, although the wrong done may be one of those things, without which the loss would not have happened, the wrongdoer must not be held responsible. *Causa proxima non remota spectatur*. Goods sold in order to enable a master to repair a ship which has been injured by perils of the sea, is

not an immediate loss occasioned by those perils: (*Powell v. Gudgeon*, 5 Maule & Selw. 431.) In the case of *Ionides v. The Universal Marine Association* (32 L. J. 170, C. P.; 8 L. T. Rep. N. S. 705) Earle, C. J. says: "If in the ordinary course of events the one antecedent is constantly followed by the other sequence, they may be taken to stand in the relation of cause and effect. Here, however, it cannot be said that a ship going ashore constantly follows a collision. The collision was the original but not the proximate cause: *Maraden v. City and County Assurance Company* (L. T. Rep. 1 C. P. 232; 13 L. T. Rep. N. S. 465.) According to the ordinary rule, damage, to be recoverable by a plaintiff, must inevitably flow from the tortious act of the defendant. It must be caused by him as the *causa causans*: (*Burton v. Pinkerton*, L. Rep. 2 Ex. 340; 17 L. T. Rep. N. S. 15.) This collision was not the inevitable cause of the wreck. The damage does not immediately and according to the common course of events follow the defendants' wrong, and was not a necessary consequence:

Bury v. Felton, 31 L. J. 105, C. P.; 11 C. B., N. S., 142; 5 L. T. Rep. N. S. 354.

Glozier v. London and South-Western Railway Company, L. Rep. 3 Q. B. 25; 17 L. T. Rep. N. S. 139.

Schales v. North London Railway Company, 21 L. T. Rep. N. S. 855.

Holland and Ellis contributed to their deaths, and the others to their own injuries, in not leaving their ship when the other vessels were still by the *Eleutheria*, and further, by not going aft when ordered by the mate on the vessel struck: (*Thorough v. Bryan*, 8 C. B. 115.) The injuries to the other men were not caused by the collision, but by the gale which afterwards arose, and were not the immediate consequence of the collision. A child *en ventre* can have no right to sue under Lord Campbell's Act. This Act is an extension of the common law right to sue for injuries caused by negligence to the representatives of those who are killed by such negligence. A child *en ventre* has no status at common law, whatever it may have in equity. Even in equity a posthumous child cannot claim rents received by a presumptive heir who enters into possession whilst the child is still *en ventre*: (*Richards v. Richards*, 29 L. J. 856, Ch.) If it is not recognised by the law before born with respect to its own estates, it cannot be said to have a claim under a statute, unless expressly provided.

W. G. F. Phillimore, for the defendants, claimants in respect of loss of life and personal injury.—The driving on shore and wreck clearly resulted from the collision, with the act of God superadded, and for this the wrongdoers in the collision are responsible. These consequences were the natural and probable results of the collision.

Scott v. Shepherd, 2 W. Bl. 892.
Ballife of Romney Marsh v. Trinity House, L. Rep. 5 Ex. 208.

Byrne v. Walton, 15 Ir. Com. Law Rep. 340;
Vandenburgh v. Truax, 4 Denio (New York) 461.

It appears now by the evidence that it would have been dangerous to try and leave the *Eleutheria* at any time after the collision, and the claimants are only bound to show that the deceased had, in consequence of the collision, two dangerous courses to choose from.

Jones v. Boyce, 1 Stark. 493;
Adams v. Lancashire and Yorkshire Railway Company, L. Rep. 4 C. P. 739; 38 L. J. 277, C. P.; 20 L. T. Rep. N. S. 850.

Even otherwise it is the duty of a seaman to stick

to his ship, and this was what the deceased did in consequence of the duty. They were placed by the collision in the position of choosing between possible loss of life and dereliction of duty, which is a position in which they ought not to be placed. The same argument applies to the claimants in respect of personal injuries. The deceased did not contribute to their death by their own fault. It is not proved that they remained in an improper part of the ship when she went ashore; and if they did the court will not look too closely into an error of judgment at such a time. As to the claim of the child *en ventre sa mère*, the policy of Lord Campbell's Act is not to give a *solutum* to the feelings, but a money payment to those who, by the death of the deceased, have lost their natural support: (*Blake v. The Midland Railway Company*, 21 L. J. 233, Q. B.) No one can require more support than a child *en ventre*, who now, and from the moment 't is born, is in a state utterly dependent on others. By the Roman law a child *en ventre* was entitled to be considered, when its interests were concerned, "Qui in utero est, perinde ac si in rebus humanis esset custoditur, quotiens de commodis ipsius partus quaritur." D. 1, 5, 7; see also Inst. I., 4. By the English law children *en ventre* take under a will leaving a bequest to children in a class: (Williams on Executors, 6 edn., p. 1015.)

E. C. Clarkson for the other defendants.

Bruce in reply.

April 1.—Sir R. PHILLIMORE.—This is a cause of limitation of liability, instituted on behalf of the owners of the *George and Richard* against the owners of the late vessel *Eleutheria*, and her cargo, the master and survivors of the crew proceeding for their private effects, also against the widow of Philip Noyes deceased, also against the child of which the widow is pregnant, not yet born, also against the representatives of the persons of the name of Holland and Ellis, deceased, and also against three persons, by name Brown, Newton, and Higgins, claimants on the ground of personal injury. The claim of the widow of Noyes as such has been admitted during the course of the suit; the claims of the other parties are contested. The collision which the owners of the *George and Richard* admit to have occurred by reason of the improper navigation of that vessel, took place on the 15th Jan. in this year, about fourteen miles from the Lizard light. It appears that the master of the *Eleutheria* got on board the *George and Richard* in order to ascertain her name, and went with her into Plymouth, and that he sent out a pilot boat to the assistance of the *Eleutheria*, and fully expected to see the *Eleutheria* arrive shortly afterwards; and being disappointed in this, sent out a steamboat, which, for some unexpected reason, after searching in vain for the *Eleutheria* returned to Plymouth, and could not on account of the weather be induced to go out again. The pilot boat went out and found a vessel attempting to tow the *Eleutheria*, but the attempt was vain, and the vessel went away; the pilot boat then attempted to tow and failed. The boat was then sent away to seek for a tug; the pilot himself got on board the *Eleutheria* with great difficulty and danger. As soon as the boat was gone, a heavy gale came on and continued until the *Eleutheria* was driven on shore, at two o'clock next morning. The vessel went to pieces. Five of the men were lost; the carpenter (Noyes) had his leg broken from the falling of

a spar, and was afterwards killed. Brown, Higgins, and Newton received slighter injuries, during their endeavours to clear the wreck, upon their legs and ankles. The evidence satisfies me that if it had been right for the men to leave the ship in the vessel which was attempting to tow her, they could not have gone on board her without great danger to their lives. The chief officer of the *Eleutheria* said that before the ship broke in two on the rock, he called Ellis and Holland to come aft, but they did not come, or perhaps their lives might have been saved. The pilot said that after the boat went and the gale came on, nothing could have been done to save the ship; that when he saw land alongside he sung out, "Every man look out for himself;" and that there is some further evidence which would render it at least doubtful whether Holland and Ellis did not come aft. This is a short review of the facts, which I have thought it necessary to state previous to considering the arguments which have been addressed as to the law applicable to them. On behalf of the *George and Richard*, the following positions have been maintained: First, that the deaths of Holland and Ellis were not caused by the collision itself, but by subsequent events; secondly, that at all events there was negligence on their parts which contributed to their deaths; thirdly, that the personal injuries of Browne, Newton, and Higgins were not caused by the collision, but by events subsequent to it; fourthly, that the unborn child of the widow Noyes is not entitled to claim damages. The maxim of the common law, *Causa proxima non remota spectatur* was invoked; and a great many cases were cited for the purpose of showing that damages cannot be recovered by a plaintiff unless they be proximate, and, as it is sometimes said, the natural consequences and results of the defendants' wrong, and flow from it immediately and according to the common course of events. Many of the cases cited related to policies of insurance, and the decision depended on the construction of the instrument as to whether the injury in question arose from the excepted perils. Cases of tort, however, as well as of contract, were among those which the industry of counsel laid before me. I have endeavoured to examine them carefully; I may observe that the inclination of the courts in cases of tort seems to be to make the wrongdoer liable for the injurious consequences of his illegal or tortious act, although very remote. The well-known "aquib" case, *Scott v. Shepherd* (2 W. Bl. 827), strongly confirms this observation. The earlier decisions on the subject seem to have been as to the technical form of the remedy, and the distinction between the actions of trespass and case, immediate injury founding the former, consequential, the latter form of remedy. In the case of *Byrne v. Watson* (15 Ir. Com. Law Rep. 340), in which an action under Lord Campbell's Act was tried, 1862, in the Irish Queen's Bench, Lefroy, L.J., says, p. 339: "The law is clear that every party is liable, not only for the immediate consequences of his negligence, but also for the resulting consequences of his acts, whether those acts are acts of violence, or of negligence in breach of a duty which imposed the necessity of care and caution upon him. Since the celebrated case of *Scott v. Shepherd* (sup.) the law has been perfectly settled with the concurrence of four most eminent judges, who at that time presided in the English Court of King's Bench, De Grey, C.J.,

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Blackstone, Gould, and Nares, JJ. . . . In the present case, it is admitted that the deceased lady was cast into the lock of the canal, owing to the negligence of the defendant. But it is asserted that when she had thus been put in a position in consequence of which (the lock-keeper having let in the water) she was suffocated, and thus came by her death, the defendant is not answerable, because the water was let into the lock by a person over whom he had no control. It was not the negligence of the defendant that was the immediate occasion of her death, but it was the negligence of the defendant that put her into a position by which she lost her life, as a consequential injury resulting from that negligence; and, although that death was not caused immediately by the act of the defendant, nor was the immediate and instantaneous result of his negligence, yet it was the consequential result of the defendant's act, and enables her representative to maintain this action." In the case of *The Bailiffs of Romney Marsh v. The Trinity House* (5 L. Rep. Ex. 208), decided in 1870, the defendants' vessel being driven upon a sea-wall, became a wreck, and one of the questions for the court was whether this injury to the wall was caused by the negligence of the defendants so as to make them liable. Kelly, C.B., said: "The defendants' vessel, by the negligence of the captain and crew, grounded upon a shoal or sandbank within three-quarters of a mile of the wall of the plaintiffs', the immediate effect of which was that the vessel became unmanageable, and beyond the control of the crew; and as at the time a high wind was blowing, and the tide flowing towards the shore, the vessel was driven and carried with great violence against the wall, and so effected the injury in question. The rule of law is, that negligence to render the defendants liable must be the *causa causans*, or the proximate cause of the injury, and not merely a *causa sine qua non*. I think that it was so in the present case. The immediate effect of the negligence was to put the vessel into such a condition that it must necessarily and inevitably be impelled in whatever direction the wind and tide were giving at the moment, to the sea, and this was directly upon and towards the plaintiffs' wall. The case, therefore, appears to me to be the same as if the ship had been lying at anchor, with the tide flowing rapidly towards a rock, and the defendants had, by some negligence broken the chain and set free the ship, in consequence of which it had at once and immediately been carried by the tide with great force and violence against the rock, and had become a wreck. Would not the wreck of the ship have been caused by the negligence which broke the chain? I think that it would, and that such a case and the case before the court are the same; that the negligence of the crew, the servants of the defendants, was thus the immediate cause of the ship being driven against the wall of the plaintiffs', and that the plaintiffs are therefore entitled to recover." The judges of the Supreme Court in *New York* have perhaps carried the law on this point to its furthest limit in their judgment in *Vandenburgh v. Truax*, in which they relied on the case, *Scott v. Shepherd*. The marginal note of that case is correct, and is as follows: "One who does an illegal or mischievous act, which is likely to prove injurious to others, is answerable for the consequences which may directly and naturally result from his conduct, though he did not intend

to do the particular injury which followed. Therefore, when the defendant, having had a quarrel with a boy in the street in the city, took up a pick axe, and followed him into the plaintiff's store, whither he fled, and, in endeavouring to keep out of defendant's reach, the boy ran against and knocked out the faucet from a cask of wine, by means of which a quantity of the wine ran out and was wasted: held, that the defendant was liable to the plaintiff for damages." (4 Denio N.Y. Rep. p. 464.) There is, perhaps, some difficulty in ranging all the cases of consequential damages, where a tort has been committed, under one principle; but the general rule to be deduced is, that the natural and proximate consequences of the tortious act are the proper subject for consideration. I do not mean to depart from this rule in my judgment on the present case. I conceive that I am acting in accordance with it when I pronounce, as I do, that the deaths of the men Holland and Ellis were the natural and proximate consequence of the collision. It has been contended that the men whose lives were lost were guilty of a negligence which contributed to this catastrophe, and therefore that their representatives cannot recover damages under Lord Campbell's Act. It was not denied that if facts show this negligence, the law is as has been stated: *Thargood v. Bryant* (8 C. B. Rep. 118). The question is one of fact—What is the contributory negligence alleged? First, the alleged refusal of these men to go aft when the vessel struck. Upon this first point there is a direct conflict of evidence as to the facts, and I am not disposed to disbelieve the evidence on behalf of the men. Secondly, it is contended that they ought to have left the ship before, but I am of opinion it was their duty to remain by the ship while there was any reasonable chance of preserving her; and if the circumstances would have justified them in leaving her, that they could not have got on board the pilot boat without great peril of their lives. The wrongdoer had no right to place them in a position of alternative danger, and then to refuse compensation because they did not adopt that alternative which he expects would have been the means of saving their lives. It is not a case where there was inconvenience in one course and danger in another, but danger in both courses. The rule of law on this point seems to me clear. The distinction between "inconvenience" and "danger," in its bearing upon the liability of the defendant, is well stated in the case of *Adams v. The Lancashire and Yorkshire Railway Company* (L. Rep. 4 C. P. 742; 38 L. J. 277, C. P.; 50 L. T. Rep. N. S. 850). Mr. Smith, J. there said: "I quite agree that if the negligence of a railway company puts a passenger in a situation of alternative danger, that is to say, if he will be in danger by remaining still, and in danger if he attempts to escape, then, if he attempts to escape, any injury that he may sustain in so doing is a consequence of the company's negligence; but if he is only suffering some inconvenience, and, to avoid that, he voluntarily runs into danger, and injury ensues, that cannot be said to be the result of the company's negligence." This is in accordance with the old case of *Jones v. Boyce* (1 Stark. 493), in which an action was brought against a coach proprietor for so negligently conducting the coach that the plaintiff, an outside passenger, was obliged to jump off the coach, in consequence of which his leg was broken. Lord Ellenborough said:

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"To enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed, by the misconduct of the defendant, in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported." Applying these rules of law to the case of these deceased men, I am of opinion that there was no negligence on their part which contributed to their deaths, and which can relieve the owners of the *George* and *Richard* of the responsibility with respect to it. With respect to the claim for personal injury of the men Brown, Higgins, and Newton, I am of opinion that it was not remotely, in any legal sense of the word, but proximately connected with the collision. The question of injury is, of course, to be ascertained at the reference, it will probably not be great. I now approach the curious and novel question of the right of the unborn child, of which the widow of Philip Noyes was pregnant at the time of the collision, to claim. There is no doubt that the law in many cases considers and protects the status of the unborn child. A bill may be filed in equity to restrain damage by a tenant for life where the infant, if born, would be in remainder. So Williams, J., observes on the subject of legacies to children: "The leading principle is, that where a bequest is immediate to 'children' in a class, children in existence at the death of the testator, and these alone, are entitled; amongst which, children *en ventre sa mère* are to be considered:" (Williams on Executors, 6th edit., p. 1015.) It has been argued that the peculiar language of Lord Campbell's Act, requires the actual existence of a claimant as a condition precedent to a right of action. I am not of this opinion. The right of action is certainly given only on behalf of pecuniary loss to the survivor or executor, but is not the unborn child as a survivor? Although it has been said twenty-five years have passed since Lord Campbell's Act, and this particular question has not arisen for discussion, it seems to have been considered in one case as within the purview of this statute. In the case of *Blake v. Midland Railway Company* (18 Ad. & Ell. N. S. 108), Coleridge, J., said: "The title of this Act may be some guide to its meaning, and it is, 'An Act for compensating the Families of Persons killed,' not for solacing their wounded feelings. Reliance was placed upon the first section, which states in what cases the newly given action may be maintained, although death has ensued; the argument being that the party injured, if he had recovered, would have been entitled to a *solatium*, and, therefore, so shall his representatives on his death. But it will be evident that this Act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles. Sect. 2 enacts, 'that in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought.' The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family. This language seems more appropriate to a loss of which some estimate may be made than to an indefinite sum, independent of all pecuniary estimate, to soothe

the feelings; and the division of the amount strongly leads to the same conclusion. 'And the amount so recovered shall be divided amongst the before mentioned parties in such shares as the jury by their verdict shall find and direct.' By what rules ought the jury to be guided in this apportionment? Are they to inquire into the degree of mental anguish which each member of the family has suffered from the bereavement? Then not only the child without filial piety, but a lunatic child, or a child of very tender years, and a posthumous child on the death of the father, may have something for pecuniary loss, but cannot come in *pari passu* with the other children, and must be cut off from the *solatium*. It seems to me that if the Legislature had intended to go the extreme length of giving, not only compensation for pecuniary loss, but a *solatium* to all the relations enumerated in sect. 5, a father and mother, a grandfather and grandmother, a stepfather and stepmother, a son and daughter, a grandson and granddaughter, a stepson and stepdaughter, language more clear and appropriate for this purpose would have been employed." I am of opinion that the proctor for the unborn child has a right to claim in this suit; though until the child is born a reference on this subject cannot of course be made.

Judgment for the defendants.

Solicitor for the plaintiff, *Thomas Cooper*.

Solicitors for the defendants, claimants in respect of loss of life and personal injuries, *Clarkson, Son, and Greenwell*.

Solicitors for the other defendants, *Rothery and Co.*

Wednesday, June 21, 1871.

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Necessaries—Master's disbursements—Mortgages. Certain necessaries having been supplied to a ship in a foreign port, they were paid for by the usual agents at that port, the master endorsing the accounts to the agents, when sent to him, with a request to them to pay, and signing them. The master was accredited to the agents by his owners, and the former were to draw bills on the owners for the amounts advanced. No money passed through the master's hands. When the ship arrived in England the mortgagees took possession of her and the freight:

Held, that as the master became personally liable for the amounts so paid, he had a right to proceed in rem against the ship.

THIS was a suit instituted on behalf of Thomas Davies against the ship *Marco Polo*, and the mortgagees of the said ship intervening, to recover wages and disbursements due to him as master of the said ship. The *Marco Polo* arrived at Callao in Chili on the 11th June 1870, under charter to proceed to Guano Island and there load a cargo of guano for England. The ship was very old and leaky, and the pumps had to be kept constantly going. The *Marco Polo* proceeded to Guano Island, and arrived there with a great part of her metal knocked off by her rolling in the seas. At this time she was making water very fast, and if the master had been forced to put back to Callao to get his clearances, he would have been forced to put her into a dry dock for repairs. The shippers of the guano being connected with the Government of Chili, will not allow a ship to put to sea with guano unless she is perfectly seaworthy.

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The cost of dry-docking would have been at least 500*l.* In order to get his clearances at Gonnape the master went in a steamer to Callao, and bought a windmill pump at the cost of 80*l.*, which he took back to Gonnape, which is 300 miles from Callao. To assist in getting up his moorings, the master employed a lighter belonging to the Government authorities. This lighter was sunk in the course of the night by a gale, forcing her across the ship's bows. The master was compelled to pay for the lighter, as the authorities refused to clear his ship unless he did so. On the voyage home the pump was never stopped, and it would have been impossible to have reached England without it. The crew refused to go to take the vessel to sea, and the master was forced to employ men to get her out of Gonnape. There were other smaller disbursements.

After the master received his orders to proceed to Callao, his owners, Messrs. Baines, Taylor, and Co., on March 1st, 1870, wrote to him: "Bryce, Grace, and Co. will do the useful in regard to the disbursements of your ship." The master had known Bryce, Grace, & Co. for many years, and had usually been accredited to them by his owners, and they had advanced money. When at Callao, purchasing the windmill pump, the master went to Bryce, Grace, and Co. to arrange the mode of payment of the liabilities he might incur for the ship. As the vessel was such a long distance off, and the master did not know what he was to receive, it was arranged that the accounts should be sent into Bryce, Grace, and Co., vouched by the master, and that they should pay them. They did not give the master any money. When the accounts were sent into the master he addressed them to Bryce, Grace, and Co., with a request indorsed on them to pay them, and he signed them with his name. Messrs. Bryce, Grace, and Co. were to draw on Messrs. Baines, Taylor, and Co. for the amounts so paid to the ship.

When the ship arrived in England in Jan. 1871 the owners, Messrs. Baines, Taylor, and Co., were bankrupt, and the defendants, the mortgagees, took possession of her and received the freight. On the 24th Jan. the master took his accounts to the defendants' brokers, but they would not accept them nor pay them. Mr. Bryce, of the Callao firm, saw the master in London about this time, and told him that the account had not been paid, and that he, the master, had better see about it. The plaintiff instituted this suit in this court in the same month, and on the 23rd Feb. Westall and Roberts, the solicitors for Messrs. Bryce, Grace, and Co., wrote to the plaintiff's solicitors, saying that if the plaintiff would proceed with the case in the Court of Admiralty and recover the amount due, they would not molest him on his solicitor's undertaking to pay over the results.

The defendants paid into court the sum of 470*l.* 1*9s.* 7*d.*, as sufficient to cover the plaintiff's wages and disbursements, but refused to pay the money disbursed at Callao. The plaintiff's claim amounted to 1800*l.*

Bull, Q.C., and Cohen for the plaintiff.—These expenses were necessary, and the master made himself personally liable.

Aspland for the defendants.—Bryce, Grace, and Co. were the agents for the owners, and advanced on the owner's credit, and not on the master's. The letter of Bryce, Grace, and Co.'s solicitors shows that they considered the owners responsible,

and only looked to the master to recover against the ship, as the owners were insolvent. [Sir P. PHILLIMORE.—You must be prepared to maintain that the master is not liable for any suit or action in respect of this claim. I shall follow *The Ferronia* (L. Rep. 2 Ad. & Ec. 65; 17 L. T. Rep. N. S. 619.)] In that case the main liabilities of the master were bills that he had drawn. Here he only testified that the accounts were correct. The letter of March 15th from the owners to the master shows that Bryce, Grace, and Co. were the owners' general agents, and that the master did not make himself but his owners liable for what was paid: (*Priestly v. Fernie*, 34 L. J. 172, Ex.; 13 L. T. Rep. N. S. 208.) It is a claim for necessities brought by Bryce, Grace, and Co., who have no lien on the ship, and cannot proceed on the general mercantile account, and have, therefore, put the master up to sue. This is a fair inference from the letter written by Bryce, Grace, and Co.'s solicitors. In *The Ferronia* the master's liability was clear, but here he cannot be held liable, as he never pledged his own credit.

Bull, Q.C. in reply.—These expenses were incurred in bringing the ship home and they enabled the mortgagees to realise the value of the ship and to obtain the freight. It cannot be said that they are to take the benefit and not bear the expense: (*Bristow v. Whitmore*, 31 L. J. 467, Ch.; 4 L. T. Rep. N. S. 622.) The letter of the 15th March merely directs the master to whom to apply for money, and is the ordinary course, and does not exclude the master's liabilities. The letter of Bryce, Grace, and Co.'s solicitors shows that the money was advanced to the master, and that they held him liable.

Sir R. PHILLIMORE.—This is a suit instituted by the master of the *Marco Polo* against that ship and the mortgagees intervening to recover his wages and certain disbursements made on behalf of the said ship. The owners of the ship are bankrupt, and she is in the possession of the mortgagees. I am clearly of opinion that the disbursements were properly made, and were such without which the vessel could not have arrived in England. On the arrival of the vessel in England, the owners being bankrupt, the mortgagees took possession of her, and received the freight payable in respect of the cargo she had brought from South America. The only question, therefore, is whether the circumstances of the case showed the liability of the master for the disbursements made by the agents at Callao. In *The Ferronia* (L. Rep. 2 Adm. & Ec. 65; 17 L. T. Rep. N. S. 619), I held that the master was entitled to a lien on the ship for disbursements when properly made. There has been nothing proved before me in this case to show that the master is not personally liable for the payments made for these goods. The mortgagees only stand in the same position as the owners, and it cannot be said that they are entitled to take the benefit of the expenses which enabled them to obtain possession of the ship and earn the freight, and at the same time repudiate the payment of those expenses. I must have given this decision if the ship had still been in the possession of the owners. I overrule the tender, and pronounce for the prayer of the petition with costs.

Solicitors for the plaintiffs, *Thomas and Hollans*.
Solicitors for the defendants, *Flux and Co.*

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHOOT, Esqrs.,
Barristers-at-Law.

May 2 and 30, and July 6, 1871.

SMITH AND OTHERS v. BROWN AND OTHERS.

Damage—Loss of Life and personal injury—Prohibition to Admiralty Court—24 Vict. c. 10 (The Admiralty Court Act 1861), s. 7—Jurisdiction of Admiralty Court to entertain suit under Lord Campbell's Act (9 & 10 Vict. c. 93).

The 24 Vict. c. 10, s. 7, enacts that "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."

Held (upon demurrer to a declaration in prohibition) per Cockburn, C. J. and Hannen, J. (Blackburn, J., dubitante), that the word "damage" does not include loss of life and personal injury, and that therefore the above section confers no jurisdiction upon the High Court of Admiralty, to entertain a suit under Lord Campbell's Act (9 & 10 Vict. c. 93) for damages resulting from negligence in the management of a vessel which has caused personal injury and death. (a)

DECLARATION.

Thomas Eustace Smith, George Luckley, and James Southern, complain of Jane Brown, Mary Ann Hodgson, and (fourteen others named), the plaintiffs in a certain suit in the High Court of Admiralty of England hereinafter mentioned, which said last-mentioned persons are hereinafter called the said plaintiffs in the said suit; for that the said Thomas Eustace Smith, George Luckley, and James Southern, were, at and before the time of the collision hereinafter mentioned, the owners of a certain steam vessel called the *Black Swan*, and the said steam vessel, on the 6th Jan. then last past, came into collision on the high seas with a certain other screw steam vessel called the *St. Bede*, and by reason of the said collision the *St. Bede* sank and her master and several of her crew were drowned. And the said plaintiffs in the said suit, who are respectively the wives, parents, and children of the said master of the *St. Bede* and of those of the crew of the *St. Bede* who were drowned as aforesaid in the said collision, and afterwards, to wit, on the 8th March then last past, by their solicitors acting for them in that behalf, instituted in the High Court of Admiralty of England a suit against the said steam vessel *Black Swan*, hereinafter called the said suit to recover damages for the injury resulting to the said plaintiffs in the said suit respectively, from the death of the said master, and the death of those of the crew of the *St. Bede* who were drowned as aforesaid, and the principle to institute the said suit, which was duly filed in the registry of the said High Court of Admiralty [precise set out], and upon the institution of said suit the said T. E. Smith, G. Luckley, and J. Southern were, in order to prevent the arrest of their steam vessel *Black Swan*, compelled to enter an appearance in the said suit, and were compelled to give bail in the said suit for the sum of 5000*l.*, and they entered an appearance and gave bail accordingly; and afterwards, to wit on the 23rd April now last past, the said plaintiffs in the said suit filed their petition in the said suit, which said petition is as follows:—

"In the High Court of Admiralty of England.

"No. 3289.

The Black Swan.

"Hillier and Fenwick, solicitors for the plaintiff, in a cause of damage instituted on behalf of Jane Brown, the widow of William Brown, deceased, late master of the steamer *St. Bede*, of 8, Garden-street, North Shields, in the county of Northumberland, William Brown, James Liddell Brown, John Gray Brown, and Anne Harriett

(a) It does not appear from the judgments of the judges in this case that, supposing the Admiralty Court to have jurisdiction in cases of loss of life and personal injury as above, on which point there are conflicting decisions, that there is anything in Lord Campbell's Act itself to prevent the court from exercising such jurisdiction. (See also the *George and Richard*, 24 L. T. Rep. N. S. 717; ante p. 50.)—E.D.

Liddell Brown, children of the deceased, and others the relatives of the chief officer and crew of the said steamer *St. Bede*, against the *Black Swan* steamship, her tackle, apparel, and furniture, and against Thomas Eustace Smith, George Luckley, and James Southern, the owners of the said *Black Swan* steamship, the defendants in this cause, say as follows:—First, at about 5 a.m., on the 7th Jan. 1870, the screw steam vessel *St. Bede*, of 532 tons register or thereabouts, manned by a crew of nineteen hands all told, whilst on a voyage from Shields to Huelva, in Spain, with a cargo of pigiron and coals, was off Farnborough Head on the coast of Yorkshire; secondly, the wind at such a time was about south south west, blowing half a gale; the weather was dark and the tide was flood, and there was a very heavy sea; the *St. Bede* was steering about south by east half east, proceeding under steam alone at the rate of about three knots an hour, with her proper regulator masted and side lights duly exhibited and burning brightly; thirdly, at such time the masted and green lights of a steam vessel, which proved to be the above-named vessel, *Black Swan*, were seen at the distance of two or three miles or thereabouts from, and bearing about two points and a half on the port bow of the *St. Bede*; the helm of the *St. Bede* was ported a little; the *Black Swan*, with her green light open crossed on the starboard bow of the *St. Bede* when she was seen to be porting her helm, and she shortly afterwards ran against and with her stem struck the *St. Bede* abaft the fore rigging, and cut her nearly in two, and caused her to founder almost immediately, and her master and all her crew, with the exception of one man named James Dunning, were drowned; the said James Dunning, after being in the water for about an hour or upwards, was picked up by a smack and saved; fourthly, shortly before the said collision the helm of the *St. Bede* was starboarded by mistake of the man at the wheel, but immediately afterwards, and just before the said collision, her helm was ported; fifthly, the *Black Swan* made default in not keeping out of the way of the *St. Bede* as she ought to have done; sixthly, the *Black Swan* ported her helm at an improper time; seventhly, the *Black Swan*, which was under both steam and sail, and was proceeding at a rapid speed, did not comply with the provisions of art. 15 of the regulations for preventing collisions at sea; eighthly, the said collision, and the loss of the lives of the master and others of the crew of the *St. Bede*, were occasioned by all or some or any one of the matters set forth in articles 5, 6, and 7 of this petition; ninthly, the said collision was not in any way occasioned by any negligent or improper navigation on the part of the *St. Bede*; tenthly, the plaintiffs respectively are the wives, parents, and children of the master and those of the crew of the *St. Bede*, who were drowned as aforesaid, as defined by the statute 9 & 10 Vict. c. 93. There is not any executor or administrator of the said master or of any of the said crew. And the said Hillier and Fenwick pray the right honourable the judge to pronounce damages to be paid for, and to condemn the defendants and their bail therein, and in costs, and to refer it to the registrar, assisted by merchants, to ascertain the amount of such damage, and that further and otherwise right and justice may be administered to the plaintiffs in the premises. And together with the said petition, particulars were filed [particulars here set out of the persons for whom and on whose behalf the suit was instituted, and of the nature of the claim.] And shortly after the filing of the said petition and particulars, the said T. E. Smith, George Luckley, and James Southern, by their counsel, prayed the Right Honourable Sir Robert Joseph Phillimore, knight Doctor of Civil Laws, Lieutenant Judge and President of the High Court of Admiralty, to reject the said petition, because the coexistence of the same appertained not to the said High Court of Admiralty of England. Yet the said Lieutenant Judge, and president of the said court not weighing the laws of this realm of England, to the great contempt of our Lady the Queen, and to the manifest injury of the said T. E. Smith, G. Luckley, and J. Southern, refused to reject the said petition, and ordered the said T. E. Smith, G. Luckley, and J. Southern to answer to the same. And the said T. E. Smith, G. Luckley, and J. Southern further say that the said plaintiffs in the said suit were not, nor was any or one of them on board the said steam vessel *St. Bede* at the time of the said collision, and that the said plaintiffs in the said suit had not, nor had any one

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of them, any share or interest in the said steam vessel *St. Bede*, or in any goods or chattels laden on board thereof or belonging thereto, and that the said plaintiffs in the said suit have not nor has any one of them sustained any loss, damage, or injury, by reason of any act, neglect, or default of the said T. E. Smith, G. Luckley, and J. Southern, or any or either of them, or any of the servants of them, or any or either of them other than the injury resulting to the said plaintiffs in the said suit respectively from the death of the said master, and from the death of those of the said crew, who were drowned as aforesaid. And, further, that no proceedings have been instituted or entertained in the said High Court of Admiralty at the suit of the said T. E. Smith, G. Luckley, and J. Southern or any of them, or at the suit of any owner of the said steam vessel *Black Swan*, for the purpose of determining the amount of the liability incurred by the owner or owners of the said steam vessel *Black Swan* in respect of loss of life, personal injury, or loss of or damage to ships' boats or goods, or for the distribution of such amount, and the said T. E. Smith, G. Luckley, and J. Southern further say that according to the law of this kingdom of England the cognizance of the said suit belongeth not to the said High Court of Admiralty, and that the said High Court of Admiralty hath not power or authority to entertain the prayer of the said plaintiffs in the said suit, or to refer it to the registrar of the said court, assisted by merchants, to ascertain the amount of the damage claimed by the said plaintiffs in the said suit, nor had the registrar of the said court, assisted by merchants, power to ascertain the amount of such damage. Yet the said plaintiffs in the said suit have not ceased to prosecute the said suit in the said High Court of Admiralty, and still do prosecute the same there, to the great oppression of the said T. E. Smith, G. Luckley, and J. Southern. Wherefore the said T. E. Smith, G. Luckley, and J. Southern humbly imploring the assistance and manueuvre of this court, pray remedy by writ of our said Lady the Queen of prohibition to the said lieutenant, judge, and president of the said High Court of Admiralty in form of law to be directed to prohibit him that he may not further hold plea before him in any wise touching the premises aforesaid."

Demurrer, that the declaration was bad in substance, wherefore the defendants prayed that the said writ of prohibition to the said Lieutenant, Judge, and President of the High Court of Admiralty of England might not issue as in the said declaration is prayed.

A ground of demurrer was that the facts stated in the declaration did not show that the High Court of Admiralty might not have cognizance of the said suit of the defendants therein.

Joinder in demurrer.

9 & 10 Vict. c. 93, enact:

That whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Section 2:

That every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the jury by their verdict shall find and direct.

24 Vict. c. 10 (The Admiralty Court Act 1861), s. 7:

The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

Section 22:

Any new writ or other process necessary or expedient for giving effect to any of the provisions of this Act may be issued from the High Court of Admiralty in such form as the judge of the said court shall from time to time direct.

Section 35:

The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam.

Butt, Q.C. (with him Clarkson).—First, there are circumstances under which the Court of Admiralty has to do what it now assumes to do, viz., assess damages. By sect. 514 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), the liability of the shipowner in cases of collision, and perhaps other cases, was limited to the value of the ship and freight earned. That section was, however, repealed by the Amendment Act, 1862, and a provision (sect. 54) substituted, limiting the liability to an assumed value of the ship and freight of 8*l.* a ton, where there is damage to ships and goods without loss of life, and to 15*l.* per ton where both kinds of injury happen. And by sect. 514 the High Court of Chancery is empowered to entertain proceedings at the suit of any owner for the purpose of determining the amount of the liability where several claims are made or apprehended. Then sect. 13 of the Admiralty Court Act 1861 (24 Vict. c. 10), enacts that "whenever any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty, the said court shall have the same powers as are conferred upon the High Court of Chancery in England by the ninth part of the Merchant Shipping Act 1854." In *Hill v. Andrus* (1 K. & J. 263), Wood, V. C. refused to entertain a suit of this kind unless the plaintiff admitted liability. But in *The Amalia* (8 L. T. Rep. N. S. 805; 1 Moo. P. C., N. S., 471), it was held that it is not necessary that owners of a vessel and cargo preferring their claim in the Court of Admiralty to limited liability should acknowledge in the first instance that their vessel was to blame. [COCKBURN, C. J.—Here there are a dozen claimants; each person's loss may vary, yet each person's pecuniary loss must be ascertained. Then the value of the ship being settled the amount to which each individual is entitled pro rata on the value of the ship must also be fixed. Moreover, the age of the deceased persons, their position in life, and all the various matters of inquiry in an action under Lord Campbell's Act have to be ascertained. But what machinery has the Admiralty Court by which it can do all this?] No doubt it is peculiarly the function of a jury to make such an investigation, unless jurisdiction is expressly given to the Court of Admiralty by the Legislature. That jurisdiction has been so given. The Court of Admiralty has similar functions to perform in other cases. The first proceeding is to stay all actions. COCKBURN, C. J.—Suppose twelve actions brought here, could the defendant go to the Admiralty and ask that the plaintiffs might all be enjoined not to go on? Sect 13 of the Admiralty Court Act 1861 provides that whenever any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty, the said court shall have the same powers as are conferred upon the High Court of Chancery in England by the 9th part of the Merchant Shipping Act 1854. [COCKBURN, C. J.—That is where the ship is arrested, but, assume that there was no arrest,

could these widows be enjoined from proceeding? Not in the Court of Admiralty, but by the Court of Chancery they would be. Matters of this kind, where there is limited liability, cannot be determined without some such powers as the Admiralty Court possesses. If these numerous widows had come into the Court of Queen's Bench how could their claims be adjusted? [BLACKBURN, C. J.—Judgment would go for the amount recovered.] Then the first judgment obtained might exhaust the value of the ship and leave the subsequent ones unsatisfied. [BLACKBURN, J.—I should have thought that the right course would have been to stay the actions proceeding to execution, but allow the plaintiffs to go on until then.] We rely on sect. 7 of the Admiralty Court Act, 1861, which gives the High Court of Admiralty jurisdiction over any claim for any damage done by any ship; and on sect. 35 which enacts that the jurisdiction conferred may be exercised either by proceedings *in rem* or *in personam*. Questions have arisen as to whether the Court of Admiralty can entertain a suit of damage by a seaman for injuries he has sustained. There are two cases upon that subject, first, *The Sylph* (17 L. T. Rep. N. S. 519; L. Rep. 2 Adm. 24). There a diver who while engaged in diving in the Mersey, was caught by the paddle wheel of a steamer, instigated a cause of damage against the ship. Held, that the Court had jurisdiction to entertain the suit. Sir R. Phillimore in that case was of opinion that the court had originally jurisdiction, and also jurisdiction given to it by the recent statutes. The judgment of Story, J., in the great case of *De Lovio v. Boit* (20 Gall. 398), ascribes to the Admiralty Court a wide jurisdiction, for which we do not attempt to contend; but we confine the argument to the jurisdiction given by statute. In *The Beta* (20 L. T. Rep. N. S. 988; L. Rep. 2 P. C. 447) it was held that the Court of Admiralty has jurisdiction, under 24 Vict. c. 10, s. 7, in a cause of damage instituted against a ship for personal injuries. Lord Romilly, delivering the judgment of the Privy Council on appeal from the decision of Sir R. Phillimore, says, "The words of the 7th section of the Admiralty Court Jurisdiction Act which had been referred to, clearly include every possible kind of damage. Personal injuries are undoubtedly within the words 'damage done by any ship.' The case of the *Sylph*, which has been referred to, and in which it was so held, has not been appealed from. There was every reason for the Legislature enacting that which the judgment of the court below holds to have been enacted." In many cases the vessel causing the damage is a foreign one, and unless the person injured could sue in the Court of Admiralty, he would be without any remedy at all, and it was to provide for many such cases, that this Act of Parliament was passed. Then how can it be said that the Admiralty Court would be better able to assess damages in cases of personal injury than in those where there has been loss of life? Both kinds are peculiarly cases for a jury. Yet, unless the *Beta* was wrongly decided, a power and jurisdiction to assess damages in cases of personal injury has been conferred on the Court of Admiralty by the Legislature. *The Gulfaze* (19 L. T. Rep. N. S. 743; L. Rep. 2 Ad. 325) was a cause of damage on behalf of the administratrix of a seaman who, at the time of his death was one of the crew of a vessel which was

sunk by a collision with the *Gulfaze*, occasioned, as the plaintiff alleged, by the mismanagement of the *Gulfaze*; and Sir Robert Phillimore held, although not without doubt, that the court had jurisdiction, under Lord Campbell's Act and the Admiralty Court Act 1861, s. 7, to entertain the suit. The *Gulfaze* was a foreign vessel, (a) and therefore the plaintiff would have had no remedy against her except in Admiralty. If it is said *contra*, that the word "declaration" in sect. 4 of Lord Campbell's Act, shows that the action is to be brought only in a court where pleadings commencing with a declaration are used, an obvious answer suggests itself, viz., that the Act certainly applies to the County Court, where declarations are unknown. When this rule was moved the Lord Chief Justice asked what would happen if the Court of Admiralty found both vessels to be in fault? Since then a case has arisen in which the court has held both vessels to be to blame. The question thereby becomes rather complicated. [COCKBURN, C. J.—Whence does the Court of Admiralty derive its power of referring matters to the registrar? There is no express power, but it is the established practice in all cases where the assessment of damages becomes necessary.]

Maniati, Q.C. (with him *Gainsford Bruce*)—It is conceded that up to the passing of the 24 Vict. c. 10, the Admiralty Court had not jurisdiction to entertain a suit under Lord Campbell's Act. The question turns, therefore, on the meaning of sect. 7 of the first-mentioned statute. That section had no such wide effect as the other side would give to it. Lord Campbell's Act gave a new cause of action and a new remedy. It begins thus: "Whereas no cause of action is now maintainable against a person who by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injuries so caused by him. . . ." Then the right of action is given, and sect. 2 declares for whose benefit the action shall be and by whom to be brought. Sect. 4 (b) points to a particular remedy—viz., an action in a court of common law. The jury were to divide the damages amongst the parties entitled to them in shares—a provision which gave rise to sect. 2 (c) of 27 & 28 Vict. c. 95. Sect. 7 of the Admiralty Court Act 1861 never was intended to give that court jurisdiction in this peculiar case, for it does not provide any mode of ascertaining damages. The damages could not, of course, be assessed by a jury. [BLACKBURN, J.—Sect. 35 gives a power to

(a) This fact does not appear from the reports.

(b) Sect. 4 enacts "That in every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant, or his attorney, a full particular of the person or persons for whom or on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered."

(c) Sect. 2, after reciting sect. 2 of 9 & 10 Vict. c. 93, enacts "That it shall be sufficient if the defendant is advised to pay money into court that he pay it as a compensation in one sum to all persons entitled under the said Act for his wrongful act, neglect, or default, without specifying the shares into which it is to be divided by the jury; and if the said sum be not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the jury shall think the same sufficient, the defendant shall be entitled to the verdict upon that issue."

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proceed *in personam*, as Mr. Butt pointed out.] And that is an additional reason for holding that the court has not jurisdiction as an alternative proceeding *in rem* is also given, fastening upon the ship a maritime lien. Therefore the jurisdiction is confined to cases where there is a maritime lien, according to the general rule, to which there is only one exception—viz., when there is misconduct of a master towards their crew or passengers. Maritime lien is the foundation of the jurisdiction of the Admiralty Courts. Their jurisdiction has always been restricted to cases where they had a power to afford relief which the common law could not give. In 1840 an Admiralty Act passed, which led to considerable difficulty. It is the 3 & 4 Vict. c. 65. Sect. 6 recites that the jurisdiction of the High Court of Admiralty may be advantageously extended. Up to that time the court had no jurisdiction within the body of a county, and the object of the statute was to give that jurisdiction. Moreover a power was also conferred of dealing with mortgages; and by sect. 6 of entertaining questions as to damages received by any vessel. [COCKBURN, C. J.—By the ship itself, not by the persons on board.] Yes; by the ship. The encroachments of the Admiralty Court on the courts of common law, clearly are shown by 13 Ric. 2, c. 5, and 15 Ric. 2, c. 3, which statutes declare that the admirals and their deputies shall not have jurisdiction within the bodies of counties, thereby giving rise to sect. 6 of 3 & 4 Vict. c. 65. In *The Bilbao* (3 L. T. Rep. N. S. 338; Lush. 149), the late distinguished judge of the Admiralty Court, Dr. Lushington says: "It was very properly admitted," by counsel in argument, "that previous to the passing of 3 & 4 Vict. c. 65, the Court of Admiralty had no jurisdiction within the body of a county. This appears from several cases, one of which is the *Eliza Jane* (3 Hagg. 335), and indeed the statute was passed for the express purpose of remedying that and other inconvenient defects. The language of that statute, however, though in many respects very general as to damage, gives the court jurisdiction only in cases of damage, received by any ship or sea-going vessel." Then the Act of 1861 (24 Vict. c. 10) was passed, and the first case upon sect. 7 was the *The Malcina* (6 L. T. Rep. N. S. 369; Lush. 493). An action brought by a barge against a steamer for a collision on the Thames within the body of a county, and Dr. Lushington there held that the court had jurisdiction by sect. 7, saying, "Difficulties have continually occurred from the words of the statute of Ric. 2, but I am of opinion that now all such are wholly removed by these most expressive words: 'The High Court of Admiralty shall have jurisdiction over any claim for any damage done by any ship.'" But it never was supposed that sect. 7 gave the Admiralty Court jurisdiction to proceed *in rem* in cases under Lord Campbell's Act. [HANSEN, J.—Do you suggest that damage done by a ship means by a ship to a ship? We do. [BLACKBURN, J.—If by the negligence of the crew, the ship were driven against a man and killed him, or against the ship in which he might be, with the same result, it would be impossible to say that was not damage done by a ship.] The right of action in question was unknown to the common law. It was expressly given by Lord Campbell's Act. It is not likely that jurisdiction would have been given to the Admiralty Court in respect of it, otherwise than in express terms. The reason why that court

has jurisdiction not possessed by the common law is founded on maritime lien. [BLACKBURN, J.—Suppose a man were injured at sea, but not killed, would not the Admiralty have jurisdiction, and is it not going a very little way further to give an action to his executor if he is killed?] There is no instance of any proceeding of such kind. [BLACKBURN, J.—I think the maritime lien arises from the jurisdiction, and not the jurisdiction from the maritime lien as you say.] The liability of the shipowner is limited to 15*l.* per ton by statutory enactment. Assume that in the present case, the vessel is not worth 15*l.* a ton, judgment obtained in the Court of Admiralty would be no bar to an action under Lord Campbell's Act; and suppose 10*l.* per ton had been recovered, the plaintiffs might afterwards sue in this court and recover an additional 5*l.* per ton. [BLACKBURN, J.—It must be remembered that the proceedings may be by the recent Act *be in personam* as well as *in rem*.] In *The Robert Pow* (9 L. T. Rep. N. S. 237; Br. & Lush. 99), it was held that the Court of Admiralty has not jurisdiction under 3 & 4 Vict. c. 65, s. 6; or 24 Vict. c. 10, s. 7, or otherwise, to entertain a claim against a steam tug for damage occasioned to the vessel towed by negligence in towing, if the damage arises not by collision, but by the vessel taking the ground. Dr. Phillimore there said, that the word "damaged" used in sect. 6, "must be taken according to the well understood meaning of the phrase in the Admiralty Court, namely, damage done by collision." Now, the present is not a case of damage done by collision, in the ordinary meaning of the word, as used in the Admiralty Court, for there is no maritime lien, and there is no jurisdiction in that court over collision cases, unless there be a maritime lien. *The Ida* (1 L. T. Rep. N. S. 417; Lush. 6), affords a deep illustration of what the Admiralty Court deems a case of collision, over which it has jurisdiction. There the master of a Danish schooner lying alongside a quay at a port in the Lannhe, wilfully cut an English barque adrift, in order to get his own vessel out, whereby the barque swung to the stream and capsized a barque which contained part of her cargo belonging to Turkish owners; and it was held that the Turkish owners of the cargo destroyed, could not sue the schooner in the Court of Admiralty. Dr. Lushington said: "The court, it must be remembered, has never exercised a general jurisdiction over damage, but over causes of collision only; and this is no collision in the proper sense of the term. . . . I have gone further than any of my predecessors in enlarging the jurisdiction of the court, because the commercial and maritime world has undergone such great changes; but I must not extend my jurisdiction beyond what circumstances render necessary." This subject is very fully considered in *Ramsay v. Allegre* (7 Curt. 491; 12 Wheaton 611), where, in the midst of a long and learned judgment, Johnson, J. says. . . . "the progress of the common law courts was rapid in wresting from the Admiralty every species of contract, leaving them none to act upon, on which they would themselves render complete justice according to the established rights of the parties. They are charged with absurdity and inconsistency, but I pronounce the charge utterly groundless; for one principle runs through all their decisions that of subjecting to the trial by jury every cause

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in which that form of trial could be applied without injury to the parties' rights." [He referred to numerous passages in his judgment.] [COCKBURN, C. J.—Why should not the Admiralty Court have jurisdiction when parties choose to resort to it, limiting their remedy to whatever might be the value of the ship?] Because the defendant is as much entitled to a trial by jury as the plaintiff. [COCKBURN, C. J.—Looking at it from a legislative rather than from a judicial point of view, the absence of a jury would probably be an advantage to the defendant, as juries are apt to lean towards the injured party.] Moreover, another consideration in the matter is that the Admiralty Court divide the damage where both vessels are in fault, and there are cross suits. [BLACKBURN, J.—But the drowned men may not themselves have been to blame for the collision.] Next, as to sect. 514 of the Merchant's Shipping Act, 1854: The effect of that section is that if a shipowner chose to come in and admit liability, the Court of Chancery might determine the amount, and *Hill v. Audus* (sup.) has decided that there must be an admission of liability. Sect. 13 of the Admiralty Court Act 1861, confers the same powers on the Court of Admiralty only when the ship is "under arrest." Now arrest only takes place when there can be proceedings *in rem*. The Common Law Procedure Act 1860 has by sect. 35 given to this court also the jurisdiction of the Court of Chancery under the Merchant Shipping Act 1854. The 27 & 28 Vict. c. 94, amending Lord Campbell's Act, assumes that the parties are only able to proceed in the common law courts, even when there is an admission of liability, for it enacts that a defendant may pay money into court "without specifying the shares into which it is to be divided by the jury." *The Gulfaze* (sup.) was a case adjudicated upon by the learned judge whose decision is now impugned. In *The Beta* the Privy Council decided that a suit for personal injury could be maintained in the Admiralty Court. That case is adverse to the defendants, but it may be distinguished from the present one, for the persons bodily hurt there were alive, and had of course a right of action at common law. Therefore the judgment amounts only to this, viz., that in cases where there was a remedy at common law the Court of Admiralty now has jurisdiction given by the Act of 1861.

Bull. Q.C. in reply.—Similar powers given to Common Law Courts by sect. 35 of the Procedure Act 1860, would not abrogate those of the Court of Admiralty. The latter court has now jurisdiction *in personam* in various other cases. No argument has been adduced against the point as to the peculiar jurisdiction of the Admiralty Court over foreign ships. It is clear that court has power which is daily exercised in cases where no maritime lien exists. *The Robert Pow* (sup.) is wrong; and it was on contract. The case of the *Ida* (sup.) was reargued before Sir R. Phillimore, who decided in accordance with the previous judgment of his predecessor. The case was first decided before the passing of the Act in question. [BLACKBURN, J.—And there are two concurring opinions, one delivered before, the other afterwards, thereby conclusively showing it was not a hasty, but a deliberate judgment.] In the *Uthla*, reported in a note to the *Sylph* (sup.) Dr. Lushington says that sect. 7 of the Admiralty Court Act 1861, means "every case of damage done by any ship; there

is no limitation, no restriction expressed." That the jurisdiction is beneficially exercised is evident from the fact of plaintiffs resorting to the Admiralty Court for redress under Lord Campbell's Act. Nice questions would arise in the common law courts as to contributory negligence—viz., whether the family of a seaman might not be disentitled to recover because his officers or comrades in whose watch a collision occurred may have been guilty of negligence, although the sailor himself may have met his death while he was below, and have been himself free from blame: (*Thoroughgood v. Bryan*, 8 C. B. 115.) That case is, however, much doubted. [HANNEN, J. referred to *Catlin v. Hills* (8 C. B. 123.) If *Thoroughgood v. Bryan* be good law it might be an answer. It must be remembered that in the Admiralty Court there is no injurious damage without misfeasance. Collisions frequently happen in fog, when no blame is attributable to either vessels, and then both suits are dismissed. If this prohibition were to issue, seamen and passengers killed by foreign ships would have no remedy.

Curr. adv. vult.

July 6.—The Court delivered the following judgments, the first being that of the Lord Chief Justice and Hannen, J., prepared by Cockburn, C. J.—This was a demurrer to a declaration in prohibition upon an application made to this court to prohibit a suit in the Court of Admiralty, instituted by the defendants, as widows or surviving relatives of certain persons who were drowned by the sinking of a vessel called the *St. Bede*, which was run down in a collision with the vessel of the present plaintiffs, called the *Black Swan*, occasioned, as was alleged, by the negligence of the person having charge of the latter vessel. The plaintiffs and defendants in the suit in the Court of Admiralty excepted to the jurisdiction of that court to entertain the suit, but that plea was overruled, whereupon they applied to this court for a prohibition, and the question which presents itself for our decision on the present record is whether the Court of Admiralty has jurisdiction to entertain such a suit or not. The question is one of considerable difficulty, but my brother Hannen and I are, on the whole, of opinion that the Court of Admiralty does not possess the jurisdiction contended for. The question turns entirely on the effect of the 7th section of the 24 Vict. c. 10. Whatever may have been the pretension of the Court of Admiralty in ancient times to jurisdiction on the matter of personal injuries arising on the high seas as explained by Story, J. in the case of *De Lorio v. Boit* (sup.), and referred to by Sir R. Phillimore in the case of *The Sylph* (sup.), as regards personal injuries caused by collision it is admitted that no such jurisdiction, independently of recent statutes, existed in modern times, and it is too plain to admit of doubt that the right of action, created for the first time by the 9 & 10 Vict. c. 73, and the 27 & 28 Vict. c. 95, was by these Acts confined to actions brought in the courts of common law. It is not contended that jurisdiction was conferred by these Acts on the Court of Admiralty; the jurisdiction, if it exist at all, must have been created by the recent legislation for the extension of the Admiralty jurisdiction. The 7th section of the 24th Vict. c. 10, on which the present question depends, is in these few words: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship,"—the term ship being, by the interpretation clause 2, to be

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taken to include "any description of vessel used in navigation not propelled by oars." The question is, whether personal injury, occasioned by the collision of two vessels, comes under the term "damage" as used in this section. Now the words used are undoubtedly very extensive, but it is to be observed that neither in common parlance, nor in legal phraseology, is the word "damage" used as applicable to injuries done to the person, but solely as applicable to mischief done to property; still less is this term applicable to loss of life or injury resulting therefrom to a widow or surviving relative. We speak, indeed, of damage as compensation for injury done to the person, but the term "damage" is not employed interchangeably with the term injury with reference to mischief wrongly occasioned to the person, and that this distinction is not a matter of mere verbal criticism, but it is of a substantial character, and necessary to be attended to, is apparent from the fact that the Legislature in two recent Acts in *pari materid*, both having reference to the liability of shipowners in respect of injury or damage, namely, the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104, part ix.), and the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), has, in a series of sections, carefully observed this distinctive phraseology, speaking in distinct terms in the same section of loss of life and personal injury on the one hand, and loss or damage done to ship's goods or other property on the other. In these Acts the term "damage" is nowhere used as applicable to injuries done to the person—it is applied only to property and inanimate things. We see no reason to suppose that the Legislature, in using the term in the enactment we are considering, had lost sight of the distinction uniformly observed in the preceding statutes. No doubt if there were anything in the other provisions of the Act which showed that the term "damage" had been here employed in a more comprehensive sense, we ought not to restrict the operation of the enactment by too nice a regard to the language used. But we not only find nothing in the other provisions of the statute which can have this effect; but it seems to us, when we consider what would be the consequences of bringing suits instituted under Lord Campbell's Act within the jurisdiction of the Admiralty, impossible to suppose that the Legislature can have intended, under a general enactment like the present, as it were by a sideward, to effect so material a change in the rights and relative position of the parties concerned in such an action. The purpose and effect of the 9 & 10 Vict. c. 93, was to give to the parties who acquired a right of action under it a right of full compensation to be recovered by the procedure of the ordinary law of the land. But the consequence of a transfer of the jurisdiction of the courts of common law to the Court of Admiralty would be not only to deprive the parties of the common law procedure and mode of trial, but, what is of still greater importance, materially to alter their substantive rights and relative position inasmuch as the Court of Admiralty in dealing with claims for damage—as, for instance, in holding that where both vessels were in the wrong the loss is to be decided between them—acts upon principles unknown to the common law, and which, though they may be very proper in the case of damage done by one vessel to another are altogether inapplicable to the case of

personal injury or the right to compensation given by Lord Campbell's Act. We cannot think that the Legislature would have introduced so important a change without an enactment referring in express terms to the case of loss of life or personal injury as was done in the Merchant Shipping Acts already referred to. It is true that in these Acts the Legislature has interfered with and abridged the rights of parties having a right of action under Lord Campbell's Act by limiting the liability of the shipowner in case of collision to the value of the ship and freight and enabling the latter to apply to the Court of Chancery for protection against any demand beyond it, but in doing so the Legislature has given no jurisdiction in reference to loss of life or personal injury in express terms, and has not contented itself with the general term "damage," but, on the contrary, has confined the use of the latter to injury to ships and property as distinguished from persons. We cannot but think that what the Legislature has there done with reference to what may be called the protective jurisdiction of the Court of Chancery created by the 17 & 18 Vict. c. 104, part 9, and the general limitation of the shipowner's liability, established by the latter statute of the 25 & 26 Vict. c. 63, it would have done in the present instance had it intended to confer the initiative jurisdiction of entertaining a suit instituted under Lord Campbell's Act, by the parties entitled to sue under that Act. It may be said that if the enactment of the 7th section of 24 & 25 Vict. c. 10, is to be confined to damage done to property in case of collision, the enactment becomes useless, seeing that the Court of Admiralty had undoubtedly jurisdiction in such cases before. But if the language of Dr. Lushington, in the case of *The Marina* (*sup.*), be looked at, it will be seen that even with reference to the jurisdiction of the admiralty in respect of damage to property, the section is by no means without its value. By the statute of 13 Ric. 2, c. 5, the jurisdiction of the admiral being expressly limited to cases arising on the high seas, it was therefore excluded in respect of any damage occurring on any water within the body of a county. By the Act of the 3 & 4 Vict. c. 65, this restriction was indeed removed, jurisdiction being given in respect of all claims and demands whatsoever in the nature of damage received by any ship or seagoing vessel, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the damage was received, in respect of which such claim is made. But the jurisdiction then given was confined to ships and seagoing vessels; damage done to a barge or other vessel used for inland navigation, would not have been within the jurisdiction. Hence, Dr. Lushington says that from the use of these words constant confusion had arisen; when therefore an Act was passed expressly for the purpose of placing the jurisdiction of the Court of Admiralty on a broader and firmer basis, of making it what it had not before been—a court of record—and giving it many of the powers in respect of procedure, previously confined to the courts of common law, it is not to be wondered at that a provision should have been introduced for getting rid of the difficulty created by the 3 and 4 Vict. c. 65, in limiting the jurisdiction to any ship or seagoing vessel, by including within it damage done by any description of vessel used in navigation not propelled by oars. Under this enactment

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Dr. Lushington, in a case referred to, was enabled to hold that damage done by a ship to a barge in the river Thames was within the jurisdiction of the Admiralty. However large the words of the 7th section may be, it is plain that the opinion of Dr. Lushington was that while they removed the difficulties arising from the statute Rio. 2, and the language of the 3 & 4 Vict., they could not operate to enlarge the jurisdiction of the court in respect of matters which were not within it before. In the case of the *Robert Pow* (Br. & Lush 102), he says, "as in the former statute, damage here means damage done by collision," and on this ground he refused to entertain a claim for damage occasioned by a vessel by negligence in towing. It is true that in the case of the *Ubbin* (L. Rep. 2 Adm. 29) Dr. Lushington held that where a ship had driven against a breakwater, and had done damage to it, a suit in the Admiralty Court would lie, but there the damage had been actually done to the breakwater by the ship itself, and the case, therefore, came within the very words of the Act, nor was there the difficulty we have pointed out in the application of the term "damage" to personal injury. If the opinion there expressed by the eminent authority referred to was, as we think it was, the correct view of the enactment in question, it would appear to follow that, inasmuch as prior to the statute the jurisdiction of the Court of Admiralty in the case of collision did not extend to loss of life or personal injury, no enlargement of the jurisdiction to claims thus arising can be held to have accrued from the enactment of the 7th section, and that is the conclusion at which, though not without doubt and difficulty, my brother Hannen and I have arrived. We are aware that in holding that the Court of Admiralty has not acquired jurisdiction in cases within the 9 & 10 Vict. c. 93, we are taking upon ourselves to overrule cases decided by very high authority. In the case of *The Sylph* (*sup.*) the present judge of the Admiralty Court held that a diver who had been caught by the paddle wheel of a steamer, and had suffered personal injury, might maintain a suit in that court. In the subsequent case of *The Gulfstream* (*sup.*) the same learned judge held, though, as he himself declares, not without doubt and hesitation, that a claim arising on Lord Campbell's Act was within the jurisdiction of the court. In the still later case of *The Beta* (*sup.*) the plaintiff having brought his suit in the Court of Admiralty in respect of personal injuries sustained through a collision between a ship, on board of which he was serving, and the defendant's vessel, the defendants excepted to the jurisdiction; and the judge having rejected their petition, and the case having been brought before the Judicial Committee of the Privy Council on appeal, that court, without even calling on the counsel for the respondents, dismissed the appeal with costs. We have, of course, felt greatly pressed by the weight of the decision of a court of such high authority, but we have been unable to bring ourselves to adopt the same view. The grounds of the decision, which appears to us to have been arrived at somewhat hastily, are very briefly given in the report of the case, but the difficulties which have stood in our way in taking the same view of the effect of the 7th section, and which have led us to an opposite conclusion, do not appear to have been present to the minds of the members of the Committee who took part in the decision. Whatever de-

ference we should, under other circumstances, feel bound to show to the decision of the Judicial Committee of the Privy Council as an appellate tribunal, in the exercise of our jurisdiction now invoked we can only look upon it as forming a branch of the Court of Admiralty, and as, after having given the case our best consideration, we arrive at the conclusion that the Legislature, in omitting all reference to loss of life or personal injury, such as is to be found in the Merchant Shipping Acts, cannot properly be taken to have intended to give jurisdiction in respect of such matter by use of the term "damage," and thereby materially to alter the rights accruing under Lord Campbell's Act, we are bound, notwithstanding the weight of the authority we have referred to, to give effect to our opinion, by giving judgment for the plaintiffs in prohibition.

BLACKBURN, J.—I have entertained doubts in this case, not altogether removed, but which are not strong enough to make me dissent from this judgment, or even to make me require further time for consideration. I agree that the whole question depends upon the construction of the statute 24 Vict. c. 10, and I also agree that in a case of prohibition, where we are called upon to restrain the Court of Admiralty, we are not bound by any decision either in the Court of Admiralty or in the Court of Privy Council when sitting in an appeal from that court, though their reasons are to be weighed with great respect. I cannot concur in what is said by the Privy Council in the case of *The Beta*, viz., that there was every reason for the Legislature enacting that which the court below holds to have been enacted. On the contrary I feel the full force of the objections stated in the judgment just delivered to the Legislature so enacting; I think that the Legislature, if such was their intention, have been guilty of an improvident and hasty piece of legislation, more particularly in not providing for the difficulties as to the mode of assessing the damages, and by not enacting whether the civil law or the common law is to be followed in cases where the injured or slaughtered man was partly to blame. I feel also strongly that it rests on the defendants in this suit to satisfy us that the Legislature affirmatively expressed an intention to confer on the Admiralty a new jurisdiction so extensive as is said. My doubt however has been whether the words used by the Legislature are not such as to show that the Legislature have so enacted, in a way I think rash and careless, but still bare so enacted. I do not dissent from a judgment which seems to me to have the effect of putting that meaning on the words of the Legislature, which in my opinion they should have intended to express, but I much doubt too whether they have expressed such an intention to give this jurisdiction, to permit me to concur in the judgment, though I sincerely hope that the statute may ultimately be held to have the meaning put upon it by the judgment of the majority.

Judgment for the plaintiffs in prohibition.

Attorney for plaintiffs, T. Cooper.

Attorneys for defendants, Hillyer and Fenwick.

PRIV. CO.] REG. (app.) v. McCLEVERTY (resp.); THE TELEGRAPHO OR RESTAURACION. [PRIV. CO.]

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by DOUGLAS KINGFORD, Esq., Barrister-at-Law.

Monday, Feb. 20, 1871.

(Present: The Right Hon. Lord ROMILLY, M.R..
Sir JAMES W. COLLIVILLE and Sir ROBERT J.
PHILLIMORE.)

REG. (app.) v. McCLEVERTY (resp.); THE

"TELEGRAPHO" or "RESTAURACION."

Piracy—Forfeiture of ship—Sale.

The taint of piracy does not, in the absence of conviction or condemnation, continue, like a maritime lien, with a ship through her transfers to various owners, and therefore a ship duly sold by public auction to a bona fide and innocent purchaser, cannot be afterwards arrested and condemned, on account of former piratical acts, at the suit of the Crown.

THIS was an appeal from the judgment of the judge of the Vice-Admiralty Court of the Virgin Islands, in a cause promoted by the Crown against the steam ship *Telegrafo* or *Restauracion*, alleged to be forfeit to the Crown for piracy, in which proceeding the respondent, Augustus McCleverty, appeared under protest to the jurisdiction.

The facts shortly were these: In May 1869, the *Telegrafo* was bought at St. Marc, in Hayti, from a British subject, by the revolutionary government of Hayti. The ship having been equipped as an armed vessel, was afterwards employed in acts of hostility. In July 1869 the ship, then lying in a port of the island of Tortola, was sold by public auction, and purchased by the respondent, a British subject. In Jan. 1870 the ship was arrested, as a piratical vessel, by a warrant from the Vice-Admiralty Court of the Virgin Islands.

The court below ordered restitution of the vessel, but without costs or damages.

Thereupon the present appeal was brought.

Sir B. Collier, Q.C. (Attorney-General) Sir Travers Twiss, Q.C., and Archibald for the appellant.

Sir R. Palmer, Q.C., Semper, Shortt, Blake, and Shee, for the respondent.

Judgment was delivered by Sir ROBERT PHILLIMORE.—This is an appeal from a sentence of the judge of the Court of Vice-Admiralty in the Virgin Islands. By that tribunal a warrant of arrest had been decreed, on the motion of the advocate for the Crown, in a prosecution against a steam vessel called the *Telegrafo* or *Restauracion*, as a pirate vessel. Her owner appeared under protest, to the jurisdiction of the court, and, after hearing an elaborate argument from counsel which occupied several days, the learned judge pronounced for the protest, and decreed restitution to the claimant, but gave no damages or costs. From this sentence the Crown has appealed, and the claimant has adhered to the appeal so far as the sentence affected the question of damages and costs. The proceedings in the court below were confined to what is known in the Admiralty Court as an Act on petition, in which the protest was set out. An answer to that Act was given in on behalf of the Crown, and a rejoinder on behalf of the claimant. The averments in these summary pleadings were supported, as is usual, by affidavits from both parties; some of those filed on behalf of the claimant were set aside by the court as having been, in the circumstances, improperly filed, and

these have been printed in the papers laid before this tribunal. Their Lordships have, however, been careful to confine their attention to those affidavits and documents which the court below admitted and referred to. Even these, it must be observed, exceeded, to a certain extent, the technical limits within which, having strict regard to the character of the proceeding, namely, a protest to the jurisdiction, they would have been kept by a court more accustomed to exercise jurisdiction of this kind; and it has been contended at this bar by the law officers for the Crown, the appellant, that the protest upon the question of jurisdiction, the only question for consideration in the court below and here, is not sustained by the evidence, that that protest should be overruled, and that they ought to be allowed to establish by plea and proof in a formal manner, and according to due course of law, the merits of their case against the steamship. The protest and the answer, however, raise various important questions of public and international law which appear to have been fully argued in the court below, are referred to in the judgment of that court, and have been much insisted upon by the appellant before this tribunal, namely, whether the acts of the former master and crew of this vessel were of a piratical or belligerent character, whether, if piratical, they were done within the territorial waters of a foreign state, and therefore justifiable only by that state, or whether, being done upon the seas, though within territorial waters, they were not, according to the law of nations, justifiable, as piratical, by the tribunals of every state. It appeared, however, to their Lordships, during the course of the argument, that there were facts admitted or proved in this case, as it was conducted by both parties in the court below, which rendered any decision upon these grave and important matters unnecessary. The protest among other allegations contained the following:—"Nor had the said Isaac Farrington, the seizer, in the absence of any adjudication pronouncing the said steamship to have been engaged in acts of piracy, or to have been the property of pirates, any authority to seize and detain the said steamship, which had been purchased at public auction by the said Augustus McCleverty, nor can the said steamship *Restauracion*, late *Telegrafo*, thus illegally seized, be brought within the jurisdiction of, or her alleged acts of piracy be recognisable by, this honourable court." The answer does not deny the facts of the sale and ownership as here stated, but alleges that the ship being found in the port, justified the seizure and warranted the jurisdiction of the court. On the 3rd May 1869 the *Telegrafo* was at Santo Marco, a Haytian port; at which time it would appear that a civil war existed, or an insurrection had broken out in the island of San Domingo. The *Telegrafo*, afterwards equipped as an armed vessel, did various acts of hostility, alleged on the one side to be piratical and on the other to be belligerent, upon various parts of the coast of San Domingo. She was then owned and commanded by one Domingo Acevedo. On the 8th June she was commissioned by the revolutionary government of San Domingo, having on board her Gregorio Lupron, general-in-chief of the Republican forces: on the 6th July she landed troops at Barrabona on the island, and about the 12th July she came into the port of Road Town, Tortola; on the 21st July she was sold by public

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auction for 10,025 dollars in a formal and regular manner by her owner to her present possessor, Mr. McCleverty, and she paid to the British Government certain dues upon the motion, according to the law of the place; and it was not till the 19th Jan. 1870 that she was arrested by a warrant from the Court of Vice-Admiralty, as a piratical vessel; she was at that time, and had been since the month of July, in the possession of a British owner, not connected in any way with her previous action, whether piratical or belligerent, on the coast of San Domingo; not an agent acting collusively for her former owner, for no such suggestion is made in the affidavit which led to the warrant or in the subsequent affidavits filed by the court, but a *bond fide* purchaser, at a public sale for value. This being the state of facts apparent on the face of the proceedings, and taken into the consideration of the court, their Lordships were anxious to know on what authority of principle or precedent this vessel could be arrested as belonging to a pirate. No precedent has been cited to their Lordships, but it has been strongly contended that the principles of law applicable to the cases of piracy warrant the arrest. Many authorities were cited for the purpose of establishing the position that the goods of pirates cannot be transferred by the pirates to a third party. That goods piratically taken cannot be transferred to a third party as against their legitimate owner is an undoubted proposition of public and of international law; but the further and different proposition that the ship of the pirate, which has not been taken from another person, cannot be transferred to an innocent purchaser for value, is not supported by any of the authorities cited. The goods of pirates are forfeited to the Crown in her Office of Admiralty, but not until after conviction, and the ship of the pirate, but not until after condemnation; or, as it is correctly stated in Bacon's Abridgment, "Piracy," "the goods of pirates not taken from others, belong, after attainment, to the Crown or its grantee; and those of which others have been despoiled will be forfeited in the same manner if the owners come not within a reasonable time to vindicate their property." The cases establish this position, that the Court of Admiralty has jurisdiction to entertain a suit, usually though not always instituted in a civil form, for restitution of goods piratically taken on the high seas. The question of restitution might, in fact, be raised by two modes of civil proceeding—either by what is technically called a cause of possession, as in the *The Segredo* or *Eliza Cornish* (1 Spinks, 37), in 1853, and in a recent case, the *Mary* otherwise *Alexandra* (18 L. T. Rep. N. S. 891), in which the United States of North America were the claimants; or by a cause of piracy civil and maritime (*causa spoliij civilis et maritima*). In the case of the *Hercules* (Chitty; 2 Dobson, Ad. Rep. 360), Lord Stowell considers the whole question of the authority of the Court of Admiralty in this matter. And it is necessary to observe how clearly the important distinction is taken between private owners seeking a restitution of their goods, and the Crown or Lord High Admiral proceeding *pro publica vindicta*, for condemnation or conviction. In the *Hercules*, an application was made to the court on behalf of Spanish subjects, who prayed restitution of certain moneys in possession of the court, alleged to be the proceeds of goods piratically

taken. Lord Stowell, in the course of his judgment (2 Dods. 373), observed:

The objections stated in argument are principally three: first, that there should be a preceding conviction of piracy; that this has not been generally required is sufficiently clear. It is true that where the Lord Admiral proceeds *pro interesse suo*, upon his royal grant *bona piratarum*, i. e., their own proper goods, not goods of others unlawfully taken on the sea, he must show that the party has been attainted of piracy (*Prinston and others v. The Admiralty*); but when a person, so despoiled of his own goods, proceeds merely for restitution, no such preliminary is required. Some of the proceedings here are by articles, which of themselves are of a criminal nature, and, therefore, could not have been preceded by a conviction. Others, as in the case of *Eglefield and others*, merely civil, by libel, or without reference to any antecedent conviction, nor has any such antecedent conviction been traced. In the case reported in Balgode (Pelaez's case), likewise in the 4th Institute, where the Spanish ambassador proceeded for the restitution of Spanish goods taken on the high seas from Spanish subjects (and the ambassador of that country appears to have been a frequent party in suite of this nature), and where the adverse party Pelaez, was a Jew, setting up a commission from Morocco, the court said he could not be proceeded against criminally, for it was not a robbery (I presume on account of his commission), but that they might deal civilly with him for them in the Admiralty, and that he ought to answer for them there civilly. And *per curiam* he may answer the suit at the point of restitution. And it appears as far as I can collect it, the settled law that without a conviction the party might proceed for what is termed the point of restitution.

In another part of his judgment Lord Stowell says:

A third objection is, that the act of piracy, being a crime, could not be considered by the common law as the proper subject of a civil suit for restitution. And it is certainly a known principle of common law that a civil suit cannot be founded on a felony, for that would approach to what is termed a compounding of a felony. The civil demand merges in the felony. The common law rather, perhaps, considers that demand as in the nature of a debt arising upon something like a contract, and *ex maleficio non erit contractus*. Whether this principle was imported (though with a more technical meaning) from the civil law (where I am not certain it is to be found in terms), or whether this mode of considering the demand as merged, is not a principle coeval and congenial with the fundamental principles of the common law itself, is more than I can presume to say. But I take the rule to be confined to such *maleficia* as the law technically considered as felonies, or as felonies and something more than felonies, as high treason. To misdemeanors, or other offences differently qualified, the policy of the law has not applied it. Now piracy is certainly not considered as a felony, at the common law, is expressly so laid down by Lord Hale. Pardon of all felonies reacheth not piracy. The principle, therefore, does not reach it, at least in its ordinary extent; and looking to what has taken place in the cases of prohibition alluded to, I am led rather to infer that it could not be extended to a crime belonging to, and defined by, another system of jurisprudence, and where reasons of legal policy and convenience rather appear to oppose its introduction; for though the law may very justly and commodiously apply its own peculiar principles to its subjects in their ordinary transactions, governed immediately by its own rules, and may, therefore, compel such individuals to give up, *pro publica vindicta*, and for the protection of the community, their own private claim of indemnification for any wrong they may have suffered, it by no means follows that where the wrong done is *contra jus gentium*, and the foreign sufferer, standing upon that law, requires a reparation, the common law of this country would impose upon him the burthen of sacrificing his private rights, so founded, to the duty of protecting the interest of the country of the offender, by confining the whole of his remedy to the useless privilege of a criminal prosecution.

As far as I am enabled to infer from the cases of attempted prohibition, the common law has made no such

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demand, but has admitted the prosecution of a civil suit for the point of restitution, either exclusively of a criminal prosecution, or in conjunction with it.

To the same effect is the old case *Radley and Bellow v. Eglesfield and Whitall*, reported in *Ventris*, p. 173, and referred to by Lord Stowell in this judgment. The present case, however, is clearly distinguishable from all these cases; here no private owner is seeking restitution of his ship, but the Crown is proceeding *pre publico vindicta*, without previous condemnation or conviction, against a vessel neither now piratically owned nor stated to have been piratically taken from any previous owner. There is no authority, their Lordships think, to be derived either from principle or from precedent for the position that a ship duly sold, before any proceedings have been taken on the part of the Crown against her, by public auction to a *bond fide* and innocent purchaser, can be afterwards arrested and condemned on account of former piratical acts to the Crown. The consequence flowing from an opposite doctrine are very alarming. In this case six months have elapsed between the sale and the arrest; but upon the principle contended for, six of any number of years and any number of *bond fide* sales and purchases would leave the vessel liable to condemnation on account of her original sin. Their Lordships are of opinion that the taint of piracy does not, in the absence of conviction or condemnation, continue, like a maritime lien, to travel with the ship through her transfers to various owners. Assuming, therefore, that this vessel had been piratically navigated previous to her transfer (a fact which their Lordships are very far from saying appears upon the affidavit which led to the warrant of arrest), their Lordships have arrived at the conclusion that the court ought not to have arrested a vessel which for many months had been in the undisputed possession of a *bond fide* purchaser by public auction on account of piratical acts alleged to have been committed from on board of her before the sale took place. Their Lordships, therefore, will humbly advise Her Majesty that the sentence of the court below should be affirmed, so far as relates to the dismissal of this suit. Their Lordships will direct that the respondent have his costs of the appeal to Her Majesty in council, but not the costs of his own adherence to the appeal, and no costs in the court below and no damages.

Judgment affirmed.

Solicitor for the appellant, F. H. Dyke, H.M.'s Procurator-General.

Solicitors for the respondent, J. and C. Robinson.

Thursday, June 15, 1871.

(Present: The Right Hon. Sir James W. Colville, Sir Joseph Napier, Lord Justice James, and Lord Justice Mellish.)

THE SAPHO.

Salvage—Ships belonging to same owners, When salvage services are performed by one ship to another, and both ships belong to the same owner, the crew of the ship which has performed the salvage services is entitled to salvage reward, if the services rendered are not such as the crew are bound to perform under their contract.

This was an appeal from a judgment of the Admiralty Court in a cause of salvage instituted on behalf of the boatswain and seventeen seamen of

the steamship *Nere* against the steamship *Sappho*. Both the ships belonged to the same owner. Sir R. J. Phillimore, by his judgment of July 27, 1870, decided that the plaintiffs were entitled to salvage, and awarded 350*l.*: (23 L. T. Rep. N. S. 710.)

Clarkson for the appellants.

Duane, Q.C. and *Gibson* for the respondents.

Judgment was delivered by MELLISH, L. J.—This is a suit for salvage, and it raises a question of considerable importance, namely, whether, when salvage services are performed by one ship to another, and both ships belong to the same owner, the crew (and the master also were he to claim it) of the ship which has performed the salvage services is entitled to salvage remuneration? It certainly seems curious that this question has never been decided on principle at all. It was very much considered in the case of the *Maria Jane* (14 Jnr. 857), which is said to be an authority, that in no case where the ship belongs to the same owners can any salvage remuneration be recovered. But when the facts of that case are looked at, their Lordships do not think that Dr. Lushington intended to lay down any such general rule. There the ships belonging to the same owner were engaged in the African trade. It is stated in the judgment that it was part of the general arrangement that the ships of the same owner and the crews of the same owner should render mutual assistance to each other, and the real question seems to have been whether the services there rendered did go beyond that mutual assistance which under the circumstances of the African trade and according to the well-known usages of that trade, one ship was bound to render another? Dr. Lushington, after all, puts the case upon what appears to their Lordships to be the true principle, namely, whether the services rendered were services which under their contract the seamen were bound to perform, and for which they are remunerated by their wages? (a) It is quite clear that as a general rule of law seamen cannot recover salvage remuneration for services which by their contract they are bound to perform, and therefore they never recover salvage remuneration for services connected with the saving of their own ship as long as the relation of master and servants between them and their owner, with reference to that ship, continues. But it has never been laid down, and their Lordships are not disposed to lay down, that if a seaman performs services for the benefit of his owner which are not within his contract, he cannot be entitled to salvage remuneration. Their Lordships do not say services which he is not bound to perform, because it may be that as an ordinary incident of a voyage if a ship meets another ship in distress, and the master orders the seamen of his ship to give assistance, they are to a certain extent bound to give assistance, but then for that assistance, if salvage services are rendered, they are entitled to receive salvage remuneration. Their Lordships do not see why the case should be different if it turn out that the ship to which the service is rendered belongs to the same owner. The ordinary contract which a seaman enters into certainly says

(a) Dr. Lushington, in his judgment in the *Collier* (L. Rep. 1 Adm. 83, 85), says that the *Maria Jane* was decided on the ground that the charterer was in possession of the saved vessel under the charter party, so as to divest the owners of their ownership for the time being. (See also the *Caroline*, Lush. 334; 5 L. T. Rep. N. S. 89.—En).

nothing about rendering services to another ship. He does something, therefore, which is not within his contract. It may be that he ought to do it because it is an ordinary incident that he should do it, but then if it is an ordinary incident that he should do it, and if he does it, not because it is within his contract, but for the reason Lord Stowell assigns in the case of the *Waterloo* (2 Dods. 443), where he says that nobody but a freebooter would refuse to render assistance under such circumstances, and that there is a moral duty to render assistance,—if he performs that duty towards a ship, though it may be belonging to the same owner, because of that moral duty, and not because it is within his original contract of service with his owner, there does not appear to be any good reason why the ordinary consequence should not follow, namely, that for this extraordinary service he should receive the remuneration which the law gives him. That appears to be in accordance with the ordinary rules laid down by Lord Stowell, and all the great authorities respecting salvage, that it is a right very much favoured in the law, and therefore that it ought not to be narrowed in a case which clearly comes within the principle. Indeed, the learned counsel for the appellant appeared to admit that if a man risked his life, that being a thing he was not bound by his contract to do, he would be entitled to receive salvage remuneration; but their Lordships do not see on what principle a distinction can be drawn between a case where a seaman risks his life and a case where he performs other extraordinary services which would in their nature be salvage services. That would be raising a new distinction, for which there appears no sufficient ground or authority. The true rule appears to their Lordships to be, to consider whether the services are in themselves of the nature of salvage services; and next, whether they are services which are within the contract which the seaman originally enters into, so that he receives remuneration for them by his ordinary wages. If they are not within his contract, so that he does not receive remuneration for them by his ordinary wages, and they are in their nature salvage services, their Lordships are of opinion that there is no good reason why the seaman should not receive the ordinary salvage remuneration which the law gives him. Then, as to the question of amount, their Lordships certainly think that the amount awarded by the court below is somewhat large, and they will not say that if they had to determine the question, they would give the same amount; but it is a fixed rule that their Lordships do not interfere with the amount given for salvage, unless it is a case where the amount is very greatly in excess or deficient in their Lordships' estimation; and they do not think that, on the whole, there is sufficient reason to induce them to interfere with the amount in this case. The result is, that their Lordships will recommend to Her Majesty that this appeal be dismissed, with costs.

Judgment affirmed.

Proctor for the appellants, *Thomas Cooper*.

Proctor for the respondents, *H. C. Coote*.

HOUSE OF LORDS.

Reported by DOUGLAS KINGFORD, Esq., Barrister-at-Law.

April 27 and 28, 1871.

(Before Lord CHELMSFORD, Lord WENTWORTH, Lord COLERIDGE, and Lord CAIRNES.)

SHEPHERD V. HARRISON AND ANOTHER.

Consignor and consignee—Vesting of property in goods—Condition precedent—Bill of exchange and bill of lading sent together.

P. N. and Co., of Pernambuco, purchased cotton for the plaintiff, a Manchester merchant. Two lots were received by the Plaintiff under bills of lading forwarded to him by the Liverpool agents of P. N. and Co., together with two bills of exchange for the amounts, the invoices being made out "on account of and at the risk of" the plaintiff. These bills of exchange were accepted by the plaintiff, and paid by him at maturity, but he protested that part of the cotton had not been bought according to his instructions. P. N. and Co. then forwarded the remainder (200 bales) of cotton by one of their own steamers, and wrote to the plaintiff, inclosing an invoice "on account and at the risk of" the plaintiff and saying that they had drawn on him for the amount, and that they inclosed the bill of lading. The bill of lading, which was indorsed in blank, was not, however, inclosed, but was forwarded, together with the bill of exchange, by P. N. and Co. through their Liverpool agents to the plaintiff. The plaintiff, on the ground that his order had not been complied with, refused to accept the bill of exchange, but he retained the bill of lading, paid the freight, and received a delivery order for the cotton signed by the defendants, who were unaware that the bill of exchange had not been accepted. On a refusal by the defendants to deliver the cotton, the plaintiff brought trover:

Held (affirming the judgment of the Court of Exchequer Chamber), that the plaintiff was not entitled to recover, the intention with which the bill of exchange and the bill of lading were sent to the plaintiff being, that the bill of exchange should be accepted or the bill of lading returned; and therefore that the bill of lading, on his refusal to accept the bill of exchange, gave no right of property to the plaintiff. (a)

ERROR on a judgment of the Court of Exchequer Chamber affirming a judgment of the Court of Queen's Bench on a special case.

The facts are briefly stated in the note above, and will be found at length in the reports in the courts below: (20 L. T. Rep. N. S. 24; 33 L. J. 105, 177, Q. B.)

Sir R. Palmer, Q. C. and Jordan for the plaintiff in error, referred to cases relied on in the arguments in the Queen's Bench: (See 20 L. T. Rep. N. S. 27.)

Holker, Q. C. and Gully, for the defendant in error, were not called on.

Lord CHELMSFORD.—My Lords, the question in this case is whether the defendants, the owners of the vessel *Olinda*, were bound to deliver to the plaintiff 200 bales of cotton, which were shipped by Paton, Nash, and Co. from Pernambuco, and

(a) This report is only a summary of the judgments delivered, it being unnecessary to set them out at length. The full judgments will be found in L. Rep. 5 H. L. Exg. & Ir. App. 116. The question was almost entirely a question of fact.—Ed.

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invoiced on account and at the risk of the plaintiff, and whether they are liable to an action for the non-delivery. The question is one entirely of fact, depending upon the circumstances stated in the special case, and upon inferences which the courts below were at liberty to draw from those facts. (His Lordship discussed the facts.) Now, on this question we have had the opinion of two courts—I should say the unanimous opinion, notwithstanding the slight doubt intimated by Cleasby, B.—and of nine judges, that the plaintiff, under the circumstances, was not entitled to the possession of the cotton. But it is said, on behalf of the appellants, that the inference of fact is only to be drawn with reference to decisions which have occurred with regard to documents which pass the property in goods; and we have been referred to cases to show that, where goods are shipped on account of and at the risk of a consignee, the absolute property in the goods vests in him, subject only to a right on the part of the consignee to stop in transitu. Some strong cases have been cited on that subject, and particularly two before Lord Ellenborough, viz., *Walley v. Montgomery* (3 East. 585) and *Cox v. Harden* (4 East 211). In the latter case the consignee had obtained possession of the goods, which, Lord Ellenborough said, removed the difficulty which stood in the way of the consignee, namely, “the circumstance of the captain’s having signed the bills of lading in such terms as did not entitle them to call upon him for a delivery under these bills of lading.” This shows, therefore, that upon a shipment with an invoice on account and at the request of the consignee, the consignee may impose conditions on the delivery of possession. Now that this is always a question of intention appears to me decided by the case of *Noakes v. Nicholson* (12 L.T. Rep. N.S. 573; 19 C.B. N.S. 290). In a book to which I have been referred, and which appears to be very ably written (Benjamin on Sale of Personal Property), the authorities on the subject are all collected, and the result summed up clearly and distinctly in the following passage (p. 288): “The following seem to be the principles established by the foregoing authorities: First, where goods are delivered by the vendor in pursuance of an order to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the vendee to receive it, and the delivery to him being equivalent to delivery to the vendee; secondly, where goods are delivered on board a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain, as bailee, for delivery to the person indicated by the bill of lading as the one for whom they are to be carried.” Under these circumstances I think that your Lordships can entertain no doubt whatever that the judges in the court below were right, and that the judgment of the Courts of Exchequer Chamber ought to be affirmed.

Lord WESTBURY.—My Lords, the law and the inferences of fact are in this case clear. The Pernambuco house in shipping the cotton took from the captain a bill of lading to their own order. The effect of this transaction was to contest the possession of the captain, and make him accountable for delivery to the holder of the bill of lading. The shippers also reserved to themselves the right of demanding possession from the captain. They had, therefore, all the incidents of property vested in them. Now this was not inconsistent with

the special terms of the shipment, namely, that the cotton was shipped on account of and at the risk of the buyers. The buyer, however, relies on certain circumstances to control the legal effect of the above transaction. With regard to the letter of Nov. 12, the bill of lading is spoken of as accompanying the invoice which the letter covers. But this it seems was a mere accidental mistake, which cannot affect the legal conclusion as to the transaction. Another and a very important inquiry is as to the intent with which Paton and Co. sent the bill of lading and bill of exchange to the present appellant. I think there is no doubt that the inference they intended to be drawn from their sending both documents together was that if the appellant did not choose to accept the bill of exchange he would send back the bill of lading. This was not done, and I take it that the bill of lading acquired in that way gave no right of property to the present appellant. The judgment of the court below ought to be affirmed.

Lords COLERIDGE and CAIRNS concurred.

Judgment affirmed.

Attorneys for the plaintiff in error, *Johnson and Wetheralls*, agents for *W. H. Hewitt*, Manchester.

Attorneys for the defendants in error, *Chester and Urquhart*, agents for *Lace, Banner and Co.*, Liverpool.

COURT OF QUEEN’S BENCH.

Reported by T. W. BACHESSE and J. BOWITT, Esqrs.,
Barristers-at-Law.

SECOND DIVISION OF THE COURT.

April 22, May 3 and 27, 1871.

(Before MELLOR, LUSH, and HANNEN (J.J.))

NICHOLSON (app.) v. WILLIAMS (resp.)

Port—Powers of the Board of Trade to declare the limits of—Taking ballast or shingle from—
54 Geo. 3, c. 159, s. 14.

The powers of the Board of Trade under the 16 & 17 Vict. c. 107 (Customs Consolidation Act 1853), and the 25 & 26 Vict. c. 69, s. 17 (the Harbours Transfer Act 1862) to appoint ports and declare the limits thereof, are not limited to revenue purposes only; nor are such powers confined to “ports” in their merely geographical sense. Where, therefore, by an order of the Board of Trade, the limits of the port of Hull were extended and defined, and the sea between Flamborough Head and Spurn Point was placed within them, and persons were prohibited from taking ballast or shingle from certain parts of the shore so extended as the port of Hull:

Held, that a person so taking ballast or shingle from such parts was guilty of an offence within the meaning of sect. 14 of the 54 Geo. 3, c. 159. (a)

This was a case stated under the 20 and 21 Viet. c. 43, by the stipendiary magistrate of Hull, upon a conviction by him of the appellant, under the 54 Geo. 3, c. 159, s. 14, for taking shingle from the shores of the port of Kingston-upon-Hull. The cases stated among other things, as follows:—

The information against the appellant in this case was laid by the collector of customs at Hull, by direction of the Board of Trade, and charges that the appellant did on the 11th April 1870, at

(a) This can scarcely be called a maritime law case; but as it may hereafter be useful in explaining the meaning of the word “port,” it is inserted.—Ed.

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the parish of Owthorn in the county of York unlawfully take shingle from the shores or banks, or from a portion of the shores or banks of the port of Kingston-upon-Hull, whereby the said port was, and is, in danger of being damaged contrary to the 54 Geo. 3, c. 159, thereby incurring a penalty of 10*l*.

The offence thus brought under consideration, was committed on the seashore at Withernsea, in the parish of Owthorn, and county of York, Withernsea being a village about fifteen miles to the north of the Spurn Point, and several miles south of Flamborough Head, and lying also between Spurn and a village called Hornsea. On the 1st Aug. 1868, the Board of Trade issued an order which prohibited the removal of shingle from the shore or banks or any portion of the shore or banks at Spurn Point, from the low lighthouse southward to the extreme of the point at low water, and northward two and a half statute miles on both sides of the Spurn Point. In July 1869 proceedings were taken by the board against several parties for infractions of this order at a place called Kilnsea, two miles from Spurn Point, and they pleaded guilty, no professional gentleman having appeared for them; the result being, that the practice of taking shingle within the limits defined by the order was stopped.

After the proceeding in July 1869, the Board of Trade issued a second order, bearing date the 6th Sept. 1869, prohibiting the removal of shingle or ballast from the shores and banks of the port of Kingston-upon-Hull, and the works thereof between the northernmost boundary of the parish of Hornsea, and the limits north of Spurn Point, defined by the said order of the 1st Aug. 1868.

The prohibition contained in this second order of the Board of Trade seems to have been the means of stopping the removal of shingle within the extended limits up to the 11th April last; but on that day the appellant, by the direction of Sir Clifford Constable, removed shingle from the shore near Withernsea, a previous intimation that he would do so having been sent to the Board of Trade by Sir Clifford Constable's solicitor.

The removal of the shingle is admitted, and it was not only admitted, but proved before me by the evidence of Mr. Code, Captain Carter, Mr. Oldham, and others, that such removal, if unrestricted from Hornsea to Kilnsea, must, by endangering the lighthouse at Spurn and the navigation and harbours in the Humber, in the Hark roads, and under Snak Island, to be injurious to the last degree to the port of Hull, assuming that such port (as alleged on the part of the Board of Trade) should be found to extend from Trent Fall to Flamborough Head.

Mr. O'Dowd (who appeared for the Board of Trade), after quoting various authorities, proceeded to the Acts, Orders, &c., of more modern date, which authorise the Board of Trade to proceed against parties removing shingle from the coast at Withernsea, and he submitted the mode under which a port can now be created, and the only mode is under the provisions of an Act, commonly called the Customs Consolidation Act 1853 (16 & 17 Vict. c. 107), but the full title of which is an Act to Amend and Consolidate the Law relating to the Customs of the United Kingdom and of the Isle of Man, and certain Laws relating to Trade and Navigation, and the British

Possessions. Under that Act the Treasury may by their warrant appoint any port or sub-port in the United Kingdom, and declare the limit thereof, and appoint proper places within the same to be legal quays for the lading and unlading of goods, and declare the bounds and extent of any such quays, or annul the limits of any port, sub-port, haven, creek, or legal quay already appointed, or to be hereafter set out and appointed, and declare the same to be no longer a port, sub-port, haven, creek, or legal quay. . . . or alter and vary the names, bounds, and limits thereof, &c. Mr. O'Dowd then contended that under the powers of this Act, Hull was appointed a port by the Treasury, as appears by the *Gazette* of 17th March 1848 (No. 20,837), hereto annexed, and that such port commences at the confluence of the Trent and Ouse, and extends to Spurn Point at the entrance of the Humber, and from thence northerly along the coast of Yorkshire to Flamborough Head. The 54 Geo. 3, c. 159 (which creates the offence alleged to have been committed by appellant) enacts that in order to prevent damage being done to the shores or banks of the ports, harbours, or havens of the kingdom, no person shall take ballast or shingle from the shores or banks, or any portion of the shores or banks, of any port, harbour, or haven of the kingdom from which the Commissioners for executing the office of Lord High Admiral shall find it necessary, for the protection of such port, harbour, or haven, or the works thereof, by order published in the *Gazette*, to prohibit the taking or removing of such shingle or ballast upon pain of forfeiting ten pounds for every such offence.

By the Harbours Transfer Act 1862 (25 & 26 Vict. c. 69, s. 17) it is enacted that from and after the 31st Dec. 1862, sects. 14 and 16 of the 54th Geo. 3, c. 159, and all provisions relative thereto shall be read and construed as if the Board of Trade were named in the said section instead of the Admiralty.

In pursuance of the powers thus conferred upon them, the Board of Trade issued the two orders already referred to, A and B, and for the breach of the observance of the second of those orders the proceedings against appellant have been taken.

In reply to the case for the prosecution, Mr. Kemplay admitted that if the Board of Trade have power to make an order that will include Withernsea, the defendant must be convicted, but contended that the port of Hull, alleged by the prosecution to extend from Trent Falls to Flamborough Head, and thus or otherwise to include Withernsea, is only a port for Customs Purposes, and not a port within the meaning of the 14th section of 54 Geo. 3, c. 159, and that that statute applies only to ports as defined by Lord Hale.

The only case referred to by Mr. Kemplay in support of this argument was the *Hull Dock Company v. Brown* (2 Barn. & Adol. 43), and I find that it was noticed in a subsequent case, *Beilby v. Raper* (3 Barn. & Adol. 284); but upon examining those cases they do not appear to me to lead to the conclusions Mr. Kemplay was contending for. I failed to satisfy myself, having regard to the mode of creating ports in ancient and more modern times, and to the various authorities on the subject of ports, to which reference has been made, that it would be safe for me to coincide in the conclusion that the port of Hull can only be said to include the coast near Withernsea for Customs purposes,

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so as to exclude that part of the coast from the protection of the 54 Geo. 3, c. 159, s. 14.

I can find nothing in the title or object of the Act of 1853 that indicates any intention to circumscribe the ports created under its provisions to merely revenue purposes, or in any matter whatsoever, but on the contrary, the ports referred to would seem to be capable of limitation only in accordance with the terms of the order creating them, nor do I find in the order of 1848 any words circumscribing the creation of the port of Hull, so as to limit its provisions to merely revenue purposes, nor is it a fact that the duties of the Customs in reference to the port of Hull, using that term in the extended sense contended for by the Board of Trade, are limited to revenue purposes, as I find that the Customs have jurisdiction over the port of Hull as thus extended for various purposes wholly independent of revenue, such as cases of stranding, registry of vessels, &c., being the ordinary agents of the Board of Trade in matters not belonging to the Customs as a revenue department. It has not been suggested by the appellant that there is any other mode of creating a port in the present day than that adopted as to the port of Hull under the order of 1848, and it has not been shown by evidence or otherwise that there is or ever was a port of Hull in accordance with the definition of Lord Hale, though it would seem from the case referred to by Mr. Kemplay that there was formerly a port of Sayer Creek, which was sometimes called the port of Hull. No reasons were adduced by the appellant when before me for contracting materially the benefits to be derived from the 54 Geo. 3, c. 159, s. 14, though such a result must follow if that Act is confined to such ports only as come literally within the definitions contained in Lord Hale's work.

On a review of the various legal authorities adduced before me, I decided in favour of the view taken by the Board of Trade, and held that, according to the proper construction of the authorities referred to of the 16 & 17 Vict. c. 107, the 54 Geo. 3, c. 159, s. 14, and of the Prohibitory Orders of the Board of Trade, an offence had been committed by the appellant as charged against him in the information before me, and I found him guilty accordingly.

The only question of law that I propose to submit on the above statement for the opinion of this court is, whether the orders of the Board of Trade, having date the 1st Aug. 1868 and the 6th Sept. 1869, are valid in point of law?

If the court should be of opinion that the said orders are valid, then the said conviction was legally and properly made, and the appellant is liable as aforesaid, and the said conviction is to stand; but if the court should be of opinion otherwise, then the said information is to be dismissed.

Attached to the case were an extract from the *London Gazette* of the 17th March 1848 (No. 20,837), purporting to be an order of the Lords of the Treasury, annulling the limits of the port of Bridlington, and defining the limits of the port of Hull; also an order prohibiting the taking of ballast or shingle from the shores or banks of the said port. Reference to these will be found sufficiently made in the statement of the case, and in the judgment of the court.

Sir John Karslake, Q. C. (Kemplay with him)

appeared for the appellant, and in the course of his argument cited the following statutes and authorities:—

54 Geo. 3, c. 159, ss. 2, 3, 4, 6, 7, 8, 11, 12, 14, 16;
19 Geo. 2, c. 22, s. 7;
6 Geo. 4, c. 107, s. 135;
9 & 10 Vict. n. 162, ss. 13, 14, 15, 16, 17;
16 & 17 Vict. c. 107, ss. 9, 10, 15, 16, 31, 37, 236, 335;
The General Steam Navigation Company v. The British and Colonial Steam Navigation Company.
1. Rep. 3 Ex. 330; 37 L. J. 194, Ex.; 19 L. T. Rep. N. S. 357;
Callis no Sewers, 58, 72;
The Mayor of Exeter v. Warren, 5 Q. B. 773;
Dock Company of Kingston-upon-Hull v. Browne, 2 B. & Ad. 43;
Hale de Portibus Maris, 46, 47, 50.

The Attorney-General (Beasley with him) appeared for the respondent, and in addition to the above authorities quoted, *Hammill's Laws of the Customs*, 77.

The arguments of counsel are so fully adverted to in the following elaborate judgment, that it is unnecessary further to refer to them.

Cur. ad. vult.

May 27.—LUSH, J.—The question submitted to us by the case is, whether two orders of the Board of Trade, dated the 1st of Aug. 1868, and the 6th Sept. 1869, are valid in point of law. The first of these orders, after reciting that the board had found it necessary for the protection of the harbour or haven of the river Humber, and of the shores and banks thereof, and of the works thereof, to prohibit the taking or removing of any shingle or ballast from the shore or bank thereafter specified, prohibited all persons from taking or removing any description of shingle or ballast from the shore or banks, or from any portion of the shore or banks, at Spurn Point, from the Low Lighthouse southward to the extreme of the point at low water, and northward two and a-half statute miles on both sides of the Spurn Point. The second order, after reciting the first, and that for the further protection of the said harbour, haven, or port, and also for the protection of the shores and banks of the port of Kingston-upon-Hull, and of the works thereof, the Board of Trade had found it necessary to extend the limits mentioned therein, went on to prohibit the taking of shingle or ballast from the shores or banks, or from any portion of the shore or banks of the said harbour or haven, or from the shores and banks of the port of Kingston-upon-Hull, and the works thereof, between the northernmost boundary of the parish of Hornsea and the limits north of Spurn Point, defined by the order of the 1st Aug. 1868. These orders were professedly founded on the statute 54 Geo. 3, c. 159, s. 14, by which it is enacted that, in order to prevent damage being done to the shores or banks of the ports, harbours, or havens in this kingdom, no person or persons shall take any ballast or shingle from the shores or banks or any portion of the shores or banks of any port, harbour, or haven of this kingdom from which the Commissioners for executing the office of Lord High Admiral of the United Kingdom for the time being shall find it necessary for the protection of such port, harbour, or haven, or the works thereof, by order under their hands, &c., to prohibit the taking or removing of such shingle or ballast, upon pain of forfeiting for every such offence the sum of 10*l*. By the 25 & 26 Vict. c. 68, s. 16, the powers vested in the Commissioners of the Admiralty by this section were transferred to the Board of Trade. The

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place where the shingle was taken by the defendant, and for which taking he was convicted, is not upon any portion of the shore or banks of that which is popularly known or which would be geographically described as the harbour or haven of the Humber, or the port of Kingston-upon-Hull, but upon a part of the coast fifteen miles to the north of Spurn Point, and lying between Spurn and a village called Hornsea. This was not in any sense part of the port of Kingston-upon-Hull, or of the haven of the Humber at the time of passing the 54 Geo. 3; but it was, at the date of the offence, within the limits of the port of Kingston-upon-Hull, as those limits were appointed and defined by an order of the Commissioners of Customs made in 1848, and published in the *London Gazette* on the 17th March in that year. By that order, made under the 9 & 10 Vict. c. 102, the coast from Spurn Point to Flamborough Head, which in the fourth year of Geo. 2 had been assigned to the port of Bridlington, and which, at the passing of the 54 Geo. 3, was within the limits of that port, were transferred to and directed to form part of the port of Hull. On behalf of the appellant it was contended that the powers of the Board of Trade under the 53 Geo. 3, c. 159, s. 14, are confined to what is geographically within part of the port or haven which is popularly known as such, or at all events, as regards this case, to so much of the shore as formed part of the port of Hull at the time when the Act passed. The title of the Act is, "An Act for the better Regulation of the several Ports, Harbours, Roadsteads, Soundings, Channels, Bays, and Navigable Rivers in the United Kingdom, and of His Majesty's Docks, Dockyard, Arenals, Wharfs, Mooring, &c.," and it contains various enactments, some of which apply to the whole coasts of the kingdom, others only to places frequented by ships for the purpose of loading and discharging. The two sections immediately preceding the 14th belong to the former class. They prohibit the unloading on any part of the shore, except at a wharf constructed for the purpose, of any ballast, stone, gravel, &c., except at or within two hours before, or two hours after, high water, and the depositing of such matters at any time below low water mark at neap tides, &c. The 14th section belongs to the latter class, and applies only to ports, harbours, or havens, its object being to prevent disturbance of the shore of these places or resort for shipping which might result in injury to the navigation and consequent detriment to commerce. It is therefore clear that the jurisdiction of the Board of Trade to prohibit the taking of shingle extends not over the whole of the coast of the kingdom, but only over such portions thereof as are within the ambit of a port, harbour or haven. Whatever is done beyond those limits is left to be dealt with at common law, but within those limits the jurisdiction of the board to prohibit the public from taking shingle or ballast is absolute and without appeal. What may be the meaning and operation of the saving clause, the 28th section, it is unnecessary to consider, because the defendant did not bring himself within its provisions. On the other hand, it is equally clear that their jurisdiction is not limited to ports or havens for which regulations have been made under the earlier sections of the Act. The enactment applies, as the object and purpose of it require that it should apply, to "any" and every port, harbour, and haven in the kingdom. Ports and havens are

not mere geographical expressions. They are places appointed by the Crown for persons and merchandises to pass into and out of the realm, and at such places only is it lawful for ships to load and discharge cargo. The assignment of such places to be "the" inlets and gates of the realm is and always has been a branch of the prerogative, resting, as Blackstone remarks (vol. 1, p. 264), partly upon a fiscal foundation, in order to secure the king's marine revenue. Their limit and bounds are necessarily defined by the authority which creates them, and the area embraced within those limits constitute the port. Having once granted the franchise, the king had not at common law the power of resumption or of narrowing and confining their limits when once established, but any person had a right to load and discharge his merchandise in any part of the haven, whereby, as observed by Blackstone in the same volume, "the revenue of the Customs was much impaired and diminished by fraudulent loadings in obscure corners." This occasioned the statutes of 1 Eliz. c. 11, and 13 & 14 Car. 2, c. 11. The latter statute (sect. 14) enables the Crown by commission to appoint all such further places, ports, havens, and creeks (except the town of Hull) as shall be lawful for loading or discharging, lading or shipping of any goods, wares, or merchandises within the Kingdom of England, and to set down and appoint the extents and limits of every port, haven, or creek within the kingdom, whereby the extents, limits, and privileges of every port, haven, or creek may be ascertained and known. The town of Hull, which was a legal port time out of mind, having been excepted out of the operation of this Act, a private Act was passed in the 14 Geo. 3 (c. 56), whereby His Majesty was empowered to assign necessary places and quays at Kingston-upon-Hull, and to settle the extents and limits of the same; and by the 45 Geo. 3 (private), the rights and privileges which then belonged to the port of Kingston-upon-Hull were extended to new docks and basins then made, which were deemed and held to be part of the port: (see *Hull Dock Company v. Brown*, 2 Bern. & Ald. 43.) The Act of Charles II. remained in force down to the year 1825, when it was repealed, together with a large number of other statutes relating to the Customs, and a new Act passed (6 Geo. 4, c. 108, s. 135), whereby a similar power was given to appoint by commission out of the Court of Exchequer any port, haven, or creek in the United Kingdom, and to set out the limits thereof; but this section contained a proviso in affirmance of the common law, that all ports, havens, and creeks, and the respective limits thereof, and all legal quays appointed and set out and existing as such at the commencement of the Act under any law till then in force shall continue to be such ports, havens, creeks, limits, and legal quays respectively as if the same had been appointed under the Act. This provision was re-enacted in the subsequent Consolidation Acts (the 3 & 4 Will. 4, c. 52, and 8 & 9 Vict. c. 86), and each contained the saving in favour of existing ports and quays. But the 9 & 10 Vict. c. 102, which dispensed with the commission out of the Exchequer, and vested the appointment of ports, sub-ports, and quays in the Commissioners of Customs, abrogated the right which existed at common law which had been preserved by all the previous Acts. Sect. 15 empowers the com-

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missioners to annul the limits of any port sub-port, haven, creek, or legal quay, or to alter or vary the names, bounds, or limits of any such port, sub-port, haven, creek, or quay. Sect. 16 requires the appointment, annulment, or alteration to be published in the *London Gazette*. It was under this statute that the order was made in 1848, annulling the port of Bridlington, and assigning the limits formerly of that port to the port of Hull. From these considerations it appears to us to be beyond a doubt that the word "port" in 54 Geo. 3 is used not in a geographical, but in its legal and proper sense, as denoting a place to which ships were or should be authorised to resort for loading and discharging. Its object and purpose being the preservation and protection of these places from injury for the sake of shipping and commerce, it cannot have been meant to refer to places where ships are not allowed to resort, nor can it refer to the mere geographical limits of such places. Ports and havens are not bounded by such limits, but by limits arbitrarily defined by the authority by which the port is constituted. Bridlington, which was created a port under the statute of Car. 2 extended along this very line of coast at the time the 54 Geo. 3 was passed. Can it be said that this spot was not at that time a part of the shore or bank of the port of Bridlington? It had as a port no other limits than those which were assigned to it when it was created a port. But it was further argued that as Hull is an ancient port, and the power to vary its limits was given for Customs purposes only, the limits of the port remained for all other purposes as they were at the time the 54 Geo. 3 passed, and that the 14th section must be read as applying to the port as it existed at that time. We cannot accede to this argument. It was for Customs purposes that ports were at first instituted, and it is for such purposes they are allowed to retain their franchise, and although at common law the Crown could not revoke an appointment once made, it is clear that under the 9 & 10 Vict. c. 102, the Crown now has the power to annul and take away the franchise from any port, whether it be an ancient port like Hull, or a comparatively modern one like Bridlington. When this, however, is done, the place ceases to be a port, and the 54 Geo. 3 no longer applies to it. If, instead of annulling the port, the commissioners were to contract its ancient limits, the port would consist of the area embraced in those new limits and the coast outside, though formerly subject to, would no longer be within, the jurisdiction of the Board of Trade; so if instead of annulling or contracting, the commissioners extend the limits of the port, the parts newly taken in become as much a part of the port as was the part originally within it. If the question were whether a right to anchorage or other dues claimable in the port as it existed before the order of 1848, is by virtue of that order extended over the new area, the case would be widely different. The answer that the enlargement was made for Customs purposes, and not to benefit the grantee of the dues, would be conclusive, but that has no bearing on the question we have to decide, which is whether the extended limits form part of the port within the meaning of the 54 Geo. 3, c. 159. For the reasons given we are of opinion that they do, and that the port intended by that Act is the port as it is constituted for the time being by the orders of the

Commissioners of Customs. We therefore affirm the conviction. *Conviction affirmed.*

Attorneys: Brookesbank and Golland; The Solicitors to the Board of Trade.

ADMIRALTY COURT.

Reported by J. F. ASPIALL, Esq., Barrister-at-Law.

April 20 and June 6, 1871.

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Non-delivery of cargo—Outbreak of war—German ship—English bill of lading and consignees—What law governs—General maritime law.

There is a general maritime law administered alike by English and foreign courts, having admiralty jurisdiction, distinct from the municipal laws of nations. (a)

Lloyd v. Guibert (13 L. T. Rep. N. S. 602) considered.

By the laws of England and of the North German Confederation, a bill of lading is decisive as between ship owner and consignee, and the North German code, although providing a form of bill of lading, does not prevent a special form of contract.

The master of a North German vessel, under a North German charter party, gave a bill of lading for goods shipped on board his vessel, in South America, as part of a general cargo to be delivered in North Germany to English consignees. The English language, money, and weight were used in the bill of lading, which contained the proviso, "the dangers of the sea only excepted." The master of the vessel, on her arrival at Falmouth, refused to proceed on account of the outbreak of war between France and Germany:

Held, that, whether the contract was governed by English, general maritime, or North German law, the master was bound to proceed, as the bill of lading was precise in its terms, and, contemplating the happening of certain events, exempted him in only one event.

The goods were stowed at the bottom of the hold under those of the other shippers, and as the charterers refused to consent to the unloading of the cargo at

(a) There may arise cases of contract where the law of no particular state is applicable, no intention of the parties being expressed, as in the case of a contract made on the high seas between vessels of different states, to be performed on the high seas, and there is no doubt that there are certain rules of conduct which are observed by all civilised nations alike, and this applies both to questions of contract and tort. Such rules are enforceable by both British and foreign courts, and so become law, and therefore it may be said, that in maritime matters there is a general maritime law. The legislative enactments of England, or of other countries, cannot apply to foreign ships with respect to acts done on the high seas or in foreign ports, unless their owners so wish at the time, and when a suit is instituted against such ships, it is manifest that there must be some law applicable to them which is distinct from the statute law of the land, and this law is derived from those principles which form the foundation not only of our English law, but of the laws of all civilised nations. Such a law whatever it may be called, is no doubt administered by English and foreign courts having admiralty jurisdiction. As the principles themselves do not make the law, but it is made rather by the application of them, the dictum above will not conflict with the words of Willes, J., in *Lloyd v. Guibert (sup.)*, where he uses the phrase, "the general maritime law as administered in England." As to the law governing cases of collision between British and foreign ships on the high seas, see *The Zollverein (Sw. 96)*, *The Dniproff (Sw. 68)*, *The Chancellor (14 Moo. P. C. C. 202; 9 L. T. Rep. N. S. 627)*.—Ed.

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Falmouth, the master would not deliver to the consignees there, even on the offer of full freight : Held, that the master was bound to deliver at Falmouth.

Semble, that as the rights and obligations of the parties to a contract are to be determined by the law which they have declared themselves to intend, and as where there is no express declaration of intention, the presumption as to the law contemplated by the parties must be gathered from the circumstances of the case, in this case the English law applied to the contract as between the shipowner and consignee. (a)

This was a suit instituted under the 6th section of the Admiralty Court Act 1861 on behalf of Messrs. Chalmers, Guthrie, and Co., of Idol-lane, in the City of London, merchants, the consignees under a bill of lading of 1923 bags of coffee on board the ship *Patria*, for damages occasioned by the non-delivery of the said goods.

The *Patria* is a vessel sailing under the flag of the North German Confederation, and belonging to the port of Geestemünde in Hanover, one of the states of the Confederation, and her owners are subjects of the said state. In March 1870 she was chartered to Messrs. Frederick Müller and Sons, of Bremen, subjects of the said Confederation, and the said charter was entered into at Bremen.

Whilst under the said charter party, she was lying at the port of Champerico, in the republic of Guatemala, taking in a general cargo for Hamburg. The said cargo was shipped under the charter party for the benefit of Messrs. Müller and Sons, and was procured by them or their agents, and not by the owners of the ship.

The plaintiff's goods were shipped on board the *Patria*, to be carried to Hamburg, on the terms of the following bill of lading.

Shipped in good order and condition by Fdgoras y Ceballos on board the vessel called the *Patria*, whereof B. H. Kassebohm is master, now lying at the port of Champerico, and bound for Hamburg, via Teojate and San Jose de Guatemala, to carry, 1923 bags of coffee, of 130lb. net each, being marked and numbered as in the margin, and are to be delivered in the like order and condition at the port of Hamburg (the dangers of the sea only excepted) unto Messrs. Chalmers, Guthrie, and Co., of London, or to assigns, be or they paying freight for the said goods 4l. British sterling per ton of 2240lb. and 5l. per cent. primage. In witness whereof the master or purser of the said vessel hath affirmed to five bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

B. H. KASSEBOHM.

Dated in Champerico the 19th March 1870.

Five copies of the said bill of lading were signed by the master, and four were given by him to the said Fdgoras y Ceballos.

All the remaining goods on board the *Patria* were shipped to Hamburg by, and belonged to, subjects of the North-German Confederation, and continued to belong to them up to the institution of this suit. On 5th April 1870 the *Patria* sailed for Hamburg, and on the 23rd Aug. arrived in the British Channel, and her master and certain of her crew being ill and in want of medical assistance, the ship put into the port of Falmouth.

Before the arrival of the ship in the English Channel war had broken out between France and Germany, and was then existing, and the port of Hamburg was blockaded by a French fleet from

the 19th Aug. until the 18th Sept. At the time the *Patria* put into Falmouth there were French cruisers in the channel and on the whole line of route to the port of Hamburg, and if she had gone to sea she would have run great risk of capture.

The master of the *Patria* on the 9th Sept. left his ship, which remained at Falmouth, and went to London, and did not return until the 1st Dec. The ship was arrested on the 9th Nov. 1870. Previous to the arrival of the ship, on the 1st June 1870, the plaintiffs learned, by a letter from Messrs. Müller and Sons, from Bremen, that they were the charterers and consignees of the vessel, and the plaintiffs wrote, on the 16th July 1870, to Müller and Sons, a letter set out in the judgment.

A correspondence took place between the plaintiffs and the master of the *Patria*, and in substance it showed that the plaintiffs did not require the master to sail during the blockade of the port of Hamburg; that they required delivery at Hamburg after the raising of the blockade, unless the master would deliver at Falmouth, either of which the master refused to do. The plaintiffs' demand for delivery at Falmouth was disputed, and the master said that there had never been a distinct demand. The master further said that there had been no sufficient tender of freight, but the plaintiffs gave evidence to prove the tender, and called a Mr. Coward, clerk to Broad and Sons, plaintiffs' agents in Falmouth, who swore that he said to the master "We will pay full freight, as if the ship was discharged at Hamburg." All the bills of lading were not given up, but it did not appear that the master made any demand for them. The goods in question were stowed at the bottom of the vessel, and could not be got out at Falmouth without unloading the goods of the other shippers. To this Müller and Sons, the charterers, would not consent unless the plaintiffs paid their proportion of the general average expenses of such unloading. It did not appear on the evidence that any demand for such payment had been made. Paragraph 2 of the defendant's answer said that the goods were shipped "on the terms of a bill of lading signed and delivered by the master of the *Patria*."

The defendants' answer also contained the following paragraph:—

13. By the law of Hanover and the said North German Confederation, the master of the *Patria* was entitled to keep the *Patria* in Falmouth harbor, whilst the *Patria* or her cargo, or part thereof, would have been liable to risk of capture at sea by reason of the continuance of the said war, and the master of the *Patria* was not by such law, whilst the blockade continued, or whilst the said war and liability to risk of capture continued, under any obligation to the plaintiffs to proceed or attempt to proceed to Hamburg with the *Patria*; and by the said law the master of the *Patria* in putting into and remaining with the *Patria* in the said harbour of Falmouth as aforesaid had not at the time of the institution of this suit been guilty of any breach of duty or of contract to or with the plaintiffs.

15. By the law of Hanover and the said Confederation, certain expenses incurred by reason of the *Patria* having gone into and having been detained at Falmouth became divisible among ship freight and cargo, according to the principles of general average; and by such law the master of the *Patria* is entitled to retain any part of the cargo of the *Patria* for the proportion of such expenses chargeable on or in respect of such part, or until the owner of such part should have given security for the payment of such proportion, and the plaintiffs never tendered or offered to pay their proportion of the said expenses in respect of the cargo comprised in the said bill of lading, nor to give security for the same.

(a) This does not in any way conflict with *Lloyd v. Guibert* (sup.), as in that case the intention of the parties furnished the guide to the governing law.—ED.

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17. By the law of Hanover and the said Confederation, the master of the *Patris* was forbidden to deliver to the plaintiffs, and could not lawfully deliver the goods mentioned in the said bill of lading unless all the copies of the said bill of lading, signed by the said master and delivered by him as aforesaid, were delivered as aforesaid. The plaintiffs never tendered to the said master diverse of the said copies of the said bills of lading; and divers of such copies have remained and are in the hands of persons unknown to the said master and the owners of the *Patris*.

20. The defendants further say that, by the said charter party aforesaid, which bore date the 29th Jan. 1829, the said charterers were entitled to the use of the said ship, and that the said ship had been put up by them as a general ship; and thereby the said bill of lading was signed and delivered by the said master pursuant to the terms of the said charter party, for the benefit of the said charterers and not for the benefit of the owners of the said ship; and that in signing and delivering the said bill of lading, the said master acted as agent for the said charterers and not as agent for the defendants.

21. The said *Edigoras y Coballas* had, at the time when the said goods were shipped, notice that the said ship was under charter; and the plaintiffs had, at the time when they became the consignees of the said goods, notice that the said ship was under charter at the time of the said shipment.

22. The defendants submit that the said goods mentioned in the said bill of lading were not carried into any port in England or Wales within the true intent and meaning of the Admiralty Court Act 1851, s. 6, and that this Honourable Court has no jurisdiction to entertain this suit.

Mr. Travers, Vice-Consul of the North German Confederation, who was German advocate, proved the existence of a North German code of laws and produced a copy of the Mercantile Code, and said that a correct translation of the part relating to maritime law was published in "Papers on Maritime Legislation, with a translation of the German Mercantile Law relating to Maritime Commerce, by Ernst Emil Wendt. The articles of the code referred to in the argument were as follow:

Art. 504.—The master shall at the same time take every possible care of the cargo during the voyage, in the interest of those who are concerned therein. When special measures are required in order to avoid or lessen a loss, it is his duty to protect the interests of those concerned in the cargo, as their representative; to take their instructions, if possible, and, as far as circumstances admit, to carry the same into effect; otherwise, however, to act according to his own discretion, and generally to take every possible care that those interested in the cargo are speedily informed of such occurrences, and of the measures thereby rendered necessary. He is in such cases particularly authorized to discharge the whole or portion of the cargo; in the most extreme cases, if a considerable loss on account of imminent deterioration or other causes cannot be otherwise averted, to sell or hypothecate it for the purpose of providing means for its preservation and further transport; to reclaim it in the case of capture or detention; or, if it shall have been otherwise withdrawn from his charge, to take all extrajudicial and judicial steps for its recovery.

Art. 505.—When the prosecution of the voyage in its original direction is prevented by an accident, the master is at liberty either to continue the voyage in another direction, or to suspend it for a shorter or longer period, or to return to the port of departure, according to the circumstances, and to the instructions received, which latter are to be adhered to as far as possible. In the case of the annulling of the contract of affreightment, he shall act according to the provisions of Art. 634.

Art. 631.—Either party can withdraw from the contract without being liable for damages.—1. When, before the commencement of the voyage, the vessel is placed under embargo, or taken possession of for the service of the country or a foreign power; the trade with the port of destination is prohibited; the loading port or the port of destination is blockaded; the exportation of the goods, to be shipped according to the contract of affreightment,

from the port of loading, or their importation into the port of destination is prohibited; the vessel is by a Government order prevented from putting to sea; or the voyage, or the transmission of the goods to be shipped according to the contract of affreightment, is prohibited. In all the foregoing cases, however, the Government order justifies the withdrawal of the contract only when the impediment that has arisen is apparently not of short duration. 2. When, before the commencement of a voyage, a war has been declared, in consequence of which the vessel, or the goods to be shipped according to the contract of affreightment, or both, can no longer be considered free, and would be liable to risk of capture.

Art. 634. The dissolution of the contract or affreightment alters nothing in the obligation of the master to take care of the cargo in the absence of the interested parties, even after the loss of the vessel (articles 504, 505). The master is, therefore, justified and obliged, and in urgent cases even without previous inquiry, as circumstances may require, either to forward the cargo to the port of destination in another vessel for account of the parties concerned, or to have it stored, or sold, and in case of its being forwarded or stored, to sell a portion of the same for the purpose of realising the funds necessary thereto and to its preservation, or in case of its being forwarded, to take a bottomry bond on the whole or part of it. The master is, however, not obliged to part with the cargo, or deliver it to another master for the purpose of its being forwarded, unless the distance freight as well as all other claims of the shipowner, and the contributions due from the cargo for general average, salvage, and assistance and bottomry have been paid or secured. The shipowner is answerable for the fulfilment of the duties devolving on the master according to the first section of this article, to the extent of his ship, so far as anything has been saved of it and of the freight.

Art. 636. When subsequent to the commencement of the voyage, any of the incidents occur to which reference is made in Art. 631, either party has a right to withdraw from the contract without being liable to damages.

When, however, any of the incidents mentioned in Art. 631, No. 1, have occurred, the parties have, before being able to withdraw, to wait for the removal of the impediment, three or five months respectively, according as the vessel is a European or in a non-European port. Such period shall be calculated from the day of receiving notice of the impediment, if the master is then at a port, or from that day on which, after having received such notice, he first reaches a port with the vessel.

The discharge of the vessel shall, in default of an agreement to the contrary, take place at the port at which it is staying at the time of the receipt of the notice of withdrawal. The charterer is bound to pay a distance freight for such portion of the voyage as is actually performed.

When, in consequence of such impediment, the vessel has returned to the port of departure or to any other port, in calculating the distance freight the nearest point to the port of destination which the vessel had reached shall be taken as the basis for ascertaining the distance actually performed.

The master is likewise bound to act, in any such cases, before and after the dissolution of the contract of affreightment, in the interest of the cargo, in conformity with the articles 504-506, and 634.

Art. 637. When the vessel, after taking in its cargo, is detained in the port of loading before the commencement of the voyage, or in an intermediate port, or in a port of refuge after its commencement, by any of the emergencies mentioned in Art. 631, then the expenses of such detention (even if the requirements of general average are not present) are divided among the ship, freight, and cargo, according to the principles of general average, whether the contract is thereby put at an end, or afterwards completely fulfilled. The expenses of the detention include all the expenses enumerated in the second clause of art. 708, No. 4, but those of putting into and leaving port only when the vessel has put into a port of refuge on account of the obstacle.

Art. 641. Should the contract of affreightment be dissolved, pursuant to Art. 630-636, the expenses of unloading from the vessel are borne by the shipowner, and all other expenses of the discharge by the charterer. When, however, the cargo only has been affected by the incident, the whole of the expenses of the discharge are borne by the charterer. The same rule applies when, in the case of

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Art. 638, a part of the cargo is discharged. When in such a case, it was necessary to put into a port for the purpose of discharging, the charterer shall also bear the port charges.

Art. 643. Should the contract not extend to the whole of the vessel, but only to a proportionate part, or to a specially defined space of the same, or to a general cargo, the articles 630-642 apply, subject to the following modification, viz.: 1. In the cases of articles 631 and 636 either party is justified in withdrawing from the contract immediately after the occurrence of the impediment, and without regard to its duration.

Art. 645. The bill of lading contains, first, the name of the master; secondly, the name and nationality of the vessel; thirdly, the name of the shipper; fourthly, the name of the consignee; fifthly, the port of lading; sixthly, the port of discharge, or the place at which orders for the same are to be obtained (port of call); seventhly, the description, quantity, and marks of the goods shipped; eighthly, the stipulations respecting the freight; ninthly, the place and date on which it has been issued; tenthly, the number of the copies issued.

Art. 647. The master is bound to deliver the goods in the port of discharge to the legal holder of even one copy of the bill of lading only. As legally entitled to receive the goods. He is to be considered the party who is designated as consignee in the bill of lading, or to whom the bill of lading, in case it is issued in order, has been transferred by endorsement.

Art. 653. The bill of lading is decisive for the legal position of the shipowner and the consignee of the goods towards each other; more especially the delivery of the goods to the consignee shall take place in accordance with the contents of the bill of lading. Provisions of the contract of affreightment not embodied in the bill of lading have no legal effect as against the consignee, unless special reference has been made to them. When such reference has been made respecting the freight to the contract of affreightment (for instance, by the words "freight as per charter-party"), the stipulations as to the time for discharging, the days on demurrage, and the demurrage are not considered to be therein included. As regards the legal position of the shipowner and the charterer towards each other, the clauses of the contract of affreightment remain conclusive.

Art. 661. After a bill of lading has been issued in order, the master cannot comply with any instructions of the shipper concerning the returning or delivery of such goods, unless all copies of such bill of lading are returned to him. The same rule applies to any demand made by the holder of a bill of lading for delivery of goods previous to the arrival of the master at the port of destination. Should he act in contravention of these provisions, he remains liable to any legal holder of the bill of lading. In case the bill of lading has not been issued in order, the master shall return or deliver such goods even without the production of a bill of lading, if the shipper and the consignee named in such bill of lading have expressed their proper consent to the returning or delivery of such goods. When, however, all copies of the bill of lading are not returned, the master can previously demand security for any losses which might arise in consequence thereof.

Bull, Q.C., and Cohen, for the plaintiffs.—The contract here is plain, and its language ought to be construed naturally, and clearly shows the intention of the parties, so that it does not admit of the introduction of any law *dolens* the contract. If it can be said that any law must be considered in order to explain the agreement, that law is the *lex fori*, or the maritime law as administered in this country. Sir R. J. PULLINMORE.—Maritime law is not administered specially in England. It is wrong to identify English law with maritime law. Maritime law resembles the *ius gentium* of the Roman law. The civil law of Rome did not apply to strangers, so the pretors adopted what was common to the law of different states, and this law so adopted was administered by them in suits instituted by or against strangers. So there is a maritime law administered by the comity of nations by all states alike, and this law is arrived

at by eliminating what is peculiar to each nation, and adopting what is universal. To hold otherwise, you must throw over Lord Kingsdown and Lord Stowell.

The Hamburg, Bro. & Lush, 253, 272; 10 L. T. Rep. N. S. 206;
The Gratitude, 3 C. Rob. 241;
Simonde v. White, 2 B. & C. 811;
De Lovio v. Boit, 2 Gallison (U. S.) 398.

Lord Mansfield says that the maritime law is not the law of a particular state, but the general law of all nations: (*Luke v. Lyde*, 2 Bnr. Rep. 883, 887.) The master chose to remain in an English port; therefore the *lex fori* should apply. The law of the flag does not apply; no one suggested that it should apply in the *Hamburg*. In *Cannell v. Sewell* (5 H. & N. 728; 2 L. T. Rep. N. S. 799), it was decided that where a master sold the cargo of his vessel in a manner binding according to the law of the country in which they were disposed of, that disposition was binding in this country. But here the master commits a breach in this country, and seeks the protection of a foreign municipal law which is not binding upon an English court. (*The Halley* L. Rep. 2 P. C. App. 193; 16 L. T. Rep. N. S. 879.) By the *lex fori* the master was bound to proceed. The excepted peril in the bill of lading is the "dangers of the seas only excepted." Neither the law of England nor the general maritime law justifies a master in not performing his contract or in delaying an unreasonable time merely on account of the outbreak of war.

Pole v. Celowitch, 9 C. B., N. S., 430; 3 L. T. Rep. N. S. 433; *The Teutonia*, 1 Aspinall's Maritime Law Cases, 32.

Paradise v. Jane, 2 Aylmer Rep. 26;

The bill of lading is decisive as between the owner and the consignee. No terms of the charter party can be taken as introduced into the bill of lading unless so expressly stipulated (*Smith v. Sieveking* 4 E. & B. 945.) Even supposing that the German law governs, the bill of lading is decisive between the owner and the consignee: (Code, Art. 653.) Further, the defendants, in paragraph 2 of their answer, say that the goods were shipped "on the terms of the bill of lading." It is an English bill of lading; the language used, the money stipulated for, and the consignees are all English. These facts show that it was the intention of the parties that the English law should govern. By the English law a master is bound to perform his contract and to proceed to his port of destination, unless the consignees prevent him from carrying the goods on, and in that case he is entitled to recover his freight: (*Cargo ex Galam* 2 Moore's P. C. C. N. S. 216, 229; 9 L. T. Rep. N. S. 550.) He is entitled to *pro rata* freight if he delivers the goods at the intermediate port and they are accepted by the consignees.

Christy v. Row, 1 Taunt. 309;
Luke v. Lyde, 2 Bnr. 883.

In this case, however, the master was offered the full freight, and he refused to deliver the goods. The amount of freight was not refused as inadequate at the time, but he now says that he was entitled to general average contribution towards the expense of unshipping and reloading the cargo. This claim is made under art. 637 of the code. This is a foreign master relying on foreign law, and he was bound to inform the consignees of his claim, and he made no such claim. The master refused to deliver, and there-

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fore a tender on the part of the consignee was unnecessary.

Dirks v. Richards, 4 M. & G. 574;

Jones v. Tarleton, 9 M. & W. 675.

By German law, the consignee named in the bill of lading is entitled to delivery of the goods without endorsement to him: (Code, art. 647.) The master is bound to deliver on the first bill of lading being presented by the terms of the instrument itself: (*The Tigress*, Bro. & Lush, 38, 8 L. T. Rep. N. S. 117.) By the German law it is only when the bills of lading were issued to order that the master has a right to demand that all should be given up by the holder before delivery at an intermediate port: (Code, art. 661.) These bills of lading were not issued to order. There were named consignees—namely, the plaintiffs, and they have a right to sue, as they are entitled to possession at any place on presentation of the bill of lading after reasonable notice and tender of freight: (*Thudall v. Taylor*, 24 L. J. 12, Q. B.; 4 Ell. & Bl. 219.) The master was not excused from performance of his contract under this bill of lading by the blockade of Hamburg; and even if he were, he was bound to proceed as soon as the blockade was at an end, or to deliver the goods at Falmouth.

Millward, Q.C., and *Clarkson* for the defendants.—The charter party was made at Bremen between Germans, and related to a German ship. Delivery in Germany is contemplated. The charter is the foundation of the adventure, and the bill of lading is under the terms of the charter. The shipper of the goods was not English, and the bill of lading was the contract entered into between him and the master, and the intention of the parties was not to make the English law govern. This bill of lading was given by a German master, and therefore the agreements to be implied as to his duties to proceed and deliver in a port of refuge must be ascertained by reference to the law of the flag which the vessel carries: (*The Bahia*, Bro. & Lush 61). This case adopts *Lloyd v. Guibert* (L. Rep. 1 Q. B. 115; 10 L. T. Rep. N. S. 570, in Ex. Ch.; 13 L. T. Rep. N. S. 602), which decides that, unless otherwise expressly provided, the law of the country to which the ship belongs must be taken to be the law to which the parties have submitted themselves. The charterers must be presumed to have had some agent at Guatemala; the vessel was not in the master's hands to procure German freight. As to the owners, cargo and ship, the whole transaction was German, so that English law cannot govern. The fact that the vessel came into an English port is not sufficient to found the jurisdiction. "Carried into any port" under the Admiralty Jurisdiction Act (24 Vict. c. 10, s. 6) refers to a port of destination. If not, being driven into a Spanish port would have made the Spanish law apply. The whole contract was to be performed at Hamburg. The master received his authority from German owners, and was master of a German ship, and it cannot be said that he could, by signing these bills of lading under a German charter, make the ship and owners subject to English law. This would be exceeding his authority as agent. He was agent to the charterers, and signed the bills of lading as their agents, and not as agent of the owners. Even by the English law the master was entitled to put into Falmouth on account of the sickness of himself and his crew, and when there he found the war had broken out. This entitled him, by German law, to stay in port. During the

blockade he was entitled to remain three months in Falmouth before he was bound either to proceed or to withdraw from the contract: (Code, Arts. 636, 631, par. 1). The remaining in port after the blockade from the 18th Sept. to the 9th Nov., the date of the arrest of the ship, was not an unreasonable delay under the circumstances. If it were, the master was justified by the German law. By Arts. 643, 636 of the code, the master was entitled to withdraw from the contract, and was not bound to proceed, war having broken out after the commencement of the voyage. As he was not bound to proceed, he was clearly entitled to put into port for the safety of ship and cargo. The master was not bound to proceed, because the bill of lading was not in the form prescribed by the code. It is not there made compulsory: (Art. 645.) The stipulation, "dangers of the seas only excepted," does not exclude such an unforeseen circumstance as the outbreak of the war. This exception is provided for by the code and it was surplusage to put it into the bill of lading. The master was not bound to deliver the goods at Falmouth but on the payment of *pro rata* freight by the general maritime law:

Christy v. Row, 1 Taunt. 300;

Cargo ex Galan (sup.);

Luke v. Lyde, 2 Barrow Rep. 883 (per Lord Mansfield).

By German law (Art. 636) the charterer is bound to pay a distance freight for such portion of the voyage as is actually performed. There was no sufficient demand of the goods or tender of freight on the part of the plaintiffs. By Art. 637, the master was entitled to the general average contribution of the plaintiffs towards the expenses of detention in Falmouth, and, by Art. 641, part of the expenses of discharging the cargo. These the plaintiffs did not offer to pay. The master was not bound to deliver up the goods to the plaintiffs, at any port short of the destination without receiving all the bills of lading signed by him (Art. 661), and he did not receive them. These goods were stowed at the bottom of the hold, and the master under the circumstances acted for the best in the interests of the different owners of cargo, as directed by Art. 504.

Bull, Q.C. in reply.—If *Lloyd v. Guibert* decides that the general maritime law administered in England is not a universal maritime law binding on all nations in time of peace, but a law to be derived from practice and decisions of English tribunals, the decision is wrong, and not binding on the court. It is against the principles of the cases already cited. *Lloyd v. Guibert* referred to things not contemplated by the parties, but here the contract is precise in its terms. The German law does not prevent parties adopting a special form of contract, and this form is conclusive: (*Kay v. Wheeler*, L. Rep. 2 C. P. 302; 16 L. T. Rep. N. S. 66.) As to the jurisdiction, the objection ought to have been taken under protest (Adm. Rules 37), and further the question is decided (*Bahia*, Bro. & Lush. 61). The owner cannot release himself from liability by chartering his vessel without the consent of the owners of the goods, there being no demise of the ship, and the master receiving freight as owners' agent as well as charterers':

Sandeman v. Scurr, L. Rep. 2 Q. B. 56; 36 L. J., Q. B., 58, 15 L. T. Rep. N. S. 609;

St. Cloud, Bro. & Lush. 4; 8 L. T. Rep. N. S. 54.

Further, this is a proceeding *in rem* against the ship, and is not against the owners, and therefore

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a maritime lien attached under the statute when the ship was arrested. The master refused to deliver, and therefore the owners were not entitled to claim *pro rata* freight. The master did not require all the bills of lading to be given up. He depends on the German law, and this bill of lading is not in accordance with the code. It was presented by the consignee named therein. By Art. 504 of the code the master was bound to consider the interest of the owners of cargo, and to deliver at Falmouth.

June 6.—Sir R. PHILLIMORE.—This is a suit by Messrs. Chalmers, Guthrie, and Co., consignees under a bill of lading, of 1293 bags of coffee, lately laden on board the ship *Patria*, for damages against that ship, on the ground of a breach of the contract contained in the bill of lading. The *Patria* is a ship sailing under the flag of the North German Confederation, belonging to a port in Hanover. In the month of March 1870, she was chartered to Messrs. Muller and Sons, of Bremen, and was lying in the port of Champerico, Guatemala, when a person of the name of Ceballas, who, I presume, was an American Spaniard, shipped on board her the coffee above mentioned, to be carried to Hamburg, on the terms of a bill of lading signed and delivered by the master, which is as follows. (His Lordship here read the bill of lading before set out.) Five copies of the bill of lading were signed by the master, four of which were delivered to Ceballas. One of those was delivered by Ceballas to the plaintiffs. Other goods were also shipped for Hamburg by other persons. The ship sailed on the 5th April. On the 23rd Aug. she arrived in the English Channel, with some of her crew, including the captain, seriously ill, and on the same day she put into Falmouth. Before this time war had broken out between the North German Confederation and France, and Hamburg was blockaded from the 19th Aug., before the arrival of the vessel, until the 18th Sept. On the 7th Nov. the suit was instituted in this court, and in substance it charges the defendants with two distinct breaches of contract—namely, refusal to deliver the coffee of the plaintiffs at Hamburg and at Falmouth. The question by what law such charges are to be tried may, according to the circumstances of each case be one of nicety and difficulty. The law of the place in which the contract was entered into (*lex loci contractus*), that of the place in which it is to be performed (*lex loci solutionis*), that of the state to which the shipowner belonged, usually called the law of the flag, the general maritime law administered by the comity of all states, and the law of the tribunal in which the suit is instituted (*lex fori*), are the laws upon one of which the attack or defence is usually founded. In the present case the defendant has relied principally upon the law of the flag. The plaintiff also maintains that the contract itself furnishes by its own terms the law applicable to his case, from whatever source the law so furnished be derived, but he contends that if any law without the contract is to be imported, it is the general maritime law. The proposition that the terms of the contract furnish *per se* the law in this case raises the first question to be considered. The propositions of jurisprudence applicable to it appear to me the following:—First, that the rights and obligations of the parties to a contract are to be determined by the law which they have declared themselves to intend; secondly,

that, where there is no express declaration of intention, the presumption as to the law contemplated by the parties must be gathered from the circumstances of the case; thirdly, that where the contract is plain in its language, that language must receive the ordinary and natural construction, and does not admit the introduction of a law *dehors* the contract; fourthly, that the contract must be executed according to its terms, or abandoned with due compensation to the parties injured, unless supervening unforeseen circumstances of a certain character have rendered the execution legally impossible, as where the port of destination has become the port of the enemy of the state to which the shipowner belongs;—and here I must observe that there is no question in this case, as in the recent case of the *Teutonia* (1 Aspinall's Maritime Law Cases 32; 24 L. T. Rep. N. S. 521) as to the fulfillment of a contract being prevented by such a legal impossibility, or by the necessity of a compromise between a public and private duty;—fifthly, that the happening of unforeseen events may, according to the circumstances, justify a reasonable delay in the execution of a contract which does not infer the abandonment of it. I will now apply these propositions to the facts of the case before me. During the interval between the arrival of the ship at Falmouth on the 25th Aug., and the institution of the suit on the 7th Nov., the ship remained in the port of Falmouth. The captain was absent from Falmouth from the 9th Sept. to the 1st Dec., when he returned to his ship. It has not been contended by the plaintiffs that there was any breach of contract in the deviation to Falmouth caused by the illness of the master. There are some outlying objections taken on the part of the defendants, which it will be convenient to dispose of in this place. It is objected that the proceedings should have been against the charterer, and not the owner. But I am of opinion that this objection cannot avail, for two reasons: first, the owner of the ship cannot release himself from his liability by chartering his vessel without the consent of the owner of the goods. In this case there is no demise of the ship. The master receives freight as agent for the owner as well as the charterer: *Sandeman v. Scurr and others* (sup.). Secondly, the proceeding here is *in rem*; the maritime lien attached under the statute as soon as the ship was arrested. Another objection is as to the jurisdiction of the court under sect. 6 of 24 Vict. c. 10. It is said that the goods in this case are not "carried into any port of England or Wales," because Falmouth was not the port of destination. In the first place this objection should have been taken under protest: in the next place, it has been already raised and disposed of by my predecessor, in whose judgment I entirely concur, and which, as it applies closely to the present case, I will state. That learned judge said: "Here, then, is a cargo, originally destined to be imported into the port of Dunkirk. In consequence of accident, the ship puts into the port of Ramsgate, and the master refuses to carry on the cargo to Dunkirk, or to give delivery at Ramsgate. That this is a great grievance cannot be denied, and the court ought to give, if necessary, great latitude to the construction of the Act of Parliament, in order to extend the remedy to this case. However, it appears to me this section was carefully worded to give the utmost jurisdiction in the matter. It uses the words 'carried into any port in England,' and does not use the

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word 'import.' I apprehend the phrase 'carried into' was advisedly used instead of the word 'import.' Then it goes on, 'or for any breach of duty or breach of contract.' Here there is a clear breach of contract and breach of duty, I am of opinion that, without any violence of construction, the statute applies to this case. I reject the motion, with costs": (*The Bahia*, Bro. & Lush. p. 62.) Another objection was, that the master had no power under the charter party "to contract," as it was expressed, "his owner out of that charter party;" but I am of a different opinion, and upon this point I adopt the language of the Court of Queen's Bench in the case already cited of *Sandeman v. Scurr*. Cockburn, C. J., in delivering the judgement of the court, said: "We think that, so long as the relation of owner and master continues, the latter, as regards parties who ship goods in ignorance of any arrangement whereby the authority ordinarily incidental to that relation is affected, must be taken to have authority to bind his owner by giving bills of lading. We proceed on the well-known principle that where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency. The master of a vessel has by law authority to sign bills of lading on behalf of his owner. A person shipping goods on board a vessel, unaware that the vessel has been chartered to another, is warranted in assuming that the master is acting by virtue of his ordinary authority, and therefore acting for his owner in signing bills of lading. It may be that as between the master and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only, and not of the owner. But, in our judgment, this altered state of the master's authority will not affect the liability of the owner, whose servant the master still remains, clothed with a character to which the authority to bind his owner by signing bills of lading attaches by virtue of his offices. We think that until the fact that the master's authority has been put an end to is brought to the knowledge of a shipper of goods the latter has a right to look to the owner as the principal with whom his contract has been made": *Sandeman v. Scurr* (sup.) I should mention that it appears from the correspondence between Müller and sons and the plaintiffs that the plaintiffs were apprised by a letter from Breueu dated the 1st June, that Müller and Sons were the charterers and consignees of the vessel. And on the 16th July the plaintiffs (war having broken out on the 15th July, according to the dates agreed upon), wrote as follows:—"16th July '70. Messrs. Fredk. Müller and Sons, Bremen. Dear Sir—In reference to your favour of 1st June, in which you inform me you are consignees and charterers of the German vessel *Patria* from Guatemala, as the disturbances on the Continent will probably close the port of Hamburgh, please communicate with the owners as regards their wishes. It would no doubt be safer for the vessel to come to London, and, in the event of her doing so, we shall be most happy to take charge of her and her cargo on your account.—We are, Dear Sir, yours truly, CHALMERS, GUTHRIE and Co." I am of opinion that the contract contained in the bill of lading cannot be affected by the terms of the charter party. The English (*Smith v. Sieving*, 5 Ell. & Bl. 589), I may observe, and the German

law are equally clear on this point, according to Act 653 of the German code. [His lordship read the article of the code before set out.] The German expert who has been examined explained this law in its natural sense. Moreover, the second article of the answer in this suit refers to the shipment as having taken place "on the terms of a bill of lading." The bill of lading in this case is in the usual form of an English bill of lading. If this instrument had specified that the English law should govern the construction of it, it could not have been maintained that the bill would not have been subject to this law. But it is contended that the intention of the parties to the contract that the English law should govern cannot be inferred from the facts that the language, form, and money for the freight are English and the consignees English; while the other surrounding facts are that the ship was German, the owners German, the charter party German, the destination of the goods a German port, the shipper not English—all these facts show, it is urged, that the law of the flag of the ship must prevail, and bring the case under the principles of the decision in *Lloyd v. Guibert*. I have been much pressed by counsel for the plaintiffs to pronounce that the decision in *Lloyd v. Guibert* (sup.) is not binding on the Admiralty Court, and also that the judgment errs in ascribing to the Admiralty Court the doctrine that the general maritime law is not an universal maritime law binding upon all nations in time of peace, but a law which is to be derived from the practice and decisions of English tribunals. If it were necessary to decide the latter point, with all respect for the high authority of the tribunal which delivered the judgment, I should have hesitated a long while before I assented to the position that there was not a general maritime law which, according to the comity of nations, was administered in the English as well as in the foreign courts of Admiralty. I should have remembered and endeavoured to apply the law upon which Lord Stowell in the *Gratiotudine* (sup.) founded the authority of the master when acting as necessary agent for the owner of the cargo, and the language of Lord Tenterden in *Simonds v. White* (sup.) as to the division of average. "The principle of average," says that high authority, "is of very ancient date and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument as upon a general rule of maritime law: (*Simonds v. White*, 1824, 2 B. & C. 811). I should have referred to the judgment of Story (*De Lovio v. Boit*, 2 Gallison 398) as to the ancient laws, customs, and usages of the sea, and considered whether there was not a general maritime law founded upon them, and the recognised exposition of them as wholly distinct from the common law of England, as the law by which in cases of collision the Admiralty Court finds both parties to blame is distinct from that of the common law court, which, upon its own principles, refuses to allow any verdict to be given. But in truth it does not appear to me necessary to note any decision on either of the points pressed upon me touching the authority of *Lloyd v. Guibert* (sup.) That case related to the question of what law should be applied to events not contemplated by the contract; but in the case before me the contract is precise in its language, and does contemplate the happening of events which might impede

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the execution of the contract, and provides that, with one special exception, namely, "The dangers of the seas only excepted" *Kay v. Wheeler*, (*sup.*) such events shall not excuse the shipowner from the fulfilment of the contract. It has not been maintained that the German law would prevent a German shipowner from adopting any special form of contract; and I must presume that the German system of jurisprudence, like that of all other states would construe according to its plain meaning, such a contract as the present. According to the natural construction of the language of this contract, the breaking out of the war did not relieve the shipowner from the obligation of fulfilling his contract. The first breach of contract alleged is the not going to Hamburg in spite of the blockade—that is before the 18th Sept. It was contended that if the consignees were ready to take the risk, it was not competent to the master, under the bill of lading, to refuse to sail. I think, however, that this breach was practically abandoned during the course of the argument, and I much doubt whether, having regard to the letter of the 16th July, it could have been maintained. But after the 18th Sept. the shipowner was bound and without any further demand, by the terms of his contract, to continue his voyage. I do not mean to say that he was not entitled to a reasonable delay in order to decide as to what was the best course to pursue. What lapse of time may be included in a reasonable delay must depend on the circumstances of each case. In *The Teutonia* (24 L. T. Rep. N. S. 521; 1 Aspinall's Maritime Law Cases, 32) and in the case of *Pole v. Cetkovitch* (*sup.*) the delay was of two or three days. In this case fifty days elapsed before the suit was instituted, a period which I am of opinion exceeded the limits of the time during which the master was entitled to pause, and which constituted the unreasonable delay which was expressly found to be wanting in *Pole v. Cetkovitch* (*sup.*), but which in the case before me made a complete breach of the contract. The expert distinctly stated that if the master had proceeded to Hamburg after the war had broken out he would not have violated any principle of German law. The contract, therefore, being plain, the circumstance of the war not relieving the defendants from the duty of executing it, and the delay being as unreasonable as to amount to a refusal to do so, the judgment must be for the plaintiff, unless his conduct or that of his agents had deprived them of the right to claim it. That conduct must be gathered from the correspondence and the evidence taken before me. It amounts, I think in substance to this. First, that the plaintiffs did not require the defendant to sail during the blockade of Hamburg, that is, before the 18th Sept.; secondly, that after that date they did require the delivery of the goods at Hamburg unless the master would deliver them at Falmouth. But this alternative was offered to him by the plaintiffs; their complaint is that the captain would neither fulfil the contract nor withdraw from it. These observations bring me to the consideration of the second alleged breach of the contract, viz., the refusal to deliver the coffee at Falmouth. If this question be triable by the English law, the contract was at an end by the refusal of the master to go to Hamburg, and the merchant was entitled to his goods, whether with or without payment of a *pro rata* freight. By the general maritime law the plaintiffs would, I think,

have been entitled to their goods, on the payment of *pro rata* freight. By the German law, or the law of the flag, art. 631, 636, 504, of the code), either party had a right to withdraw from the contract without being liable to damage; and it is the duty of the master to take the instructions of the owners of the cargo, and as far as circumstances admit to execute them, and (art. 641) the expense of unloading is to be borne by the shipowners, and other expenses of discharge by the charterer and as I understood the expert, a payment of "distance" freight,—which is, I suppose, *pro rata* freight—is to be made. I must here observe, that though I do not doubt that Mr. Travers, the expert, efficiently discharges the duties of his consular office, he did not pretend to any knowledge of jurisprudence apart from the letter of the code, and was wholly unacquainted with any judicial decisions thereon. The court, therefore, is left very much to put its own construction upon the code, the translation of which by Mr. Wendt has been relied upon by the counsel on both sides. With regard to the German law, the first objection to the delivery of the goods raised by the defendants was that no direct demand had been made for the goods; it appears to me that the evidence proves that there was a sufficient demand. As to the second objection, that there was no sufficient tender of freight, I am of opinion that the contrary is proved. Mr. Coward, the clerk of Messrs. Broad and Son, the agents, said: "I told him (that is the master) we would pay full freight, the same as if the ship was discharged at Hamburg." As to the third objection, that all the bills of lading were not given up, a sufficient answer is that the master never asked for the other bills of lading. This objection is in the circumstances purely technical, and it is very doubtful, to say the least, whether according to the German law he had any right to insist upon the other bills of lading in the case of such a bill of lading as the present, which is not the one contemplated by the German code, and which was presented by the consignee named in the instrument itself. By the English law the master was certainly bound to deliver the goods to the holder of the bill of lading: (*The Tigris* (*sup.*)). The remaining and principle objection is that these goods were put on board a general ship, and so stowed that they could not be delivered without disturbing the goods of other shippers; that the master is by the German law to exercise his discretion upon the subject, and that he had a right to exact their share of general average from the plaintiffs, which share was never tendered to him. Here again it may be answered, that the demand for average was never made by the master—a remark which loses none of its force from the fact that this claim was made according to the foreign law, with which the English merchant could not be supposed to be conversant. Neither, I may observe in passing, was any demand made by the master for an indemnity. But further it appears to me that it was the duty of the master, under the German code, to deliver goods by Art. 504. (His Lordship read the article.) It seems to me, however, that all these objections have been devised by the skill of counsel since the suit has been instituted; that the real objection urged by the master at the time was not the want of a proper demand or inadequacy of the freight tendered, or the want of security or indemnity, but the absence of consent on the part of the charterers. I do not

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think that the absence of this consent was a sufficient justification under the German law for the refusal to deliver the goods to the plaintiffs. Upon all grounds, therefore, that the refusal was contrary to the plain stipulations of the contract, that after the tender of full freight, it was not justified either by the law of the flag, or by the *lex fori*, or by general maritime law, I pronounce for the petition of the plaintiffs with costs.

Solicitors for the plaintiffs, Thomas and Hollands.
Solicitors for the defendants, Clarkson, Son, and Greenhall.

May 2 and June 6, 1871.

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Non-delivery of cargo—War—Reasonable delay—Waiver.

A North German vessel shipped goods in the Black Sea for a port in the United Kingdom or on the Continent under an English charter-party, by which she was to call at F. or P. for orders, such orders to be given by the charterer's agents in London by return of post on receipt of the master's announcement of his arrival.

She arrived at F. on Aug. 9th. Orders were given, but not till Sept. 3rd, to proceed to Leith; but from that date until the arrest of the ship, on Sept. 21st, negotiations were going on for discharge of the cargo at F. Between those dates the winds were light and variable, and the master remained in port for fear of capture by French cruisers in the channel, war then existing between France and Germany:

Held, that the delay was reasonable, and that neither by English nor North German law was the master bound to proceed, and that the negotiations waived the orders to proceed. (a)

THIS was a suit instituted under the 6th section of the Admiralty Court Act 1861 on behalf of Messrs. A. Southgate and Son, merchants, of Ipswich, against the ship *Heinrich* and her owners for damages they had sustained in consequence of the non-delivery of certain goods, of which they held the bill of lading, as indorsees of the consignees.

The *Heinrich* was a vessel sailing under the North German flag, and belonging to the port of Rostock, in the Grand Duchy of Mecklenburg, a state of the North German Confederation, and her owners and master were all Germans, and subjects of the said state.

On the 11th March 1870 the master of the *Heinrich*, then lying at Constantinople, entered into a charter-party with Messrs. Brocklemann and Hartog, German merchants in that city, of which the following are the material provisions:—

Memorandum for charter.

Constantinople, March 11, 1870.

It is this day mutually agreed between Captain Krull, of the good ship or vessel called the *Heinrich* 311.1 Pans of German flag, of the burthen of 1700 quarters register measurement or thereabouts, whereof he is master, now in this port ready, and Messieurs Brocklemann and Hartog, of this city, merchants. That the said ship being tight

staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to a safe port in the Sea of Azor, as ordered, at Berdianski, in twenty-four hours after arrival, with Messieurs Carberri and Wagstaff, or lay days to count, or so near thereunto as she may safely get and there load from the factors of the said freighter, a full and complete cargo of tallow, wheat, Indian corn, seed, or other stowage goods or grain, at the option of the freighter, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded, shall thenceforth proceed to a safe port in the United Kingdom or a safe port on the Continent between Havre and Hamburg, both inclusive, or so near thereunto as she may safely get, calling at Cork or Falmouth or Plymouth, at the master's option, for orders, which are to be given by return of post in reply to the captain's letter to the charterers' agents in London, or lay days to commence, and deliver the same, always afloat at all times on being paid freight, as there set out. It is also agreed, should the cargo consist of wheat, Indian corn, barley, oats, rye, or seed, and the whole or any portion be delivered in a heated or damaged condition, and the receivers of such cargo claim to deduct full freight upon such damaged or heated portions, it shall be at the captain's option either to allow the same, or to be paid full freight upon the quantity of cargo shipped according to bill of lading, provided no part of the cargo be thrown overboard or otherwise disposed of on the voyage (the act of God, the Queen's enemies, restraint of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage always mutually excepted). The freight to be paid in cash on unloading and right delivery of the cargo. Thirty-five running days are to be allowed the said merchant, if the ship be not sooner despatched, for loading and unloading, and if one-half or more of the cargo consist of wool, ten additional lay days to be allowed ten days on demurrage over and above the said laying days, at 5s. per day.

BROCKLEMAN and HARTOG.

The *Heinrich* thereupon proceeded to Berdianski, which is a port in the Empire of Russia, and pursuant to the said charter party received on board a cargo of wheat from one Michele Paicos. The said master of the *Heinrich* signed and delivered a bill of lading in three parts for the said cargo, and such a bill for lading was in Italian, and the following is a translation thereof:—

Berdianski, 15/27th May, 1870.

In the name of God has been loaded at this port by Mr. Michele Paicos on account and risk of whom it may concern on board the Mecklenburg brig called *Heinrich*, Capt. J. H. Krull, to coednet and to consign the same on this his present voyage, according to the tenor of his charter party stipulated at Constantinople, and dated 11th May 1870. To order the goods as stated and enumerated at foot in the same and like good condition, and as such the said captain promises on his safe arrival to deliver the freight being paid him according to the terms of his charter party with all other conditions expressed therein. In witness whereof the master will sign this with similar other as put before him, one of which being accomplished the other to stand void.

Consumed for loading cargo twenty-four lay days.

W. J. M. PAICOS.

The *Heinrich* sailed in due course from Berdianski with the cargo so shipped on board her, and on the 8th Aug. 1870 arrived therewith at Falmouth, and on the 9th Aug. 1870 the master of the *Heinrich* wrote to Messrs. Spatali and Co., of London, who were the charterer's agents in London, and to whom the bill of lading had been endorsed by Michele Paicos, a letter announcing his arrival at Falmouth, and asking for orders, but he got no orders until Sept. 3rd, when he was ordered to proceed to Leith.

At the time of the arrival of the *Heinrich* at Falmouth war was waging between France and Germany, and continued till after the arrest of the

(a) It will be seen the term "reasonable delay" is to be interpreted according to the circumstances of each case, and does not necessarily mean only two or three days, as in the cases cited in the argument. It could scarcely be contended that a master was bound to put his ship into position where he must have been captured, unless he has bound himself to run all such risks by the terms of his agreement. His duty is to deliver the goods, and he must take the best means in his power to do so.—Ed.

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[ADM.]

vessel, Sept. 21st. There were French cruisers in the British Channel, and if the *Heinrich* had gone out she would have run a great risk of capture.

For the plaintiffs a Mr. Coward was called at the hearing, and he said:—

I am a clerk in Fox and Co.'s office at Falmouth. They are agents for Mr. Lutton, the plaintiffs' broker. I remember the *Heinrich* arriving in Falmouth. On the 23rd Aug. I saw the master and asked him if he would allow the ship to be towed to Dublin. He answered that he would only allow her to be towed to Plymouth. On the 10th Sept., in consequence of a letter from Lutton, I asked the master if he would allow 2s. or 3s. per quarter deduction from his freight, and discharge at Falmouth; this he declined, and offered 6d. per quarter deduction, but we did not agree to it. On the 13th Sept. the master called, and said that he would sail for Leith unless we accepted his offer to discharge on deduction of 6d. per quarter. On the 14th Sept. he refused to go to Leith, and I communicated this to the consignees.

Cross-examined:—

He declined to leave because of the war and the French cruisers outside. The first time he said he would go to Leith was the 13th Sept. I saw him on the 3rd Sept., but I do not remember his saying that he would go then. On the 14th Sept. we were still trying to get him to allow a further deduction from his freight.

For the defendants a German advocate was called, and he proved the existence of a North German code, and said that a translation by Wendt was correct (Maritime Legislation, with a Translation of the German Mercantile Law relating to Maritime Commerce. Ernst Emil Wendt.) He gave it as his opinion that according to that code a North German vessel is justified in putting into and stopping in port, and that the master would be entitled to land the cargo if there were danger of its spoiling. He cited articles 631, 634, 637, 505: (see *The Patria*, ante, p. 71.) He further said that if there was a stipulation in the charter against delay in port, the contract would overrule the code, and such a contract would not be illegal according to German law. The master of the *Heinrich* was then called and said:

When the ship was laden we had eleven lay days left. I first heard of the war from a pilot beside the Lizard. We arrived at Falmouth on the 9th Aug., and I wrote a letter to Spartali and Co., asking for orders, but got no answer. On the 22nd Aug. I entered a protest against detention, and on the 23rd Aug. Mr. Coward asked me if I would go to Dublin. I said it would be dangerous, but did not refuse. On the 25th Aug. he asked me if I would like to go to Leith, or to discharge at Falmouth, on giving up 3s. or 2s. 6d. per quarter on freight. I told him he had no business to ask such a question, as I had put into the port for orders. I told him I was waiting for orders, but heard nothing until the 3rd Sept. On that day orders to sail to Leith and a protest were given to me, and I said I was willing to sail as soon as I could.

Sept. 4.—I offered to give up a portion of the freight and unload at Falmouth, or to proceed to Leith. I claimed demurrage.

Sept. 5.—Coward told me I had no right to demurrage. We negotiated for discharge; they asked 3s. per quarter. I offered 6d. per quarter deduction.

Sept. 8.—The wind was fresh in the forenoon; S.W. by S.S.W. in the afternoon.

Sept. 10.—I saw Coward, and he asked for a deduction of 2s. per quarter. I declined to deduct more than 6d., as it would leave me no profit. I said I should sail if he did not accept my offer. He telegraphed to his principals, and did not object to my waiting.

Sept. 12.—I was preparing the ship for sea when the crew refused to go. They were afraid of being captured.

Sept. 13.—I told the crew that the consul said they were bound to go, and I promised they should not lose their wages if taken; and they consented to go on.

Sept. 14.—Negotiations about reduction of freight still went on. I told Coward I was willing to sail for Leith on the first opportunity. I did not speak of Plymouth.

I did not go because the weather was changeable. The wind was S.W., and then fell round to N., and it was calm.

Sept. 15.—The wind was S.E. It was a bad wind for getting out. I saw French cruisers close to the harbour.

Sept. 16.—The wind was light.

Sept. 17.—Wind S., almost calm.

Sept. 18.—Wind S.S.W., very light, and almost calm.

Sept. 19.—Wind S.E.

Sept. 21.—The vessel was arrested. With light breeze I was sure to be captured by the French, and could not have got through the Channel. I had given directions to my agent, Mr. Van Weenan, to clear the ship at the Custom House, and he would have paid the light dues after I had gone, so that the French consul should not know when I was going. The cargo was afterwards discharged to prevent it from spoiling. I could have proceeded at once if orders had come on Aug. 10, as the wind was fair.

Cross-examined.—The negotiation for discharge at Falmouth began on the 25th Aug. We differed in the treaty to the extent of 130l. I should have gone out of Falmouth the day my crew refused. They prevented me.

The cause was instituted on the 15th Sept., and the vessel was arrested on the 21st Sept.

The defendants offered to give up their claim for demurrage if the plaintiffs abandoned the claim against the ship.

The defendants' answer contained amongst others the following paragraph:—

"By the law of the said States of the said North German Confederation and of the said Grand Duchy, regard being had to the terms of the said charter party and bill of lading, the master of the *Heinrich* was not bound to attempt to proceed from the said port of Falmouth to Leith with the *Heinrich*, if by so doing he would have exposed the *Heinrich* to risk of capture, and the said master would, by attempting to proceed with the *Heinrich* to Leith at any time after he received orders so to proceed up to the time of the institution of this suit and of the said arrest, have exposed the *Heinrich* to risk of capture, and by reason of the premises the master of the *Heinrich* and the defendants had not at the time of the institution of this suit been guilty of any breach of contract or duty with or to the plaintiffs."

Butt, Q. C. and Cohen for the plaintiffs.—The defendants relied in the pleadings on the right of the master to remain in port on account of the war. The master now says he was always willing to sail. This is a question of English law. Has the master exonerated himself from the performance of this contract, or has anything happened to exonerate him? He says he is excused, first, on account of the weather; secondly, because negotiations were going on, and so the orders to sail were waived. But the charter party provides the only exceptions that can exonerate him. These exceptions prevent the defendants from going into the German code. Express stipulations override the operation of that code. There were most positive orders to sail on the 3rd Sept. It cannot be said that the discussion as to how much the master should deduct from his freight, excuses him from obeying his orders. The orders were given after the negotiations had commenced. There was a clear refusal to sail on the 14th Sept., and this was communicated to the consignees by Coward. No sufficient proof that the weather stopped them. On the 12th Sept. the crew refused to go. This is a clear breach. The crew are servants of the owners as much as the master.

Milward, Q. C. and Clarkson for the defendants.—The charter party is the foundation of the con-

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tract. The question of what law is to govern must be considered with reference to the time when the contract is completed. By the contract we were to call at Falmouth for orders. By the contract the lay days began on the 11th Aug., as there was no reply to the master's letter to the charterers' agents. The not sending this reply was a breach on the part of the plaintiffs. The master was entitled to a reply by return of post. If the master had received orders by return, he could have proceeded as the wind then was. The master considered that he had a right by law to stay in port, but that he would run the risk if he could get a fair wind. He was not bound to sail for a reasonable period, but he was willing to take the risk if there was a chance of success. We do not abandon the law, we only say that we were justified in acting as we did. The master was entitled to reasonable delay: (*Pole v. Ceteovich*, 9 C. B., N. S., 430; 3 L. T. Rep. N. S. 438; 30 L. J. 102, C. P.) He was prevented from sailing by the exception in the charter, "Queen's enemies." This means the enemies of the sovereign of the shipowner: (*Russell v. Niemann*, 34 L. J. 10, C. P.; 17 C. B., N. S., 163; 10 L. T. Rep. N. S. 786.) The claim for demurrage arises strictly out of the contract, and out of the clause in the charter party which provides for orders being given by return of post. By that clause lay days are to begin unless orders are given. Demurrage commences when the lay days are finished. A claim for demurrage is in the nature of a claim for liquidated damages.

Butt, Q. C. in reply.—A necessary condition precedent to a claim for demurrage is readiness and willingness to sail for the port as ordered. If the defendants claim demurrage they put aside their defence of the outbreak of war. If they stopped in port in consequence of the war they cannot say they were willing to proceed. If the clause about orders in the charter party is a condition precedent they would have a right to sell the cargo in order to free the ship. The delay was unreasonable. They were fully entitled to stay in port a few days.

Pole v. Ceteovich, 9 C. B., N. S., 430; 3 L. T. Rep. N. S. 438; 30 L. J. 102, C. P.;

The Tindonia, 24 L. T. Rep. N. S. 321; 1 Asp. Mar. Law Cas. 32.

JUNE 6.—SIR R. PHILLIMORE.—This is a suit brought by Messrs. A. Southgate and Son, the assignees of the bill of lading of a cargo lately laden on board the vessel *Heinrich*, against the said vessel, under the 6th section of the Admiralty Court Act 1861. The *Heinrich* is a vessel sailing under the flag of the Grand Duchy of Mecklenburg, one of the states of the North German Confederation. On the 11th March 1870, the *Heinrich*, being then lying at Constantinople, a charter-party was entered into between her master and Messrs. Brockleemann and Hartog, of Constantinople. The ship was to take on board a cargo at Berdianski, in the sea of Azov, and to proceed to a safe port in the United Kingdom, or a safe port on the continent between Havre and Hambrugh (both inclusive), or so near thereto as she may safely get, calling at Cork or Falmouth or Plymouth, at the master's option, for orders (which are to be given by return of post in reply to the captain's letter to the charterers' agents in London, or lay days to commence), and deliver the same always afloat at all times on being paid freight as therein mentioned, the act of God, the Queen's

enemies, restraint of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever during the said voyage always mutually excepted. The freight to be paid in cash on unloading and right delivery of the cargo. Thirty-five running days are to be allowed the said merchant (if the ship be not sooner despatched) for loading and unloading; and if one-half or more of the cargo consist of wool ten additional lay days to be allowed, ten days on demurrage over and above the said laying days, at 5s. per day. The ship proceeded to Berdianski, and took on board the cargo of wheat mentioned in the petition from a Greek merchant Michele Paicos. A bill of lading was signed by the master at Berdianski in three parts, in the Italian language, of which the following translation is in all material parts accurate: (His Lordship here read the bill of lading before set out.) The ship arrived at Falmouth on the 8th Aug., and on the 9th the master wrote to Spertali and Co., from whom Paicos had told him to get his orders, and who were the charterers' agents in London, and also indorsees of the bill of lading, as follows: "Falmouth, 9th Aug. 1870. Messrs. Spertali and Co., London. Gentlemen,—I herewith beg to advise you of my safe arrival here with the North German brig *Heinrich*, under my command, with a cargo of wheat from Berdianski, awaiting your orders as soon as convenient.—I remain, Gentlemen, yours &c., J. H. Krull." No answer was received by the master to his letter. On the 23rd or 25th Aug. some conversation passed between him and Mr. Coward. Coward was a clerk in the office of Fox and Co., who acted as agent for Linton, the broker of the plaintiffs, Messrs. A. Southgate and Son. According to Coward, the master was asked whether he would allow his ship to be towed to Dublin, when he said he would allow her to be towed to Plymouth, if the consignees paid the towage. According to the master, nothing was said about towing by steam; he was asked to sail to Dublin, and said it would be dangerous to do so. Nothing was said about being towed to Plymouth, to which place he never refused to go, but would, on the contrary, have been happy to have gone. It does not appear from the evidence that any definite order for a port of destination was given at this interview. On the 27th or 28th Coward asked him if he would like to go to Leith; he said, "You have no business to ask such a question; I put into this port for orders." He was then asked if he would make a redaction on his freight instead of going to Leith, and he offered to take a *pro rata* freight, and it was settled that Coward should write to his principal on the subject. Upon the 3rd Sept., for the first time, the master received something approaching to a distinct order to go to Leith. He ought to have received, according to the charter-party, an answer by return of post to his letter of the 9th Aug., and demurrage would begin from that date. On the 15th Sept. the suit was instituted in this court, and on the 21st the ship was arrested. The true question is whether the not sailing between the 3rd and 21st of Sept. constituted a breach of contract. On the 3rd Sept. the master said—as he said continually on the other days of this interval—that he would sail for Leith on the first favourable opportunity, meaning he said, favour-

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able in two senses—namely, first, having a fair wind for leaving the port; and, secondly, such a wind as would enable him to run if he saw French cruisers. That there were French cruisers in the neighborhood and there was a real risk of capture are conclusions which must be drawn from the evidence. Mr. Van Weenan says that he received orders from the master to clear the vessel for Leith on the 5th or 6th Sept., and that he did not clear the vessel because he feared that the French consul would learn her destination, and obtained permission from the Custom House to pay the light dues after the vessel had gone out. On the 12th Sept. the crew refused, when ordered, to weigh anchor, alleging an apprehension, which I believe was sincere, of being captured and imprisoned by the French. At the same time negotiations were continually going on, having for their object the delivery of the cargo at Falmouth for a reduced freight. Looking at all the circumstances of the case, I am of opinion that, whether the English or whether the German law be applied to the construction of the contract of affreightment—which in this case is to be derived from the charter-party and the bill of lading, the delay of the master was justified by the existence of the excepted peril of the enemies of his sovereign: (*Russell v. Niemann*, 34 L. J. 10, C. P.; 17 C. R. N. S., 163; 10 L. T. Rep. N. S. 786.) I also think that the continuing treaty on the subject of the reduction of freight modified the character of the order which he received to sail for Leith, and which I cannot help surmising was given for the purpose of inducing the master to acquiesce in the larger reduction of freight proposed on behalf of the plaintiffs; and I doubt, to say the least, whether any positive refusal of a distinct and clear order is established in this case. But I think the first ground sufficient to support the defence which is set up in the answer, and I dismiss the petition with costs.

Solicitors for the plaintiffs, *Thomas and Hollams*.

Solicitors for the defendants, *Gregory Rowcliffe and Co.*

May 17 and June 6, 1871.

THE WILHELM SCHMIDT.

Damage to cargo—Outbreak of war—Reasonable delay—Law governing contract—Right of assignee to sue—Bills of Lading Act—Admiralty Court Act.

The master of a North German ship, lying at Constantinople, entered into a charter party with North German subjects, there resident, to carry a cargo to a port in the United Kingdom or on the continent, to be delivered to English consignees. The charter party and the bill of lading given under it were in the English language, and it was stipulated that the ship should call at one of three ports of the United Kingdom for orders. The ship duly called at F., and was ordered to proceed to an English port to discharge.

Held, that, as the intention of the parties as to what law should govern, was to be gathered from the circumstances of the case, and as the giving of the orders fixed the seat of the contract in England, the law of England applied. (a)

(a) It will be seen from this case and the *Patra* (ante p. 71) and the *Heinrich* (ante p. 72) that the intention of the parties, as evidenced by the circumstances of each case, shows what law is to govern a contract made by

War then existed between France and Germany. The master sailed from F., as ordered, but, through a reasonable fear of capture, put into D. The ship remained at D. for two months, waiting for a steam tug, which was considered necessary by the charterers' agents to avoid capture, the master expressing himself ready to sail with the first fair wind. The ship was then sent forward by steam power, at the charterers' agents' expense. The cargo was damaged and the plaintiffs lost profits by the delay.

Held, that the master was justified in putting into and remaining in port, and that the shipowners were not liable for the damage caused by the delay.

Whilst the ship was yet to arrive, the charterers' agents (the consignees of cargo) appropriated the cargo and endorsed the bill of lading, through other persons, to the plaintiffs. The plaintiffs sustained no loss by deterioration, for, under the contract of sale, they paid for the cargo after deductions settled by arbitration, for the damage done to it.

Held, that the plaintiffs were entitled to sue under the Bills of Lading Act and Admiralty Court Act 1861, and perhaps even as trustees for the consignees.

THIS was a case instituted under the 6th section of the Admiralty Court Act 1861, on behalf of Messrs. Barher, Roper, and Co., of Lowestoft, in the county of Suffolk, merchants, the owners of a cargo loaded on board the vessel *Wilhelm Schmidt*, and against her owners intervening, to recover damages consequent on the non-delivery of the said cargo within reasonable time, the deterioration caused to the cargo by delay, and the having to procure other cargoes to supply its place. The *Wilhelm Schmidt* at the time of the institution of the suit was a German vessel belonging to the port of Rostock, in the Grand Duchy of Mecklenburg-Schwerin, and was sailing under the flag of the North German Confederation, and her owners were subjects of the said confederation. In the month of March 1870, the ship was lying at Constantinople, and on 21st March, a charter party was there entered into between her master and Messrs. Schjött and Reppen, merchants, resident at Constantinople, but subjects of the North German Confederation. By such charter party, which was in the English language, the *Wilhelm Schmidt* was to proceed to a safe port in the sea of Azov, as ordered at Beridianski, and there load a full and complete cargo of goods at the option of the freighter, and proceed therewith to a safe port in the United Kingdom or the continent, calling at Cork, Falmouth, or Plymouth for orders, which were to be given by return of post in reply to the master's letter to the charterers' agents in London, and deliver the said cargo on being paid freight at rates therein mentioned, "the act of God, the

them. It is impossible to fix a hard and fast rule, as was attempted in *Lloyd v. Guibert* (supra). Such a rule would lead to the most complicated questions. We need only instance the case of goods shipped at the same time at a foreign port on two vessels of different flags by the same shippers, and consigned to the same consignees in England, under identical bills of lading. If the laws of the flags governed these contracts, the goods would be carried by the two ships on different terms, according to the different laws, although the intention of the shippers was to make the terms in each case identical. It is easy to gather the intention of the parties in each case, and such intention is a pure question of fact, and not of law; and it is to be regretted that it has not been so treated in this country. —EN.

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Queen's enemies, restraint of princes and rulers, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever, during the said voyage, always mutually excepted." In pursuance of the said charter party, and in accordance with the charterers' orders, the ship proceeded to Yeisk, and the said Messrs. Schjött and Reppen caused to be shipped on board, by one D. A. Negroponte, a cargo of linseed, and the master of the *Wilhelm Schmidt* signed and delivered a bill of lading in the English language, in the following terms.

Shipped in good order and condition by D. A. Negroponte in and upon the good ship called the *Wilhelm Schmidt*, Captain Fr. Zeplian, now riding at anchor in Yeisk, and bound for Cork, Falmouth, or Plymouth, for orders as per charter party, linseed in bulk, say two thousand five hundred and fifty-two cwt. each, each.

Mate for damage—1000 being marked and numbered as in the margin, and are to be delivered in the like good order and condition at a safe port of the United Kingdom or on the continent (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever kind soever excepted) unto Messrs. Melas, Brothers, of London, or to their assigns, paying freight for the said goods, and all other conditions as per charter party, dated Constantinople, March 21, 1870, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished, the other two to stand void.

FRED. ZEPLIEN,
P. D. A. NEGROPONTE,
S. PALAPRU.

Dated in Yeisk 2/4, May, 1870.

Laying days consumed in loading cargo, twenty.

On 14th May 1870 the ship sailed from Yeisk with the said cargo on board, and arrived at Falmouth on 7th Sept. 1870, and the master at once wrote to Messrs. Melas, Bros., the consignees and charterers' agents. On the 10th Sept. 1870 the master received orders from Messrs. Melas, Bros., to proceed to Ipswich, and there deliver to the plaintiffs. Messrs. Melas, Bros., whilst the cargo was yet to arrive and whilst the ship was on her voyage, sold the cargo to Messrs. Edwards, Easty, and Co., who were the plaintiffs' brokers in London, for and on behalf of the plaintiffs. The captain had no knowledge of such sale, and received his orders from Melas, Bros., and their agents at Falmouth. At the time of the arrival of the ship at Falmouth war had broken out between France and Germany, and it continued to exist until after the delivery of the cargo to the plaintiffs. When the ship arrived at Falmouth her bottom was very foul; and her master, thinking it necessary in order to diminish the risk of capture, proceeded to have it cleaned. This and light and unfavourable winds kept the ship at Falmouth until 12th Oct. 1870. The winds were easterly and very light until that date; and the master said that he had not a fair chance of slipping through the French cruisers, of which there were many about the Channel, without a strong wind from the westward. On 26th Sept. the agents of Melas, Bros., at Falmouth, asked the captain to accept orders to go to Lowestoft instead of Ipswich, and he consented. On 12th Oct. there was a strong S.W. gale, and the captain would have started, but he could not get a pilot; but on 13th Oct. he sailed, being towed out by two tugs. The wind lasted favourable until that evening, when it changed and fell to nearly a calm,

and when off Dartmouth the master saw two men-of-war, which he feared were French cruisers, and he stood in for Dartmouth, into which port he put the next day. It was proved that these were French cruisers in the Channel trying to capture German ships. Whilst at Dartmouth the master was in constant communication with Mr. Kingston, the agent of Melas Brothers there, who was also German consul. He warned the master of the French cruisers being on the route the master would have to take. On Oct. 22nd the agent of Melas Brothers asked the master to pay a sum of money towards the expenses of a tug to tow the ship to Lowestoft, and the master on obtaining his owner's consent, offered to pay 20*l*, but this was considered too small a sum by Melas Brothers. A tug was not procured owing to a tug company, through fear of capture, refusing to carry out a contract they had made to tow the ship. The master did all he could to obtain a tug. On the 1st Nov. the captain promised to sail with the first fair wind, and repeated his promise on Nov. 17th, when he said he would go whenever he had a good chance to get through the cruisers, but that he had a difference with his crew; and at the end of Nov. the master declared he would go under canvas, and thereupon Messrs. Melas Brothers on Dec. 2nd intimated that they would provide a tug at their own expense.

The ship was towed out of Dartmouth on the 10th Dec., and arrived at Lowestoft 14th Dec. The master acknowledged that he would not have put into and delayed at Dartmouth, and would have sailed for Lowestoft direct, if it had not been for fear of capture. The discharge of cargo did not commence until 23rd Dec., and when the cargo was examined it was found to be damaged by heating caused by the long detention in the ship's hold. The plaintiffs paid Messrs. Melas Brothers the full price of the cargo less certain deductions for deterioration which were settled by arbitration in accordance with the contract of sale. The cargo had been examined at Dartmouth, and found to be slightly heated, and the master did all he could to prevent further mischief.

The defendant's answer contained, amongst others, the following paragraphs:

16. By the law of Rostock and the North German Confederation the master of the *Wilhelm Schmidt* was entitled to keep the said vessel in the port of Falmouth and in Dartmouth whilst she would have been liable to risk of capture at sea by reason of the existence of the said war, and by such law the master of the *Wilhelm Schmidt* whilst the said war and liability to risk of capture continued was not under any obligation to the plaintiffs to proceed or to attempt to proceed to Ipswich or Lowestoft with the *Wilhelm Schmidt*, and by the said law the master of the said vessel had not been guilty of any breach of contract or of duty with or to the plaintiffs by remaining in Falmouth or putting into and remaining in Dartmouth with the said goods on board the said ship under the circumstances.

18. If the said cargo was not delivered in like order and condition as when it was shipped on board the *Wilhelm Schmidt*, the damage and deterioration thereto was caused by the restraints of princes and rulers within the true intent and meaning of the said charter party and bill of lading, and by its having been shipped gross and in an unfit condition for shipment, and by the natural condition and inherent vices of the said cargo, or by some or one of such causes.

19. The damaged and deteriorated condition (if any) of the said cargo was occasioned by the natural condition and the inherent vices of the said cargo, and by the prolongation of the voyage owing to the said war, and liability to risk of capture, and by the law of the said

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[ADM.]

Confederation the owners of the *Wilhelm Schmidt* are not liable to the Plaintiffs in respect thereof.

Mr. Travers, Vice-Consul of the North German Confederation, and a German advocate, was called who proved the existence of a code of the North German Confederation, and proved a translation by Wendt (Papers on Maritime Legislation, with a translation of the German Mercantile Law relating to Maritime Commerce) to be a correct translation. He gave it as his opinion that under that code a master is not responsible for any damage resulting from delay under the circumstances of this case. He referred to Art. 636 taken with Art. 631, Art. 637, 595, of the code. These articles of the North German code and all the others cited in the argument and judgment will be found set out in the *Patria*, ante p. 71, except the following articles.

Art. 607. The shipowner is answerable for any damage arising through loss of or injury to the goods, from the time of their being shipped until their delivery, unless he can prove that such loss or injury has been caused by the act of God (*vis major*) or by the natural condition of the goods, more particularly by *vice propre*, by diminution in quantity, by ordinary leakage, &c., or by such defective packing as could not be noticed externally. Loss and injury arising from a defective condition of the vessel, which, in spite of all possible caution, could not be discovered, are to be considered as loss and injury by the act of God.

Art. 649. The act of handing over any bill of lading issued to order to the party thereby becoming authorised to receive the goods, has, as soon as such goods are really shipped, the same legal consequence with respect to the acquisition of the rights depending on the delivery of the goods, as the delivery of the goods themselves.

Art. 658. Should the bill of lading contain the clauses, "free from breakage," or "free from leakage," or "free from damage," or any other addition to the same effect, the shipowner is not answerable for the breakage or leakage or damage, unless it can be proved to have been caused by the default of the master or another person by whom the shipowner is responsible.

Benjamin (Cohen with him) for the plaintiffs.—The cargo was delivered in a damaged state, caused by heating arising from the delay. The vessel arrived at Falmouth on 7th Sept., and did not discharge her cargo for four months. It is admitted that the master did not proceed for fear of capture. [Sir R. PHILLIMORE.—The question is, whether the existence of the war is a justification of the delay.] It is no justification, whether the case is to be governed by German or English law. By all laws written agreements bind as long as they are not illegal. The bill of lading is here the agreement between the parties. The vessel is not described in the bill of lading as a German ship. Article 645 of the North German Code provides a form of bill of lading, and this is not in accordance with that form. It does not mention the nationality of the ship, and therefore it is not a German bill of lading. By Arts. 647–649 of the code the plaintiffs had a right to delivery of the cargo. By Art. 653 the bill of lading is decisive as between the shipowner and the consignee, and the latter is not affected by the charter unless it is referred to; but the only provisions in the bill of lading are "the act of God, the Queen's enemies," &c., the usual exceptions of an English bill of lading. The contract must depend upon its written terms, and here they are precise: (*Kay v. Whorler*, L. Rep. 2 C. P. 302; 16 L. T. Rep. N. S. 65.) Even supposing it is a German contract, the shipowner would, by German law, be exempt only under Art. 607 from loss caused by the risks therein contained. Further

exemptions must be set out in the bill of lading. There is no article in the code exempting the shipowner from liability to damage occasioned by delay. The word "accident," in Art. 595 of the code, cannot mean risk of capture. By Arts. 631–636 either party may withdraw from the contract when a war has been declared, in consequence of which the vessel would be liable to risk of capture, but they are not compelled to withdraw. The master did not withdraw, he only delayed. The defendants ask us to put in the stipulation "free from damage." (Art. 659.) The bill of lading contains an exception, "Queen's enemies," but this cannot mean the enemies of Prussia. [Sir R. PHILLIMORE—*Russell v. Niemann*, 34 L. J. 10, C. P.; 17 C. B., N. S., 163; 10 L. T. Rep. N. S. 786.] If the contract is to be governed by English law, there was no act of enemies. The special exceptions in the bill of lading point to acts done in war, not the mere outbreak of war. Articles 631, 636, of the code, give the parties power to withdraw, and are therefore inapplicable here where both parties refused. Whilst at Falmouth, the master could either stick to his contract or withdraw under these articles. He elected to sail with the first fair wind, and must be held bound by this election. He committed a breach by putting into Dartmouth for fear of capture. His position was the same as if the charter party had been entered into after war had begun to his knowledge; he then would have been bound to proceed unless prevented by the excepted perils. None of these things happened. He could not be said to be prevented from proceeding by the presence of the French cruisers; he had no right to delay a perishable cargo on account of fear. He held out to us that the wind delayed him, and gave us no chance to withdraw. The right to delay on account of risk of capture depends upon whether the case is to be governed by English or German law. The obligation as to delivery is governed by English law. It is immaterial that the contract was made at Constantinople; the law of the place of delivery governs, and that is in England. The destination was fixed by the orders for England, and it is as though the bill of lading ran to deliver in Lowestoft. The seat of the contract is England, and it was the intention of the parties to bind themselves by the English law: *Lloyd v. Guibert* (L. Rep. 1 Q. B. 115; 10 L. T. Rep. N. S. 570; in Ex. Ch. 13 L. T. Rep. N. S. 602.) The master has power to make his owners liable for contracts entered into by him to the extent allowed by the law of the country of the owners. When the contract was made there was no war; it was an ordinary English bill of lading, containing English exceptions given in pursuance of an English charter. The bill of lading was in English, and the form was English, because the contract was to be carried out in England. The language selected shows which law is to bind. The intention is to be sought in the acts of the parties, and governs the contract unless the law interposes:

4 Phillimore's International law, pp. 473, 480.

Clarkson (Bull, Q.C. with him), for the defendants.—The plaintiffs have no right to sue. This is an English court, and right of suit depends on English law. The plaintiffs were not parties to the contract. They acquire their rights under the Bill of Lading Act. They have suffered no damage as they had allowances for deterioration.

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They cannot sue as trustees for the consignees. They could only sue if the *cestui que trust* had no right of action, but here the consignees, Melas Brothers, have a right to sue, and can sue even if the plaintiffs succeed. The main question must be governed by German law. The master had no authority from his owners to impose upon them liability, except that contemplated by their own law. The rights and liabilities of the parties must not be taken to be in abeyance until orders were given at Falmouth. This would be contrary to the passage in Phillimore's International Law. If it were so, the owner of the goods might wait and see which was the best port as to rights arising from the relations of nations. The contract is complete, with one term to be supplied, but the rights are determined when it is made, and the law of the flag governs the case: (*The Bahia, Bro. & Lush., 292.*) Even if English law governs, parties may be exempted by law where there is no stipulation in the written agreement, as in the case of loss by fire: (Merchant Shipping Act 1854, s. 503.) It is a principle of both German and English law, that the court must look to the written contract, but the parties are not deprived of the protection of the code unless there is an express stipulation. The master did not elect to go on; he said he would go as soon as he could without risk. The plaintiffs might have withdrawn. They deprived themselves of the right to recover for not going to Ipswich by giving the second order: (*Pole v. Oelovich, 9 C. B., N. S., 439; 5 L. T. Rep. N. S. 438.*) The master accepted that order for the plaintiffs' convenience. The plaintiffs wished the vessel to be towed in order to diminish risk. By the German law the master was justified in his delay: (Art. 636.) The damage was caused by the delay, and the shipowner is not answerable for the natural condition of the goods consequent thereon: (Art. 607.) If English law governs, the contract says nothing as to time of delivery, and its completion was prevented by Queen's enemies. This means enemies of sovereign of shipowner: (*Russell v. Niemann 34 L. J. 10, C. P.; 17 C. B., N. S., 163; 10 L. T. Rep. N. S. 786.*) The words are not, "act of Queen's enemies," and do not mean particular acts, but risk of capture. There is a further exception, "restraint of princes." The contract of the shipowner was to proceed under sail, not under steam, and he was prevented. Their own agent warned the master not to go save under steam.

Benjamin in reply.—The plaintiffs have a right to sue under the Bills of Lading Act: (*Smurthwaite v. Wilkins, 31 L. J., 214, C. P.; 11 C. B., N. S., 842; 5 L. T. Rep. N. S. 842.*) Even as trustees they have a right to sue: (*Robertson v. Wait, 22 L. J. 210 Ex.; 8 Ex. 299.*) This objection was not raised on the pleadings. This is a suit for damages for breach of contract and duty and loss of profit, and not merely for non-delivery. If it is held that the existence of enemies excuses the defendants from performance, it must be held that no overt acts are necessary but the mere existence of war. In this case the defendants would have been excused if there had been no cruisers in the Channel.

June 6.—Sir R. PHILLIMORE (after stating the facts).—It has been contended that, having regard to those facts, the present plaintiffs, who have sustained, as is alleged, no damage, and who are suing under the Bills of Lading Act and the

Admiralty Court Act, and who cannot sue as trustees, have no *personam standi* in this court. To this objection there are several answers: First, that it is not properly taken, but ought to have been pleaded; secondly, that it is by no means clear—looking to the case decided by Baron Parke (*Robertson and another v. Wait sup.*), an authority to which I was referred in the *Nuova Raffaella* (1 Aspinall's Mar. Law Cas. 16: 24 L. T. Rep. N. S.), lately decided by me—that the plaintiffs cannot sue as trustees; thirdly, under the Bills of Lading Act, the assignee of the bill passes not only his property, but also his liabilities and rights (*Smurthwaite and another v. Wilkins sup.*); fourthly, this suit is brought not only for damages, but for breach of contract and duty, and for the consequent loss of profit which thereby accrued to the plaintiffs. It is a question for the registrar, assisted by merchants, if any reference be ordered to ascertain what the amount of that loss is. I am of opinion that the preliminary and technical objection cannot be sustained. Now, as to the merits of the case, there are some important points which the admissions of counsel on both sides have placed out of the reach of controversy. The damage done to the cargo is not ascribed to want of care or negligence of the master, but to delay in sailing to the particular port for which orders were given. That delay was caused by the fear which the master entertained of being captured by the enemy of his sovereign, and not by any physical obstacle or by any moral or legal impossibility. Neither party to the contract wished to withdraw from, but both elected to adhere to it. The plaintiffs contended that the defendant is liable to damages, because the contract contained in the bill of lading is plain, and capture was not an excepted peril; and also because the contract, if any difficulty arise, must be construed according to the English law, which alone is applicable to it, and by which the risk or fear of capture did not, in the circumstances, release the master from his liability to carry the cargo to its destination. Nor, it is contended, if the German law be applicable, is the master, who adhered to his contract after being apprised of the war, released from his liability. And lastly, the hesitating and uncertain conduct of the master in playing fast and loose with the owners of the goods prevented them from exercising the option given them by the German law of withdrawing from the contract. These are the principal arguments which have been addressed to me on behalf of the plaintiffs. The contract of affreightment is in the charter party and in the bill of lading which refers to it. Both these contain as excepted perils the Queen's enemies, and the charter party further, "restraint of princes." The question by what law terms in this contract which are not of themselves clear, are to be explained, depends for its solution upon the answer to another question, viz., what law did the parties intend to govern the contract which they executed? and upon this point I am disposed to agree with the able argument of Mr. Benjamin, that the intention of the parties can be collected from the contract itself. The contract, he justly observed, is in the English language, which is not the language of the place in which it is made, but of one of the parties to it; the obligation of the contract is relative to the delivery of the goods, and an English form of contract has been chosen by the parties for the expression of their intention, be-

cause that obligation of delivery is to be executed in England. The consignee of the goods is English. The vessel is to proceed with her cargo to one of three British ports, where she is to receive the order which is to fix her destination to some safe port in the United Kingdom or the Continent; and when those orders are received and the destination is fixed, it does not seem to me irrational or unfair that the determination should be considered as if expressed in the original contract, and when the place of performance was fixed to be in England, the seat of the contract, to use the expression of foreign jurists, would be in that country, and the law of the country would be the law of the contract. To the objection, that upon this principle the law of the contract would be in abeyance until the order fixing the destination was given, it may, I think, be fairly answered, not only that the maxim "*Certum est quod certum reddi potest*" applies, but that the *prima facie* law and the ultimate law, so to speak, agree, the law of the place of call for orders, and the law of the place of performance fixed by the orders being both English; and I am of opinion that if any law is to be invoked for the purpose of construing the terms of the contract, both the intention to be collected from the circumstances of the contract, and the fact as to the place of performance lead to the conclusion that that law must be the law of England. The question remains whether the expected perils of the king's enemies (*Russell v. Niemann, sup.*) and the restraint of princes do or do not, according to the law of England relieve the master from the liability to damages which by the delay in the delivery of these goods he would otherwise have incurred. The vessel having arrived at Falmouth on the 9th Sept., on the 10th the master received orders from Melas Brothers to proceed to Ipswich. He had then received intelligence that French cruisers were in the neighbourhood. The bottom of the ship was foul, and the sails were damaged; some time was occupied in cleansing and repairing them; the winds were unfavourable. On the 26th Eastly and Co. telegraphed to Melas, "if in time, we should feel much obliged by your ordering the *Wilhelm Schmidt* to Lowestoft in lieu of Ipswich, as originally requested." Fox and Co. asked the master "if he would accept Lowestoft instead of Ipswich." He answered, "Yes, if I can please you." The acceptance of this alteration seems to have been asked in some degree as a favour of the master. The plaintiffs had bought another cargo to go to their mills at Ipswich, and had then cancelled the orders for Ipswich, and substituted the order for Lowestoft. The master deposes that there was no favourable wind before the 12th Oct.; that on that day he hoisted his jack for a pilot, but it blew too hard. On the 13th the pilot came on board, and the vessel was towed out of Falmouth harbour by two steamers. The wind afterwards wore round from the S.W. to the N.E., and died away. The master, seeing what he believed to be two French cruisers to the east of him, put into Dartmouth on the 14th Oct., and there he remained till the 10th Dec. This interval of time was occupied by negotiations with reference to obtaining the agency of steam power to take the ship to Lowestoft. The evidence on this matter is principally, if not entirely, furnished by the master, Mr. Kingston, the agent at Dartmouth for the plaintiffs, and the correspondence. From

the evidence I think the following propositions are to be deduced:—First, that the master was sincerely apprehensive of being captured by French cruisers—the enemies of his sovereign; that this danger apprehended was not remote or chimerical, but present and real; that Mr. Kingston, who was German Consul as well as agent for the plaintiffs, while in his latter capacity, he was continually urging the master to sail, was as continually, in his former capacity, admonishing him that if he did sail his ship would be taken. "You are in a very bad position," he said; "I would not be in your place; as German Consul I must tell you that you will lose your ship. I must advise you to stay here." Secondly, that it was indirectly, if not directly, admitted in terms, but certainly by the conduct of the plaintiffs, that steam power was, in the circumstances, necessary to bring the ship to Lowestoft, because by this agency she could be towed within the territorial limits of England, and thereby escape the imminent peril of capture. Thirdly, that during this interval negotiations were taking place between the plaintiffs and defendants, having for their object an arrangement as to the proportions of expense to be borne by the master and the plaintiffs consequent on the employment of a steam tug. Fourthly, that the master was honestly desirous of being towed to Lowestoft for the purpose of delivering the cargo at that port, and did all that he thought he could do consistently with his duty to his employers to forward the arrangement for obtaining a steam tug. It should be observed that it appears that one of the causes of failure of the negotiations was the alarm which one of the steam tugs negotiated with entertained of being captured. Fifthly, that on the 10th Dec. the steam tug and the ship immediately sailed for Lowestoft. Applying the principles of the English law to these propositions of fact, to the whole history of the case, and especially to the terms of the contract of affreightment, I do not think that the *Wilhelm Schmidt* is liable for the damages occasioned by the delay in the delivering of the cargo. If the principles of the German Code be applicable to this contract, they are still more favourable to the plaintiff. I dismiss the petition in this case with costs.

Solicitors for the plaintiffs, *Thomas and Hollans*.
Solicitor for the defendants, *Thomas Cooper*.

July 25 and Aug. 2, 1871.

THE GAUNTLET.

Naval service—Towing prize of war—Property in prize—Foreign Enlistment Act 1870 (33 & 34 Vict. c. 90), s. 8.

The property in a prize of war may pass to the captors without such prize being taken into a port belonging to the country of the captors, or being condemned by a prize court.

A prize of war (a merchantman), with a prize crew on board, is not a ship of war.

A tug towing such a vessel from neutral waters to the waters of her captors, in the ordinary course of her employment, does not complete the capture, and is not employed in the naval service of a belligerent within the meaning of the Foreign Enlistment Act 1870, s. 8, sub. 4.

This was a cause instituted by her Majesty's Procurator-General against the steaming *Gauntlet* to obtain the forfeiture of the *Gauntlet* to her

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Majesty for alleged breaches of the Foreign Enlistment Act 1870, s. 8, subs. 4 (a.)

The following is the petition in the said cause:—

1. On the 24th Nov. 1870, the ship *Lord Brougham*, of the port of Hamburgh, having been then lately captured and taken on the high seas, by a French vessel of war, as a prize of war, arrived and anchored in the Downs, to wit, within three marine miles of the shore of England, being in the possession of the Government of France, and in charge of a French prize crew.

2. On the same 24th Nov. 1870, Henry Beer Mumford, one of the owners of the said steam vessel *Gauntlet*, did, without the licence of her Majesty in that behalf—to wit, at Deal, in the county of Kent, make and enter into a certain agreement with *Le Saurel*, then being French Consul at Folkestone, in the county of Kent, and in the service of the French Government, that in consideration of a sum of money to be paid, to wit, by the French Consul-General in London, on behalf of the French Government, to wit, to the said Henry Beer Mumford and the other owners of the said steam vessel, he would despatch the said vessel *Gauntlet* in order or with intent that the said steam vessel should, or with knowledge or having reasonable cause to believe that she would be employed in the naval service of France, in towing the said ship *Lord Brougham* from the place where she then was, in charge of a French prize crew, as such prize of war as aforesaid—to wit, from within three marine miles of the shore of England to the port of Dunkirk, in France.

3. On the 24th Nov. and following days the said Henry Beer Mumford did accordingly in pursuance of the said agreement, and without the licence of her Majesty, despatch or cause or allow to be despatched the said steam vessel *Gauntlet*, in order or with intent that the said steam vessel should or with knowledge or having reasonable cause to believe that she would be employed in the naval service of France as aforesaid in towing the said ship *Lord Brougham*, then being in charge of a French prize crew as such prize of war as aforesaid, to wit, from within three marine miles of the shore of England to the said port of Dunkirk in France.

The said steam vessel *Gauntlet* then being in charge of the servants of the said Henry Beer Mumford and the said other owners was thereupon accordingly without the licence of her Majesty employed in the naval service aforesaid of France in towing, and did tow the said ship *Lord Brougham*, then being in charge of a French prize crew as aforesaid as such prize of war as aforesaid, to wit, from within three marine miles of the shore of England to the said port of Dunkirk.

5. During all the times aforesaid, France was a State at war with Prussia, and Prussia was a State at peace with her Majesty, as the said Henry Beer Mumford and the other owners of the said steam vessel *Gauntlet* during all the times aforesaid well knew.

6. By reason of the premises, the said Henry Beer Mumford did within her Majesty's dominions, and without the licence of her Majesty, within the meaning of the

(a) Sect. 8. If any person within her Majesty's dominions, without the licence of her Majesty, does any of the following acts: (1), holds, &c.; (2), issues, &c.; (3), equips, &c.; (4), despatches, or causes or allows to be despatched, with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; such person shall be deemed to have committed an offence against the Act, and the following consequences shall ensue:—(1), the offender shall be, &c.; (2), the ship in respect of which any such offence is committed and her equipment shall be forfeited to her Majesty, &c.

Sect. 30. In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them; that is to say, . . . "naval service" shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war, or other ship, when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport or store ship, privateer, or ship under letters of marque; and, as respects a ship, include any user of a ship as a transport, store ship, privateer, or ship under letters of marque.

Foreign Enlistment Act 1870, despatch and cause and allow to be despatched the said steamship or vessel *Gauntlet* in order or with intent that she should or with knowledge or having reasonable cause to believe that she would be employed in the naval service of a foreign State, to wit, France, then at war with a State, to wit, Prussia, then at peace with her Majesty, and the said steamship or vessel and her equipment thereby became and were and are forfeited to her Majesty, in pursuance of and under the provisions of the said Act.

The defendant's answer set out that it was a common and usual practice for the masters of steamships to apply to the consuls of foreign states for employment in the towage of vessels and to arrange with or in the presence of such consuls the sums to be paid for such service, and, as a rule, the masters of foreign vessels will enter into no agreements in relation to their ships unless in the presence of or with the approbation of the consuls of their respective states where such consuls are accessible, and this statement appeared to be the fact. The answer further contained the following articles:

6. The said Henry Beer Mumford and the said James William West had heard a rumour to the effect that the *Lord Brougham* was a North German vessel which had then lately been captured on the high seas by a French vessel of war as a prize of war. The said contract was notwithstanding entered into, and the said towage service rendered for the ordinary remuneration of the said tug, and not otherwise.

7. That the said Henry Beer Mumford did not on the 24th Nov. 1870, or on any other day, enter into an agreement with *Le Saurel*, the French consul at Folkestone, in the county of Kent, as stated in the said petition, or at all for the despatch of the said steam vessel *Gauntlet* in order or with intent that she should or with knowledge or having reasonable cause to believe that she would be employed in the naval service of France in towing a prize of war as in the said petition alleged, and that the said Henry Beer Mumford did not on the 24th Nov. and following days, or any other days, in pursuance of the said agreement, or of any other agreement, or at all despatch or cause or all to be despatched, the said steam vessel *Gauntlet*, in order or with intent that she should, or with knowledge or having reasonable cause to believe that she would be employed in the naval service of France in towing such prize of war as in the said petition alleged, and that the said steam vessel was not accordingly or at all employed in the naval service of France in towing the said ship, as in the said petition alleged.

The parties agreed upon certain admissions, which are as follows:

1. That on or about the 24th Nov. 1870, the ship *Lord Brougham* in the petition filed in this cause referred to, was only captured in the English Channel, as prize of war, by a ship of war in the service of the Government of France.

2. That at the time of such capture the said ship *Lord Brougham* was the property of subjects of the King of Prussia, and was sailing under the Prussian flag, on a voyage from South America to Hamburgh with a cargo of merchandise.

3. That upon such capture the greater number of her crew were taken out of the said ship *Lord Brougham*, as prisoners of war, and a prize crew from the said French ship of war, under the command of an officer in the French naval service was put on board of the said ship *Lord Brougham*.

4. That after the said capture the *Lord Brougham* was driven, by stress of weather, to the Downs, where she arrived on the 24th Nov. 1870 (and by order of an Admiral in the French naval service commanding the French ship of war, *La Provence*, then lying in the Downs), anchored near to the said ship *La Provence*, and within three marine miles of the shore of England.

5. That the French ship of war, *La Provence*, left the Downs on the 25th Nov. 1870, leaving the said *Lord Brougham* still at anchor there.

6. That on the 27th Nov. the said steamship *Gauntlet* made fast to the said ship *Lord Brougham*, at the place

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where she was lying at anchor in the Downs as aforesaid, and towed her to Dunkirk Roads and there left her.

7. That the said ship *Lord Brougham* was so towed as aforesaid under and in pursuance of a certain agreement for that purpose, and which agreement is in the words and figures following, that is to say:

"We, the undersigned, do agree to tow the *Lord Brougham* from the Downs to Dunkirk Roads, for the sum of 70*l.* sterling.

"(Signed) H. B. MUMFORD,
"DOUROUVILLE."

8. The said Henry Beer Mumford, one of the parties to the said agreement, is one of the above-named defendants and a part owner of the said steamer *Gauntlet*. The said M. Douroville, the other party to the said agreement, was the prize captain of the said *Lord Brougham*, and the said agreement was signed in the presence and with the concurrence of the said Le Saurel, one Woodroffe being also present.

9. That the said sum of 70*l.* mentioned in the said agreement is a usual charge for the towage of such a vessel as the *Lord Brougham* from the Downs to Dunkirk Roads.

10. That as soon as the *Gauntlet* had towed the said vessel, *Lord Brougham*, to Dunkirk Roads, J. W. West, the captain of the *Gauntlet*, presented to the said M. Douroville the usual towage certificate, which is in the words and figures following, that is to say:

I hereby certify that the steamer *Gauntlet* has towed the ship *Lord Brougham*, under my command, from the Downs to Dunkirk Roads to my satisfaction, for which please pay the sum of 70*l.* sterling. DOUROUVILLE.

The 27th Nov. 1870.

11. The said certificate having been signed by the said M. Douroville, was, on the return of the *Gauntlet* to Deal, presented by the said J. W. West to the said M. Le Saurel for payment of the said sum of 70*l.* The said M. Le Saurel then handed to the said J. W. West an order upon the French consul-general in London for payment of the said sum. Such last-mentioned order, accompanied by the said certificate, was on the 7th Dec. presented to the said French consul-general in London, who, on the 27th Dec. 1870, paid the said sum of 70*l.*

12. That the *Lord Brougham*, during such voyage to Dunkirk Roads, was in charge of the said prize crew and the officer commanding the same.

F. H. DYKE,
Queen's Proctor.

LOWLESS, NELSON, and JONES,
Solicitors for the Defendants.

Dated this 20th July 1871.

According to the instructions issued by her Majesty's Government during the war between France and Germany, any belligerent ship which entered the territorial waters of her Majesty was required to depart and put to sea in twenty-four hours, except in case of stress of weather, and "armed ships of either party are interdicted from carrying prizes made by them into the ports, harbours, roadsteads, or waters of the United Kingdom, or any of her Majesty's colonies or possessions abroad." (Letter of Lord Granville to the Lords Commissioners of the Admiralty, *London Gazette*, 19th July 1870, p. 3432). On the 26th Nov. the collector of Customs at Deal had an interview with an agent of the French consul, and called his attention to the orders of her Majesty's Government, and asked him "if the French consul was coming to see him about the ship, as it was time she started." The reply was that the French consul had been telegraphed for. He arrived on the same day at Deal, went to the office of the latter, and said to him, "I come to speak about the *Lord Brougham*, as you have sent me word that she was to be moved at once. I did telegraph to many places to have a tug, and I found one that was by accident at anchor in the Downs. This tug was not the one for which I had telegraphed," he said "that's all right." The collector pointed out to the French consul the orders of the Govern-

ment under which he ordered the prize to be removed.

The *Attorney-General*, *Queen's Advocate*, and *Archibald*, for the Crown.—The section applicable is a 8, sub-sect. 4. The sole question is whether the tug was employed in the naval service of France? Had her owners reasonable cause to believe that she would be employed in the naval service? The amount paid is immaterial. By means of the tug they avoided recapture, of which they were in danger until *infra providia*. If a Prussian cruiser had chased the tug, there would then have been naval service. If she had towed out a French man-of-war to capture the prize, or in or out of action, it would be a clear offence, for she would have been under the command of a French officer. Does it make any difference that she assisted only in the completion of the capture? She was under the command of the prize captain and was bound to obey him under penalty of losing the towage money: (*The Christina*, 6 Notes of Cases, 4). The tug and the prize were one vessel: (*The Cleodon*, 1 Lush. 158, 4 L. T. Rep. N. S. 159). The prize was towed to a French port, when she first became safe, and this was part of the capture, viz., its completion. If the prize captain had taken the master of the tug on board as one of the crew, he would have been in the naval service. What is the difference between that and towing under orders? It must depend on the intention of the parties. If the object were to take her out of English waters there was no offence, but if to take her *infra providia*, there was. [Sir R. PHILLIMORE.—The evidence was, that the intention was to take her out of British waters.] So far as the evidence went. The place to which she was taken shows the intention. [Sir R. PHILLIMORE.—Supposing she had only been towed a mile, the criterion would then be to what port they were taking her. Does the taking her to Dunkirk constitute the offence, or the taking her in tow at all?] The taking her to the waters of a belligerent is a naval service and constitutes the offence. The agreement was with the French consul on behalf of the French government. [Sir R. PHILLIMORE.—Under what part of the interpretation clause do you put the offence?] That clause does not limit the words "naval service," but only says what shall be included in them, and even if it is not within the words, it is a naval service. The object of the Act is to maintain perfect neutrality. The act done amounted to pilotage. [Sir R. PHILLIMORE.—If the master of the tug can be called a pilot, must not his service be in a military or naval operation? Is not the capture complete when the flag is struck?] No; there must be *deductio infra providia*: (6 Phil. Int. Law, 504). A vessel must be condemned before the property definitely passes to her captors: (1b. p. 464; *Ones v. Withers*, 2 Burr. Rep. 693). Capture is not complete until the ship is brought into port. This ship must be taken to be a ship of war under this Act. She would have to fight against recapture. [Sir R. PHILLIMORE.—Suppose the vessel empty.] That would be different; here she is connected with a ship of war, and has a prize crew on board. The object of the Legislature is to make the Act as wide as possible.

The *Admiralty Advocate* and *Edwyn Jones* for the defendants.—The ship was removed at the instigation of the collector of customs; this shows the intention was to remove her from British

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waters. This Act is a penal one, and must be strictly construed. All that is not forbidden is permitted; there is no such word as "towing" in the Act. To condemn the tug you must hold towing to mean naval service. The tug actually towed the ship from a place of safety into danger, as there might be Prussian cruisers in the Channel. The words of the Act are "military or naval service;" there must be a hostile operation or warlike act. [Sir R. PHILLIMORE.—Is not the first duty of a captor to bring the prize *infra presidia* by taking her into port?] A vessel may be condemned in a neutral port by a competent tribunal:

The Polka, 1 Spinks, 447;

The Henrich and Maria, 4 C. Rob. 43.

If that is so, she belonged to the French Government when she put into Deal, at any rate sufficiently to justify the *Gauntlet* in towing her. She could not be said to be any longer the property of her German owners. The title to her had passed, or at any rate, could only be matter of dispute before a competent tribunal, and it cannot be said that a neutral tug could be responsible in such a case. This was a French prize, and by French law she was *infra presidia* in a neutral port, and could be condemned by the counsel if the English Government consented: (*Traité des Prises Maritimes*; *Pilotes at Dunderdy*, p. 22b.) [Sir R. PHILLIMORE.—If the vessel had been seized by the Prussians, would the tug have been free from capture?] It cannot be said that the crew of the tug could be made prisoners of war. [Sir R. PHILLIMORE.—The crew of a blockade runner cannot be taken prisoners.] Neither could the crew of this tug. The statute says the words "shall" have the meanings herein-after respectively assigned to them," and these meanings must be strictly construed in a penal statute. If the word "pilot" applies, the ship must be employed in a naval or military operation, and there can be no difference between the employment of a person and a ship in the meaning of the Act. The prize was not a ship of war, and, by capture, she was French property. There is no reason why a disabled man-of-war should not be towed. It is not a naval operation, even if she thereby escape capture. The men on board the tug were not servants of the French Government, if the tug had thrown off they would have been guilty of no breach of naval duty, but only of a breach of contract. *The Cleadon* (*sup.*) is only applicable to cases of collision.

The *Queen's Advocate* in reply.—An interpretation clause does not narrow the meaning of words, but extends them: (*Ex parte Ferguson and Hutchinson*, L. Rep. 6 Q. B. 280; 24 L. T. Rep. N. S. 96; 1 Aspinall's Mar. Law Cas. 8.) The tug was employed in subverting the naval operations of France, and is therefore within the statute: (*The International*, L. Rep. 3 A. & E. 321; 23 L. T. Rep. N. S. 787.) The *Lord Brougham* was a ship of war as long as she was in possession of the prize crew. They would have been prisoners of war if they had been captured, and were in the same position as if they had been on board the French man-of-war. If they had made any capture the whole of the crew of the man-of-war would have shared.

The Frederick and Mary Ann, 6 C. Rob. 214

Aug. 2.—Sir R. Phillimore.—This is a suit instituted on behalf of the Crown by her Majesty's Procurator-General against a steamship called the *Gauntlet*. The petition prays that this ship may be decreed to be forfeited to the Crown on the

ground that the ship has violated the provisions of the Foreign Enlistment Act, and more especially those contained in the 8th section of that statute. That section provides "that if any person within her Majesty's dominions, without the licence of her Majesty, does any of the following acts, that is to say . . . (4) despatches, or causes or allows to be despatched, any ship, with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly state." . . . The statute provides that the ship, in respect of which any such offence is committed, and her equipment, shall be forfeited to her Majesty. The interpretation clause (sect. 30), to which I must again presently advert, enacts that "naval service shall," &c. (as before set out.) The principal facts of the case to be derived from the admissions of both parties filed in court are as follows: (His Lordship here stated the facts.) The question for the court to determine is, whether these facts render the *Gauntlet* liable to condemnation under the provisions of the statute to which I have adverted. The statute is a highly penal one. As to its general character I have expressed my opinion in the recent case of the *International* (*sup.*) I will only now say that it is my duty neither to weaken the effect of the statute by a tenderness to the circumstances of a particular case, nor to strain the provisions of it so as to include a case which is not clearly within them. There is one argument on the construction of the statute which I wish to dispose of *in limine*. It has been contended by the defendants that the interpretation clause limits and restrains the enacting clause, and that inasmuch as steamtug is not among the vessels therein enumerated, there is a *casus omissus* in the statute which disposes of the present case in favour of the defendants. I am of opinion, however, that the interpretation clause is not of a restrictive, but of an enlarging character. I am glad to be fortified in this conclusion by the opinion of Blackburn, J. in *Ex parte Ferguson and Hutchinson* (*sup.*) upon a similar clause in the Merchant Shipping Act, as to which he says, "The argument against the proposition is one which I have heard very frequently, viz., where an Act says certain words shall include a certain thing, that the words must apply exclusively to that which they are to include. That is not so; the definition given of a 'ship' is in order that 'ship' may have a more extensive meaning." The argument on behalf of the Crown for the condemnation of this vessel has been that the consequences of the act of capture were incomplete until the prize had been brought *infra presidia*, and that these consequences were completed by the agency and intervention of the *Gauntlet*. That the towing was connected with the original seizure, was indeed a continuance of the belligerent act; that if the intention had been merely to take the vessel out of neutral waters, the case would have been subject to different considerations; but here she was brought in safety into the waters of the captors country, and the captor was relieved from the necessity of protecting his prize during the transit across the channel. That the *Gauntlet* was, for the time, the servant of the French captain, and hired by the French consul, so as to be employed in the French naval service. It was also contended that the captured vessel having a

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prize crew commanded by an officer, on board, was herself a ship of war; and it was urged that for one of, or for all those reasons, the *Gauntlet* has been despatched by her owner without the licence of her Majesty, "with reasonable cause to believe" that it would be employed in the naval service of France, and therefore has incurred the penalty of condemnation. I think this is a fair summary of the arguments of the Counsel for the Crown. I proceed to consider their force and effect, bearing in mind the reply which has been offered to them by the counsel for the defendants. First, I am unable to assent to the main position with respect to the completion of the act of capture by the employment of the *Gauntlet*, having regard to the circumstances of this case. It is true that various opinions have been expressed by great authorities on international law as to what constitutes a consummation, so to speak, of the act of capture—what is the criterion of the property in the vessel having become finally vested in the captor, and that the *deductio infra presidia* of the country of the captor is, by general recognition, a certain and secure, and, I may add, in my opinion, the proper means of effecting the transfer of such property; but at the same time this act cannot be said, having regard to the practice of states, to be the only criterion or the only means. I cannot express myself so well on this point as in the language of Lord Stowell in the *Heinrich and Maria* (sup.). In that case the condemnation in the court of the enemy of a prize ship lying in a neutral port was held to warrant the sale of her to a neutral merchant. Lord Stowell says: "Without entering into a discussion of the several opinions that have been thrown out on this subject, I think I may state the better opinion and practice to have been that a prize should be brought *infra presidia* of the capturing country, where, by being so brought, it may be considered as incorporated into the mass of national stock. The greatest extension that has been allowed has not carried the rule beyond the ports or places of security belonging to some friend or ally in the war, who has a common interest in defending the acquisitions of the belligerent, made from the common enemy of both. In later times an additional formality has been required, that of a sentence of condemnation in a competent court, decreeing the capture to have been rightly made, *jure belli*; it not being thought fit, in civilised society, that property of this sort should be converted without the sentence of a competent court, pronouncing it to have been seized as the property of an enemy, and to be now become *jure belli* the property of the captor. The purposes of justice require that such exercises of war should be placed under public inspection: and, therefore, the mere *deductio infra presidia* has not been deemed sufficient. No man buys under that title; he requires a sentence of condemnation, as the foundation of the title of the seller; and when the transfer is accepted, he is liable to have that document called for as the foundation of his own. From the moment that a sentence of condemnation becomes necessary, it imposes an additional obligation for bringing the property on which it is to pass into the country of the captor: for a legal sentence must be the result of legal proceedings in a legitimate court, armed with competent authority upon the subject matter, and upon the parties concerned—a court which has the means

of porseing the proper inquiry, and enforcing its decisions. These are principles of universal jurisdiction applicable to all courts, and more particularly to those which, by their constitution, in all countries, meet act *in rem* upon the corpse or substance of the thing acquired, and upon the parties, one of whom is not subject to other rights than those of war, and is amenable to no jurisdiction, but such as belongs to those who possess the rights of war against him. Upon principle, therefore, it is not to be asserted that a ship, brought into a neutral port, is with effect proceeded against in the belligerent country. The *res ipsa*, the corpse, is not within the possession of the court, and possession in such cases founds the jurisdiction."

It might be reasonably expected that these premises would have led this great judge to the necessary conclusion that not having been brought *infra presidia*, and having been condemned while lying in a neutral port, had not passed by a legal title to the claimant, but the decision is nevertheless otherwise, for Lord Stowell proceeds to say: "But it is not to be denied that the Court of Admiralty has gone further. It is now for a considerable time, that this court has been in the habit of condemning prizes carried to Lisbon and Leghorn, at times when I am not at liberty to say, that the sovereignty of those ports were engaged in a common war against the enemy of this country. The fact, that the ships proceeded against here, were lying there, has not been dissembled." . . . After some other remarks he continues: "Now, unless it can be shown that there is something in the nature of all these ports that essentially distinguishes them from the common character of neutral ports, not merely in certain other respects, but such as furnish a ground of solid distinction for purposes of this nature, I think it will be difficult to avoid the consequence, that whatever the correct principle may be, and however much it might import this country to respect and enforce this principle, this court, at least, is bound against that principle by its own practice. . . . How far the Superior Court will consider this question as concluded by the practice, even an inveterate practice of this court, is more than I can say. It might be extremely proper that the opinion of the court should be taken on this important question. It might seem to be its duty, for anything I know (for it would be presumptuous in me to hazard a conjecture), to recall the practice of this court to the proper purity of the principle. But sitting here, and observing, as I am judicially bound to do, the course of judicial administration which has prevailed, I do not feel myself authorised to uphold the sentences, which have passed in this court, over prizes carried into foreign ports, and disallowed at the same time, the validity of such as the enemy had pronounced, under circumstances so nearly similar, as not to afford ground of distinction between them, which appears, to my judgment, sufficiently solid." The course which Lord Stowell evidently wished to be taken, was pursued. The case was appealed, but in spite of this strong expression of Lord Stowell's opinion, I find that this case of *Heinrich and Maria* was affirmed by the Lords Commissioners of Appeal, on the 7th Aug. 1807. During the late war with Russia, my immediate predecessor in this court, while maintaining that a prize condemned ought to be in belligerent territory, nevertheless condemned, though reluc-

tantly, a prize lying in a neutral port, the Sovereign of which expressly consented to such condemnation: (*The Polka (sup.)*). Can I, in the face of these judgments, but more especially of the former, pronounce, under the provision of a penal statute, a sentence of forfeiture to the Crown of this vessel on the ground that by bringing the French prize *infra præsidia* of France, she had completed the title of her possession, only inchoate by the act of the French capture? I am of opinion that I cannot do so. But I must also observe that in considering the force of this argument, that the property in the prize could not pass without bringing her *infra præsidia*, the practice of the courts of the captor, as well as that of our own courts must be examined. It appears to me clear that the French tribunals of prize would hold that this *deductio infra præsidia* was not necessary to confer a valid title to the property: (*De Pistoyes et Duverdý; Traité des Prises Maritimes*, pp. 173, 176, 225, and, &c., 229, and, &c.) This vessel then would have been condemned while lying in neutral waters by a properly constituted tribunal of prize sitting in France. And it is to be observed that if the *Lord Brougham* had been for months instead of days in neutral waters the captor would, according to the argument, have acquired no legal property in the prize. Such a tribunal could not indeed be lawfully constituted or lawfully sit in a neutral territory. But it may be as I have stated, that with the permission of the neutral State, the prize locally situate in the waters of the neutral State might be condemned by the belligerent tribunal sitting in the belligerent State. Whether the neutral State, by such permission, might not provoke a serious question as to the strict maintenance of her neutral character and position; whether such permission must not be equally granted to both belligerents, and whether even such a course would not involve the neutral State in great difficulties, are grave considerations into which I have not to inquire. The fact that apart from the orders of her Majesty's government such a sentence of condemnation would not be illegal is only adverted to by me for the purpose of showing the contention that the *Gauntlet* is brought within the penal clauses of this statute, because her Act alone enabled the belligerent to acquire a valid title to this prize, cannot in my opinion be sustained. But if the vessel had become *jurs belli* a French vessel, then it was as lawful for the neutral steaming to tow her as it would have been for her to have towed any merchant vessel, originally French, across the Channel, though she had been hired for this purpose by the captain of a belligerent ship with the approval and intervention of the French consul. The case has been put of a neutral steaming attendant upon a belligerent ship and employed in towing away the prizes which she made; and it has been asked whether such conduct, relieving the belligerent ship from the encumbrance of protecting her prizes, and enabling her either to go into action against the enemy or to make fresh prizes, would not be an employment in the naval service of the belligerent? I mean to express no doubt that the judicial answer to this question would be in the affirmative, but the circumstances of the present case are materially and essentially different; the *Gauntlet* was in no way whatever directly or indirectly connected with or ministering to the capture of the vessel. She had, indeed, reasonable ground "to believe" at the time

when she was hired that the vessel which she was employed to tow had been captured from the German helligerent, but that was all. For that there was any intention on the part of the *Gauntlet* to infringe the provisions of the Foreign Enlistment Act, is not only on inference unwarranted by the facts in evidence before me, but, in truth, the contrary is to be presumed from them. The English collector of customs tells the French Consul that this vessel cannot remain in English waters. He is the person who originates and demands her removal. The consul says that he has accidentally found a steaming which would tow her away. The collector is perfectly satisfied. No suggestion of anything illegal in the transaction is made, and the tug proceeds to do her ordinary work, for the ordinary price. And I may here observe that it is not only a fact of notoriety, but one proved in the recent suits instituted in this court by English owners of cargo against German merchants, that there was no German cruiser in the Channel at this time, and that the transit was practically unattended by any risk or peril arising out of the war. Having towed the vessel across the Channel, the master of the tug, on presenting a certificate that he has performed his service, receives the ordinary price from the French consul on his return. It may indeed be, that, however innocent as to intention, the *Gauntlet* has, as a matter of fact, violated the provisions and incurred the penalties of the statute; but it is certainly a conclusion at which the court would be reluctant to arrive. Then it has been contended that, inasmuch as the vessel had a prize crew and officer on board, she was a ship of war, and, therefore, to tow her was to be employed in the naval service of the belligerent. I do not assent to this proposition. The prize crew and officer are not put on board a prize for the purpose of enabling her to cruise against the enemy, but for the purpose of maintaining the capture and preventing the native crew from rescuing the vessel. She was not commissioned, and was not a ship of war. Upon the whole, I am of opinion that the circumstances of the case do not warrant me in pronouncing that the *Gauntlet* is forfeited to the Crown, on the ground of her having been despatched with reasonable cause to believe that she would be employed in the naval service of France; and I dismiss her with her costs from this suit.

Proctor for the Crown, F. H. DUKE, Queen's Proctor.

Solicitors for the defendants, LOWLESS, NELSON, and JONES.

UNITED STATES DISTRICT COURT—EASTERN DISTRICT OF MICHIGAN.

Collected by F. O. CROMB, Esq., Barrister-at-Law.

THE SUNNYSIDE.

Tug lying in wait—Duties of to avoid collision—Responsibility of sailing vessel coming into collision with tug—Both vessels in fault.

A tug was lying in wait with her anchor up, drifting at the rate of between one and two miles per hour. She had the bright coloured lights up of a steam vessel in motion. A bark with all her sails set, and going about nine miles an hour, ran into the tug and sunk her, no effort having been made by the tug to get out of the way, but the bark at the last moment having put her helm hard up.

Held, in a suit by the owners of the tug, that it was the duty of the tug, notwithstanding she was lying in wait, to keep out of the way of the bark:

Held, also, that the lights of the tug having been seen from the bark two miles off, it was the duty of those on board to keep on her course, and to keep the lights of the tug in sight, and therefore the bark was in fault. The damages were ordered to be borne equally by the two vessels. (a)

COLLISION.

The collision occurred in Lake Huron, some five or six miles off shore, and a little above the port of Lexington, in the state of Michigan, at about three o'clock in the morning of the 14th June 1869. The night was clear, and although it was not yet daylight, the morning had dawned, and a vessel could be seen from one and a half to two miles distant. The wind was south-west. The tug was then, and for several hours previously had been, waiting for a tow. She had her bright coloured lights burning, and although her steam was up, her machinery was not in motion, and she was lying entirely still, except that she was drifting before the wind in a north-easterly direction, at the rate of from one to two miles per hour. At the time of the collision she was heading eastwardly, or as some of the witnesses said, east by north-half-north.

The bark was on a voyage from Erie to Chicago with a cargo of coal, and at the time of the collision was, and for some time previously had been, sailing on a course north-half-west. She had all sails set, and was moving through the water at the rate of about nine miles per hour. The bark struck the tug while the latter was lying as above described, hitting her just forward of the pilot house, at about right angles, or perhaps anking a very little forward, crushing in her timbers, and causing her to sink in about fifteen minutes.

The allegations on both sides appear by the judgment.

LONGYEAR, J.—The only fault attributed to the bark by the libel, viz., a change of course, is not sustained by the proof, but on the contrary, it clearly appears that the bark kept her course without any variation up to the moment of collision. If the trial had been confined to this one allegation of fault, the libel should clearly be dismissed. But such is not the case. A large portion of the testimony, admitted without objection, relates to other questions of fault on the part of the bark, and of excuse on the part of the tug, than those set up in the libel, and although the objection was made at the argument, the case was really tried and submitted upon those other questions. The case has, no doubt, been as fully and fairly tried, and can be as satisfactorily disposed of in its present position, as it could be if the present libel were dismissed and a new one filed, covering the case more fully as made by the testimony. The court will, therefore, in the exercise of that broad discretion possessed by it, allow the libel to be amended, and dispose of the case upon the merits as really presented and submitted at the hearing. It is clear to my mind that gross faults are attributable to both vessels in this case. First, as to the tug. The tug, showing as she did, the lights of a steam vessel in motion, must be held to

the responsibilities and duties of such vessel. By article 15 of the Collision Act of 1864, it was the duty of the tug to keep out of the way of the bark, provided the bark kept her course, as was her duty under article 18. The bark, as we have seen, did keep her course. Therefore, the tug is clearly in fault in not keeping out of the way of the bark, unless the excuses set up for her or some of them are tenable. It is contended, on behalf of the tug, that she had a right to lay where she was, in wait for a tow, and that it was customary for tugs to do so. The tug, no doubt, had the right claimed, but while exercising that right she had no right to exhibit the lights of a steam vessel in motion, and thereby mislead other vessels as to her status and intentions. If she would exercise that right in the night time in such a manner as to exempt herself from the duty imposed by article 15, she must do so at anchor, and with her anchor light up. It is also contended, on behalf of the tug, that some portions of her engine or machinery were partially disabled, in consequence of which she could not get under motion readily when lying still. This excuse is clearly untenable, because, first, it appears that no effort whatever was made to put her in motion; and, secondly, it does not appear but that there had been ample opportunity for repairs since the disability was known to exist. The tug, then, was clearly in fault in not keeping out of the way of the bark. Secondly, as to the bark: the duty of a steam vessel to keep out of the way of a sailing vessel, and of the latter to keep on her course, does not excuse the sailing vessel from the observance of ordinary care in her navigation, nor from the use of such means as may lay in her power to avoid a collision in case of immediate danger, even though that danger may have been made imminent by a non-observance of duty on the part of the steam vessel. Such I understand to be the effect of article 19, which is as follows: "In obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger." That is to say, these rules are made exclusively for preventing collisions. Now if under "any special circumstances which may exist in any particular case," it is necessary to depart from these rules in order to accomplish the very object the rules are intended to accomplish, then it is just as much the duty of a vessel to depart from the rules, as it is under other circumstances to observe them. It will not do to say that because one vessel shall fail to do its duty, the other is thereby licensed to run her down and destroy her, when such a consequence may be avoided by the exercise of ordinary care and precaution. And yet in order to exonerate the *Sunnyside* from blame in this case we must adopt that theory. The bright and green lights of the tug were seen and reported by the lookout on the *Sunnyside* when one and a half to two miles distant. The lights were seen a little over the port bow of the bark, and clearly indicated a steam vessel ahead to the eastward and across the bows of the bark. When the tug's lights were reported by the lookout the master, then in charge of the navigation of the bark, told the lookout that he "supposed it was a steamer, and guessed she would take care of herself." From this time the

(a) It has been held in the Admiralty Court that a vessel drifting must show her coloured lights; (*The George Arlie*, Lush 382; *The Est* and *The Glens*, 38 L. J. 33, Adm.; 20 L. T. Rep. N. S. 567.—Ed.)

Q. B.]

WOODHAM AND ANOTHER (apps.) v. PETERSON (resp.)

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tag's lights were not reported, nor was any watch kept or any notice whatever taken of them on board the bark until the lookout saw the tug right under the bows of the boat, and a collision was inevitable. Ordinary care and precaution require that when a light is once seen in circumstances to involve risk of collision, close watch must be kept on such light until it is safely passed: (See article 30, Collision Act of 29th April 1884; 1 Para. on Ship. & Adm. 505, note 3; *The Grey Eagle*, 9 Wall 505; *The Havre*, 1 Ben. 293, 303, 306.) The lights of the tug, as we have seen, were seen from the bark when from one and a half to two miles distant. The bark was moving through the water at the rate of nine miles per hour, at which rate she must have been from ten to fourteen minutes reaching the tug after her lights were first seen from the bark. There could have been no difficulty by the exercise of the commonest care and precaution on board the bark in determining that the tug was not in motion, but was slowly drifting right up into the course of the bark, where a collision must be inevitable unless the bark herself did something to avoid it. Neither was there any difficulty in the way of the bark's avoiding the collision, and if ordinary care and precaution had been exercised she would no doubt have done so. Because that care and precaution were not exercised on board the bark, contributing to the collision, as it undoubtedly did, she is in fault, and must stand her fair proportion of the loss occasioned by the collision. The tug and the bark were, therefore, both in fault, and the damages sustained by both on account of the collision must be equally divided between them. Let a decree be entered accordingly, and referring it to a commissioner to ascertain and compute the damages. The question of costs is reserved until the coming in of the commissioner's report.

COURT OF QUEEN'S BENCH.

Reported by T. W. SALTERS, and J. SHORTT, Esqrs.,
Barristers-at-Law.

Thursday, June 15, 1871.

WOODHAM AND ANOTHER (apps.) v. PETERSON (resp.)

Charter party—Port of Rochester—Metage due—
Liability of shipowner or consignee.

By charter party it was agreed that a ship should load a cargo of oats and proceed to a safe port on the east coast of Great Britain, &c., and there "deliver the same always afloat on being paid freight," at certain rates per quarter of oats discharged. "The cargo to be brought to and taken from alongside at charterer's expense and risk."

The ship sailed to Rochester, and discharged her cargo within that port.

The mayor and corporation of the city of Rochester, as owners of the port, are entitled to an ancient fee, toll, due, or reward of 1d. per quarter upon corn brought by water to, and unloaded within, the said port, payable by the person bringing such corn, for the weighing of the said corn, or being ready and willing to weigh the same. This due having been paid by the captain, the shipowners' agent brought an action in the County Court to recover the amount from the consignees of the cargo as and for money paid for them at their request. Judgment was given for the plaintiff.

On appeal, the court being of opinion that the question of liability arising between the shipowners and

consignees depended upon whether the due was in ancient times a payment for actual metage service done by the mayor and corporation before a cargo was put over the side of a ship, or afterwards, remitted the case to the judge below in order that he might ascertain the fact; and

Held, that (having regard to the terms of the charter party), if the due in its origin was for metage to be performed on board, the shipowners must bear it; but, if the metage was to be done ashore, then the cargo should fall on the consignees, who would in that case be liable to repay to the shipowners the amount disbursed for the same.

APPEAL from the judgment of the judge of the County Court of Kent, at Rochester, upon a plaint brought by the plaintiffs, as agent for the owners of two ships, against the defendants, as consignees of the cargoes of the said ships, by which plaint the plaintiff sought to recover 14l. 1s. 3d., as and for money paid by the plaintiff for the defendants at their request.

The plaintiff, a ship and insurance broker, carrying on business in London, entered into two charter parties with Johnson and Son, of London, merchants, by each of which it was agreed that the ship therein named should proceed to a certain place, and there load a full cargo of oats, and, being so loaded therewith, should proceed to a safe port on the east coast of Great Britain, London inclusive, or a safe port in the English Channel, or to Havre—orders to be given on signing bills of lading—or so near thereunto as she might safely get, and there deliver the same, always afloat, on being paid freight—2s. 3d. sterling for east coast of Great Britain, London inclusive, 2s. 6d. ditto for English Channel, 2s. 7½d. ditto for Havre, all per quarter of 36½b. oats discharged; 2d. gratuity to captain for good delivery. "The cargo to be brought to, and taken from alongside at charterer's expense and risk." (The act of God, &c., always excepted). "The freight to be paid on unloading and right delivery of the cargo in cash. The necessary cash for ship's disbursements to be advanced by shippers at the port of loading on usual terms."

The defendants were consignees of both cargoes, the bills of lading of which were endorsed to them in the usual way. Both ships were ordered to Rochester, and discharged their respective cargoes within that port. The case set out a certain decree of the Court of Chancery, dated the 28th July 1851, in a cause between the mayor, aldermen, and burgesses of the city of Rochester and one William Lee, whereby it was declared "that the mayor, aldermen, and burgesses of the city of Rochester, in the county of Kent, otherwise the mayor, aldermen, and citizens of the city of Rochester, in the county of Kent, are, as owners, of the port of the city of Rochester, lawfully entitled to demand, have, receive, and take the fee, toll, due or reward of three pence and one-half of a farthing for each and every ton weight of coals brought by water to and unloaded within the said port of the said city, payable by the person or persons bringing such coals by water in any ship or vessel to, and unloading the same coals within the said port of the same city, for the weighing of the said coals, or being ready and willing to weigh the same . . ."

It was admitted that the mayor, aldermen, and citizens of the city of Rochester are a body corporate, and are also as such owners of the said

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port of the said city entitled upon the terms of the said degree to a due of 1d. per quarter upon corn, grain and seeds. The captain of the two ships paid to the collector of the mayor, aldermen, and citizens in the whole course of business due amounting in the whole to the sum of 144. 1s. 3d., the amount sought to be recovered, and the receipts given by the collector had endorsed on them the following direction, signed by the respective masters of the two ships: "Pay the within to Messrs. Grossund and Co" (the shipowners), "or order, the value received in cash."

It was contended, on behalf of the plaintiff, that the due is payable for the corn, in fact, for the mayor, aldermen, and citizens weighing or being ready and willing to weigh the same, and not upon the ship, and that although the mayor, aldermen, and citizens obtain the money from the shipowner in the first instance, yet that the toll or due ultimately falls upon the owner or consignee of the cargo, they being the persons interested in the unloading and right delivery of the cargo, the due, as was contended by the plaintiff, being a due in respect of certain things, such as coal, corn, and seeds brought into the port by water, and unloaded there, and for the above reasons, the sums paid being paid by compulsion of law, were recoverable from the defendants as for money paid for their use and at their request. The defendant contended that the freight covered the port dues, and that the owner was liable under the charter parties to all charges necessarily incurred prior to and for the purpose of the delivery of the cargo, unless such were expressly excepted by the charter party.

The judgment of the County Court was given for the plaintiff, and the question was, whether this judgment was correct in point of law.

The case was stated at the request of both parties.

If the court should be of opinion that the judgment of the County Court was right, the verdict for the plaintiff was to stand; if otherwise a nonsuit or a verdict for the defendants was to be entered as the court might direct.

Prentice, Q.C. with him *Barrow*.—The question is, whether these port dues were payable by the shipowner or the charterers? According to the ordinary rule, the shipowner must pay them. [BLACKBURN, J.—This payment is for metage, and is not a port due.] By the charter the shipowner is to deliver the cargo "always afloat." The only place where the corn would be weighed would be on board ship. The captain pays the charge in the usual course of business, a fact tending to show that the shipowner is liable, and the ship is disinterested if the payment is not made. "Always afloat" are words written in ink and not printed. This due is payable on unloading, and for being "ready and willing to weigh" the corn. [LUSH, J.—The weighing may be for the benefit of the shipowner, or of the charterer, or both. BLACKBURN, J.—In *Hargr. Law Tract*, p. 76, measure is defined to be "a toll due for the use of a common husel or other instrument to measure dry or wet goods imported or exported." The right to this fee toll or port due was established in the Court of Chancery, as is stated in the case. In order to enable the shipowner to earn his freight he was under the necessity of paying these dues, and, having paid them, is not entitled to recover the amount from the charterers: (*Faith*

v. The East India Company, 4 B. & Ald. 630.) Is the charter party there, the freighter promised to pay and defray two-thirds of the port charges; the owner having paid the whole, was held to have no lien on the goods shipped for those charges, and Holroyd, J., expressing an opinion that the owner could not recover a sum he had paid for port charges, adds, "These charges would if not specially provided for by the charter party, fall on the owner of the ship. Then do they, by this charter party, become freight or in the nature of freight? I think not; and that the plaintiff is not entitled to a lien for them." [BLACKBURN, J.—The learned judge is there speaking of a charge on the ship.] But that shows the general rule. The real consideration for the due is the mayor and corporation being ready and willing to weigh the cargo. [LUSH, J.—This is not a duty for coming into the port; if the vessel merely came in for repair or safety and anchored, say for a week and then went out, the due would not be payable.] In *Bishop v. Wear* (3 Camp. 361), Sir James Mansfield, C.J., said, "If the goods are not landed, a compensation must be made for the benefit derived from the wharf by the owner of the ship. The goods cannot be subjected to this charge more than to many others which are incurred by the ship in the course of the voyage. According to the bill of lading the goods in question were to be delivered on payment of freight." [BLACKBURN, J., mentioned a case referred to in *Layburn v. Crisp* (8 Car. & P. 399), as having been tried before Lord Mansfield and a special jury at Guildhall in the year 1779.](a) Upon discharging this corn into the barges it was necessary to pay this due. [BLACKBURN, J.—That is the very thing I want you to prove to me. The old records of Rochester would be most material to the present question.] If this is not paid on unloading, why does the shipowner pay it at all? The consignees are entitled to have these oats on payment of freight only. How can an action for money paid lie against them for this due? [BLACKBURN, J.—There would be no difficulty as to that point if it was a charge imposed by law on the shipowner.] If they were liable to pay, the shipowner was not liable; if they were not originally liable then they are not now. [LUSH, J.—If the charter had contained a stipulation that the consignees should pay this due, still the captain would be bound to pay it in the first instance.]

Pollock, Q.C. (with him *F. J. Smith*) for the respondents.—The County Court judge was right; this charter is in a very ordinary form. There is a clear distinction between metage and other dues with which owners of cargo have nothing to do, such as lightage dues, &c. For whom is this charge incurred? Surely for the consignees. Before the amount of freight to be paid can be ascertained, the cargo must be measured. He cited

Jenkins v. Harvey, 5 Tyr. 871;

The Ribble Navigation Company v. Hargreaves, 17 C. B. 385.

Prentice, Q.C. in reply.

BLACKBURN, J.—This case is not so stated as to enable us to decide whether or no the judgment was right or wrong, and consequently we are obliged to say that the case must be remitted to the County Court Judge. This is to be regretted,

(a) Anon. and semble not reported.

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as the amount in dispute is small, although the question involved is of some importance. Probably, however, when our reasons about to be given are heard, the parties may come to some arrangement, or if they are unable so to do, the County Court judge will know what our opinion is on the subject, and he will doubtless be guided thereby. The question arises on these charter parties by which each ship therein named may be ordered to a large number of ports, and she may go as near thereto as she may safely get. She must keep aloft—that means that she shall not be bound to take up any position in a place where she would be left lying on the mud to await a turn of tide. Freight is to be paid at so much per quarter of 330lb., oats discharged—that provision of course requires for the mutual benefit of shipowner and consignee that the quantity of the cargo should in some way or other be ascertained. Next comes the important clause: "The cargo to be brought to and taken from alongside at charterer's expense and risk." The shipowner said this, as it were, "I will bring the ship as near as I can, and deliver the cargo alongside, whether the ship lies close to a wharf, or whether you bring boats or lighters out to her, according to the nature of the port. I will deliver alongside, and so earn my freight." All to be done thereafter is to be done by the consignee, and not at the shipowner's expense. Now there is ancient toll of 1d. payable upon every quarter of oats, due to the mayor and corporation of the city of Rochester for their being ready and willing to do the service of weighing and measuring grain brought to their port. If, required, they must perform that service, but, if the parties do not choose that they shall do it, the mayor and corporation are nevertheless entitled to the due. If it is paid without services done, it comes to be somewhat of the nature of a tax: but its origin was in service. If the mayor and corporation were bound to render that service so that their money was earned before the goods were taken out of the ship, then the payment would fall on the importer (a word which I think must mean the shipowner who brings the grain in), and the consignee would be under no obligation to recon him. But, on the other hand, if the right of the mayor and corporation was to have the weighing done ashore, and consequently they had not earned their money until after the goods were taken out of the ship and put into the hands of the consignee, then it would be otherwise. If the shipowner had done all that he agreed to do when he delivered the goods overboard alongside, and if, owing to his having come in and made himself liable and being obliged to pay, he had paid this due, it would be a payment by compulsion of law, and he would be entitled to recover the sum so paid from the consignee. It seems to me that the real question for us to determine is, whether this due was earned before the grain was put over the side of the vessel or afterwards. Was the ancient usage, when the mayor and corporation acquired this prerogative right to do the work of weighing and measuring, that in order to earn this money the mayor was obliged to send a person down to measure on board the ship before she went alongside, then the 1d. would have been earned before the goods came into the hands of the consignee; or was it the ancient usage that the mayor was to have bushels and measures in some appointed place in the town, and by strict right the persons whose grain was dis-

charged in the port had to bring it to the appointed place to be weighed. I think in such latter case the due would fall on the consignee, and not on the shipowner. But my judgment turns entirely on the terms of these charter parties. The charter parties might be easily framed so that the mortgage due might be either upon the shipowner or the consignee. I cannot say whether the ancient custom of Rochester would entitle the mayor and corporation to have goods brought to places where he would measure them—for such a due as this due for mortgage might be either earned at the ship or on the shore, whereas such dues as cranage, wharfage, &c., from their nature could only be earned for services rendered on land—or whether it was that the mayor and corporation were in the habit of sending their meter down on board the vessel, and the earning of their mortgage due was contingent on their doing that. What the original practice was I cannot tell. I cannot but think, however, that if the evidence given upon the numerous trials which seem to have taken place with respect to the dues of this port was carefully searched through, the matter would be determined. All we can say in the present case is, that the question as to which side should bear this mortgage due depends on the terms of the charter parties.

LUSH, J.—I am of the same opinion. I agree that the charter parties are in the ordinary form as respects the question at issue, and in practice no doubt there is a difficulty in getting brokers to alter established forms of charter parties, however desirable a change might be. I quite agree with my learned brother, that the question is whether the service for which this toll was originally given was one which the mayor and corporation were entitled to require to be performed on board, or whether it was one to be rendered after the cargo was discharged. If it was to be done on board, then the charge would be upon the ship, and she must bear it. The matter depends upon the ancient usage.

HANSEN, J.—I am of the same opinion. The duty on the ship would be a duty on the shipowner, while the ship was still afloat to deliver, according to circumstances, into barges alongside, or if his vessel could get to a quay, to deliver from the vessel. The question is, can he fulfil that duty without already having become liable to pay this due? and the answer to that question will decide the case.

Dues remitted accordingly.

Attorneys for the appellants, Mackeson and Co.
Attorneys for the respondents, Sandys and Co.

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR and H. H. HOCKING, Esqrs.,
Barristers-at-Law.

Saturday, June 24, 1871.

LIDGETT v. SECRETAN AND ANOTHER.

Marine insurance—Particular loss suffered by ship while insured under one policy, and total loss while insured under another—Merger of partial into total loss—Rights of insured.

Plaintiff insured his ship with various underwriters, among whom were defendants, for the voyage from L. to C., and thirty days after arrival at C. Before the ship reached C. she suffered a particular loss. Plaintiff, not knowing of this, insured her while at C., and on the voyage from C. to L., under

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a valued policy (the value taken fairly representing the real value of the ship in an uninjured state) with various underwriters, among whom were defendants. On arrival at C., the ship was taken into dock, where it was ascertained that considerable repairs were required. These repairs were set on foot; but before they were completed, and after the first policy had expired and the second policy had attached, the ship was totally destroyed by fire. The two policies were altogether independent of each other.

Held, that plaintiff was entitled, under the first policy, to recover, not only the cost of the repairs actually executed, but the whole amount that it would have cost to complete the repairs rendered necessary by the damage sustained, and, under the second policy, the sum at which the ship was valued in the policy, without any deduction in respect of that part of the sum claimable under the first policy, which had not been actually expended in repairs. (a)

This was an action brought by the owners of the ship *Charlemagne* upon two policies of insurance upon the ship, underwritten by the defendants, the one for a voyage out from London to Calcutta and for thirty days there after arrival in safety, and the other at and from Calcutta to London. The vessel struck on a reef on the voyage out, and sustained a particular and general average loss, and whilst at Calcutta, after her arrival, was totally destroyed by fire. The declaration contained counts claiming losses under both policies, including a general average loss under the outward policy, and to these counts the defendant pleaded a single plea of payment into court of 110*l.* in satisfaction of the plaintiffs' claims. To this plea the plaintiffs replied that the sum paid in was not sufficient.

The cause came on for trial at the Guildhall, in the City of London, at the sittings after Michaelmas Term 1868, before the Lord Chief Justice and a special jury, when it was ordered by the court, with the consent of the parties, that a verdict should be entered for the plaintiffs for the amount claimed in the declaration, subject to the opinion of the court upon a special case to be settled by Mr. Charles Pollock upon the question whether, when the ship was destroyed by fire, she was covered by the outward policy, and also as to the principle upon which the partial loss under the outward policy was to be calculated in the event of the plaintiffs being held by the court not to be entitled to recover a total loss under the outward policy; and it having been decided by this court upon a case stated for that purpose that the plaintiffs were not entitled to recover for a total loss under the outward policy (see 22 L. T. Rep. N. S. 272), the following further case was stated, in order to obtain the opinion of the court as to the principle upon which the partial loss is to be calculated under that property.

CASE.

In July 1866 the plaintiffs, who are shipowners carrying on business in London, were the owners of the iron sailing vessel the *Charlemagne*, then about to proceed on a voyage from London to Calcutta, and after a certain stay there, back again

(a) This case clearly shows that the rights of the parties to a policy are determined when the risk under the policy is ended; and, therefore, nothing that happens after the termination of the risk exempts them from liability incurred previously to such termination.—ED.

from Calcutta to London. To cover the vessel on the outward voyage, the plaintiffs effected a policy of insurance in the ordinary form with various underwriters to the amount of 18,000*l.* upon the ship, valued at 20,000*l.*, and the defendants, who are underwriters at Lloyd's, underwrote the policy for 150*l.* In order to cover the ship upon the homeward voyage, the plaintiffs effected a further policy, in the ordinary form, with various underwriters, which was subscribed to the amount of 10,100*l.* on the ship, valued at 20,000*l.*, and the defendant underwrote this policy for 100*l.* In the outward policy the risk was expressed to be "at and from London to Calcutta, and for thirty days after arrival." In the homeward policy the risk was, "at and from Calcutta to London."

The *Charlemagne*, in the course of her outward voyage, struck upon a reef or bank near the mouth of the River Hooghly, and remained aground for about an hour. The captain deemed it best for the safety of the vessel, passengers, and cargo, to force the vessel over the bank, and for that purpose to throw overboard some of the cargo in order to lighten her. Accordingly a quantity of cargo was jettisoned, and the ship being thus lightened, gradually worked over the bank. The ship sustained considerable damage to her bottom and rudder, but the extent of this was not fully known until the survey hereinafter mentioned. She continued her voyage, and reached Calcutta on the 28th Oct., and at once proceeded with the discharge of her cargo, which was completed by the 8th Nov.

On the 12th Nov. the *Charlemagne* was taken into dry dock for survey and repairs. The result of the survey made upon the *Charlemagne* in the dry dock showed that extensive repairs were necessary, in consequence of the damage done to the ship whilst aground. The repairs were accordingly commenced. Whilst they were in progress, the outward policy expired. Afterwards, on the 5th Dec., the vessel was totally destroyed by fire.

According to the plaintiffs' evidence the expenses actually incurred amounted to a small proportion of the outlay which would have been required to complete the repairs.

The defendant admits that he is liable to a general and particular average loss under the outward policy, and for a total loss with benefit of salvage under the homeward policy, and the amount paid into court has been calculated on the supposition that it covers the defendant's proportion of the loss and general average, and other expenses actually incurred by the plaintiffs under the outward policy, and the total loss under the homeward policy. The plaintiffs do not admit the correctness of the calculation.

The plaintiffs, however, contend that they are entitled under the outward policy to recover for the whole amount of loss and damage sustained by the said ship by striking on the said reef, without regard to the extent to which the same was actually repaired and made good.

The plaintiffs also contend that in estimating the costs of repairs for which the defendant is liable under the outward policy, they are entitled to include the amount which the plaintiffs would have had to pay for dock dues, and other charges of a like nature for the time during which the vessel would have remained in the dry dock for the purpose of being repaired. The defendant contends that under the outward policy he is only

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liable for the amount of deck dues and charges actually incurred at the time of the fire.

In adjusting the amount of the salvage under the homeward policy, the dock dues incurred since the fire, and which must have been necessarily incurred before realizing the net salvage of the wreck, are deducted from the proceeds arising from the sale of the wreck.

The questions for the opinion of the court are, what are the true principles upon which the said losses are to be assessed.

The case is to be remitted to the said arbitrator to determine whether, adopting the principle so laid down as to the mode of calculating the particular average loss, the said sum of 110*l.* is sufficient to satisfy the plaintiffs' claims in the action, and if the arbitrator should find that it is not sufficient, then the judgment is to be for the plaintiff for such sum as the arbitrator shall find that the plaintiffs are entitled to, with costs of suit, and if the arbitrator shall find that the said sum is sufficient, then judgment is to be entered for the defendants with costs.

Sir George Honyman, Q.B. (*Watkin Williams and Cohen* with him), for the plaintiff.—The rights of the parties ought to be determined at the time of the expiration of the risk. That being so, the defendants cannot allege, in answer to the claim under the first policy, anything that happened after the expiration of that policy. As to the claim under the second policy, *Barker v. Janson* (17 L. T. Rep. N. S. 473; L. Rep. 3 O. P. 303) is conclusive in favour of this plaintiff.

Sir John Karslake, Q.C. (*J. C. Mathew* with him) for the defendants.—If a contract of insurance be a contract of indemnity, then the assured cannot recover more than the value of the ship which he has lost; but if the plaintiff is to have awarded to him all that he now claims, he will get a great deal more than the value of the ship. The partial loss is merged in the subsequent total loss, although the one happened while the ship was under one policy and the other while she was under another. As is stated in *Tindor's Mercantile Cases* (notes to *Lewis v. Rucker*, p. 216, 2nd edit.), "although a vessel may have sustained an average loss, if no expenses have been actually incurred in repairing it, the assured cannot recover anything for the average loss in addition to the subsequent total loss." The reasoning of the court in *Lewis v. Janson* (12 East, 648) applies here. *Stewart v. Steele* (5 Scott's New Rep. 927) is an authority for saying that the plaintiff can recover under the first policy only the amount that he actually expended on the repairs. But if the plaintiff is entitled under the first policy to recover as much as it would have cost to have put his ship in proper repair, the defendants have a right to an abatement in the amount payable by them under the second policy to the extent to which that money was not actually expended. The second policy being a voyage policy, there was implied in it a warranty of seaworthiness. The case is precisely the same as if the money had been expended on the ship and some part of the ship had escaped, or as if it had been spent in timber for the repairs, and the timber, though lying close to the ship, had not been burnt. In either case the insurers could have claimed the benefit of the salvage.

Sir George Honyman, Q.C., in reply.

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WILLES, J.—In this case two questions are raised. They arise in this way—the vessel, which was first injured and afterwards destroyed by fire, was insured on one policy, which was a distinct contract, on the voyage from London to Calcutta, and for thirty days after arrival. It was also insured on another policy for the voyage back from Calcutta to London. The vessel appears to have been damaged during the time that the first policy attached, and in respect of that damage compensation for a particular loss is claimed under the first policy. After the second policy had attached, the ship was totally destroyed by fire, the repairs rendered necessary by the injuries previously sustained having at that time been commenced, but not being finished. At the time the vessel was burnt a substantial amount of repairs remained to be done, so that the injuries sustained materially detracted from the value of the ship at the time she caught fire. No reference is made in one policy to the existence of the other, but the two policies are distinct contracts relating to distinct periods of time. The first policy, which covers the period of the voyage out, and thirty days after arrival at Calcutta, stands by itself. In this first policy, neither party refers to another contract to be made to cover the subsequent period, and neither party claims, or can claim, to be absolved from liability on the first policy by reason of another distinct contract having been made to cover the subsequent period. The circumstances of the defendant having underwritten both policies is merely an accident, and forms no connection between the two policies. Thus the rights of the parties under each policy have to be determined upon the true construction of that policy, and without reference to the other. The first question is raised on the first policy. What is the right of the plaintiff under that? He claims to be compensated by the underwriters, for, not only the expense he was put to in respect of the repairs actually done to the ship, but also for the cost of the repairs that would have had to be done before the ship could have been said to have been properly and thoroughly repaired. As to the cost of the repairs actually done, the underwriters raise no question. To that extent, it is conceded that payment must be made. But the underwriters dispute their liability under the first policy to make good the cost of repairs that were never done, and that raises the question whether in any case of particular loss a shipowner can recover against the underwriters before expenses have been incurred in respect of the damage sustained; in other words, whether the owner is bound to repair the ship before he can bring an action. It is further said that, even if the owner had completed the repairs, they would have done no good, because the ship was subsequently burnt. That however, is reaching a long way, and speculating on results which it is assumed would have ensued, but which it is impossible to affirm would have taken place. The fact that the ship was kept a long time at Calcutta by reason of the damage she had sustained, may or may not have led to the fire taking place. We cannot affirm that it did or that it did not. We are asked to have resort to the circumstance of the fire—which is apparently totally unconnected with the accident that happened to the ship while going up the river—to relieve the underwriters from liability under the first policy. If we look still

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closer into the circumstances connected with this part of the question, we find that the ship at the time that the first policy expired was reduced in value. A ship which, for the sake of argument, I will say was worth 5000*l.* was reduced in value to 4000*l.*, and a policy of insurance is a contract of indemnity. That being so, if the shipowner is worse off by 1000*l.*, he is entitled to be indemnified to that extent, and if he were dealing with an underwriter who was disposed to settle at once, the loss, if at once settled, would be settled at 1000*l.* Supposing that in this case the last of the thirty days had been the 31st December, and the owner had made his claim on the 1st Jan. for the whole cost of the repairs rendered necessary by the accident, and that claim had been settled on the 2nd Jan., and the fire had taken place on the 4th; could the underwriter under such circumstances have brought an action to recover the value of his cheque, or stop payment of it if not presented, and plead failure of consideration if sued upon it? It would be strange if he could; and if he could not, the damages must be regarded as a liquidated sum, and as settled at the time the risk expires. I might take another case. Supposing that the ship insured is, through injuries sustained, worth only 4000*l.* instead of 5000*l.*; the risk expires on Dec. 31st, and on Jan. 2nd the ship is sold by the underwriter at her reduced value, 4000*l.*, and on the 3rd Jan. is destroyed by fire, could the underwriters say that the sale was not one of the perils insured against, and that he would not pay, because the owner was only able to claim by reason of something happening after the policy had expired? Could the underwriter, under such circumstances, say that the particular loss was merged in the total loss which, on the supposition, does not happen till after the policy has expired? It is said that the underwriter would have such a defence, because a particular loss is not paid for if the ship is afterwards and during the risk totally lost. That is for one of two reasons. Either the underwriter agrees to pay as for a total loss, and does pay (except losses which come under the head of saving and labouring), and in so paying discharges the whole loss. If he paid in respect of the particular as well as of the total loss, he would be paying more than the value of the ship. Another case which might arise is this. A ship, having suffered a particular damage by a peril insured against, is afterwards lost or destroyed by a peril not insured against, but as to which the owner is his own insurer. That was the case in *Livie v. Janson*. The result of such a state of things is that, as the assured has put himself in the same position as the underwriter would have been if he had taken that risk, the particular loss has to be borne by him, just as it would have had to be borne by the underwriter if he had taken the risk through which the vessel was lost. Authority and reasoning go together on this point. Are we then to extend what is called the doctrine of merger to a case where the total loss occurs after the expiration of the policy? On this point there is no authority? but I think the case put by my brother M. Smith very apposite in point of principle. A tenant, under covenant to repair, at the end of his term leaves the house very much out of repair. The landlord, wanting to build another sort of house upon the ground, pulls the house down, but sues the tenant for a breach of the covenant to repair. The answer of the tenant is, I am not bound to pay, because you

never wanted the repairs done. He thus sets up, in answer to the claim in respect of a breach of covenant, matter which has subsequently occurred. That is clearly no answer to the action. In the same way, the liability of the underwriter must be determined at the expiration of the risk, and the underwriters of the first policy in this case must pay as they would have had to pay if they had settled as soon as the risk expired. They must pay an amount equal to the depreciation of the vessel at the end of the first voyage. I will not go into arithmetical details; the assessor must go into that for himself. The only question before us is, on what principle the assessor is to proceed? The plaintiff is not entitled to get anything which he had not actually lost at the time of the expiration of the first policy; but the arbitrator must inquire what the vessel would have been worth but for the damage, and what it actually was worth in its damaged state, and give the owner the difference. The arbitrator will, in so doing, take into account the expenses necessary to put the ship into a proper state of repair, in order to arrive at a conclusion as to what was the diminution in the value of the ship at the time the risk expired. In the case of a wooden ship it would be customary to charge the owner to the extent of one-eighth of the repairs, in respect of the advantage of having part of the ship new instead of old. It is said that the same calculation is not applicable here, as the ship was an iron one. Whether this principle would apply here or not has not been argued, so I will dwell no longer upon it. Whatever may be the actual result, the arbitrator will give only such a sum as will represent the diminution in the value of the ship at the time the risk expired. The second question arises under the second policy. It is a question of great importance, and has been discussed over and over again. The practice of insuring ships at an agreed value is commonly recognised among both underwriters and shipowners, and, though it may be abused in some cases by dishonest persons, has this great advantage, that, when honestly carried out, it ensures a full indemnity to the assured, and gives large premiums to the underwriters; and moreover, these valuation policies save both parties, in case of loss, very costly inquiries. Of course, if a ship is insured for a sum so very disproportionate to its real value that fraud may be presumed, that is another matter, and if the sum for which the ship is insured be so large that a jury would say that the policy was in reality a wager as to the safety of the ship, the underwriters would be protected and the policy would be void. There are other reasons why the practice of valuation is useful. It must be admitted that such policies are to some extent objectionable, as giving facilities to infractions of the law against wagering policies, as it is always difficult to prevent a man from insuring to a larger extent than his ship would be worth in the market. Still, on the other hand, owners often insure when the ship is for away and her precise value cannot be ascertained, and it is important to enable people to insure their ships for a fair and reasonable sum, though perhaps at the time they may be in a damaged state, or even lost. But if you introduce this principle of valuation into policies, the sum at which the ship is valued most, if she be lost, he paid, though it may turn out that the ship was not worth half the sum at which she was valued in the policy, by reason of the damage she had sus-

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LIDGITT v. SECRETAN AND ANOTHER.

[C. P.]

tained. (a) Another set of cases may arise in which the same principle applies. Supposing that a shipowner makes a speculation, and fits out a vessel to carry troops, or for some other out-of-the-way purpose, which would require great expenditure in the way of fitting out his ship. If such a man were to send his ship so fitted up into the market, it might be that the alterations in question would make her less valuable; still he would undoubtedly be able to include the value of the alterations in his valuation, and recover the value of the ship with reference to its cost, and not with reference to what the ship would fetch in the market, and he might do so, although the special purpose for which he had fitted out the ship had failed. There are other cases which occur very frequently. A shipowner sends a ship on a voyage which is unsuccessful; he then sends her on a second, and in insuring her for this second voyage, introduces as an element in the valuation the loss he has sustained on the first voyage, though of course that would never add anything to the real market value of the ship. This practice is allowed to pass among underwriters, though I must not be understood now as expressing any lawyer's opinion on it. It is at any rate convenient that there should be a fixed sum, and especially in the case of vessels insured when far from home, and that this fixed sum should be paid if the vessels are lost. This rule has been applied in many cases, the most recent being *Barker v. Janson*. There the ship was valued at 8000*l.*, and the policy was a time policy. The ship having been lost, the whole sum of 8000*l.* was demanded of the underwriters. At the time the ship was lost she had been so damaged in a storm that occurred prior to the attaching of the policy in question, that a large sum would have had to have been expended on her before she could have been pronounced seaworthy. The underwriters claimed to be allowed to deduct this sum from the 8000*l.* for which the ship had been insured. The court, however, refused to allow this. The vessel, as she stood at the time, had been valued at 8000*l.*, and that was the sum agreed to be paid, whether she was destroyed or not. If her value had been increased, the underwriters would have had to pay no more than 8000*l.*, and when it had decreased, they could not claim to pay less: 8000*l.* represented the conventional rather than the real value. We had occasion the other day to refer to this question and show that, as the result of the decisions both in this country and in the United States, the value fixed in the policy is taken as the sum to be paid in case of loss, but not in calculating whether there has been a constructive loss. An article was adopted in 1861 or 1862 into the German code, after great consideration, by which it was determined that the insurance value of a ship should not be taken into account in deciding whether there had been a constructive total loss. That is the state of the law both here and abroad; and it would be destructive of the advantages derived from valued policies if, in such a case as this, or *Barker v. Janson*, the underwriters could go into the state of the vessel at the time of the making of the policy, or claim a deduction in respect of injuries sustained by the ship before the

policy attached. The case of *Barker v. Janson* would be exactly applicable here, but for the distinction pointed out by Sir J. Karslake, that there the policy was a time policy. In the case of such a policy it was not necessary that the ship should be in a seaworthy state at the time the policy was to attach, whereas, in this case, the insurance being for the voyage, the ship could not leave port without having been made seaworthy; and in this case it was expressly stipulated that the vessel should not leave the Hooghly till the repairs were properly done, the cost of which repairs the underwriters now claim—in other words, the underwriters claim to pay less for a loss in port than they would have had to pay for a loss at sea. If the ship had been lost at sea, she being then in the same condition as she was in port (assuming the policy to have attached), would the underwriters have been entitled to claim a deduction in respect of a particular loss sustained before the policy attached? There is no authority in support of such a claim, and, on the grounds I have already stated, the sum fixed in the policy must (in the absence of fraud or wagering) be taken as the sum which the underwriters have to pay. Sir John Karslake has next contended that the underwriters of the second policy have a right to the amount of money that was to have, but had not, been spent on repairs, as salvage. But then, to make out this claim, they must have recourse to the first policy. If there had been no such first policy, the owner would have had no such sum to pay; and it is immaterial, so far as the underwriters of the second policy are concerned, that the owner had happened to effect this first policy. If the sum named in the second policy be taken as the sum to be paid, we cannot consistently allow any deduction to be made from it. The result is that the arbitrator must assess the damages on the principles contended for by the plaintiff.

M. SMITH, J.—I am of the same opinion. The questions raised have been in the main already decided in the cases referred to. It appears that there were two separate policies, by one of which the ship was insured on the outward voyage from London to Calcutta, and thirty days after, and by the other while at Calcutta and on the homeward voyage from Calcutta to London. She suffered damage while insured by the first policy, and this damage had been only partially repaired when the first policy expired; and after the expiration of that policy, and the attachment of the second one, and while the repairs were still in a very incomplete state, the ship was totally destroyed by fire. The defendant, who happens to have underwritten both policies, now has this action brought against him, to compel payment of his proportion under the first policy of the amount that it would have cost to have thoroughly repaired the injuries sustained by the ship while sailing under the first policy, and also under the second policy, of his proportion of the 8000*l.* for which the ship was insured. He has paid money into court on the supposition that he is liable to pay under the first policy his share only in the expenses actually incurred in repairs, or that, if he has to pay more under the first policy, he and the other underwriters of the second policy are entitled to an abatement to the extent to which the money payable under the first policy for the repairs was not actually expended. The question now for us to decide is, what is the true principle of

(a) See *Irving v. Manning*, 6 C. B. 301; 1 H. L. Cas. 287.—Ed.

assessing the damages? The plaintiff is, in my judgment, entitled under the first policy to recover to the extent to which the ship was deteriorated in value by the accident, so that the measure of damages is the answer to the question what the necessary repairs would have cost. It is material in dealing with this question, to consider at what time the cost of the loss sustained by an insured ship becomes a fixed sum payable by the insurers. It is unnecessary to determine whether or not it may be so regarded earlier, but at any rate it may be considered a fixed sum, subject to estimation at the time of the expiration of the policy. That is stated to be the law of Menle, J. in *Stewart v. Steele*, where, referring to the case of *Blackett v. The Royal Exchange Assurance Company*, he says: "That case establishes this principle, that the proper time to estimate the loss, where the party is put to no expense, is at the expiration of the risk." At that period, at any rate, the rights of the parties may be taken as fixed. But it is contended by the defendants that the particular damage, sustained while the ship was under the first policy, is merged in the total loss against which the owner is insured under the second policy; but, the loss having occurred after the first policy had expired, there was nothing in which the loss could merge. If the total loss had happened during the currency of the first policy, the doctrine of merger might have applied. The principle of this distinction is obvious. The underwriters insure against accident during the whole voyage, and it may be that the whole voyage must be regarded before the extent of the indemnity payable can be estimated. But when the period for which a ship is insured is at an end, I am at a loss to see how anything happening after the expiration of that period can affect the rights of the parties, which are fixed as soon as the period has expired. This view is supported by the judgment of Lord Campbell, C.J., in *Knight v. Faith* (15 Q. B. 649) where he says, (p. 668): "But here the insurers have not paid, and they deny their liability to pay, a total loss; and they are not at liberty to allege that the partial loss is merged in a total loss, from which they are exempt." Moreover, in this case, the underwriters of the second policy have nothing to do with the partial loss that occurred during the period covered by the first policy. Their liability is just the same as if the owner had not effected that first policy. It is unnecessary to go further into the question of the defendants' liability under the first policy. I will only say that I fully concur with the judgment of my brother Willes, which is amply supported both by reasoning and authority. Then it is contended by Sir John Karslake that, assuming the defendants to be liable to pay a particular average under the first policy to the whole extent to which the ship was deteriorated in value, still they are entitled to a reduction in the amount payable by them under the second policy, to the extent to which the money payable under the first policy was not actually expended in repairs. That seems to me an attempt to open the question of value in the case of a valued policy. Supposing there had been no first, but only this second, policy. In such a case the vessel, having been made *bona fide*, would have to be accepted. When a ship is insured by a valued policy to commence on a future day, the value must always be liable to be reduced by accidents; in this instance the ship was damaged by sea

peril. It would be contrary to principle if such a circumstance were to be taken into consideration and urged as a reason for opening the question of value, when the contract has once been made. It is unnecessary that I should say anything more on that part of the question, as it was fully discussed in the recent case of *Barker v. Janson*. No doubt, if the repairs had been completed before the policy attached, the ship would have been of greater value than she actually was. But that has nothing to do with the underwriters of the second policy. No doubt a policy of insurance is a contract of indemnity; but in the case of a valued policy, the value of the ship is taken at a liquidated sum, which is by the agreement to be taken as the real value. I think, therefore, that the defendant has paid money into court upon a wrong principle, and that the case must go back to the arbitrator for him to assess the damages to the principles we have laid down.

Judgment for plaintiff.

Attorneys for plaintiff, *Thomas and Hollams.*

Attorneys for defendant, *Walton, Bubb, and Walton.*

NISI PRIUS.

Reported by F. O. CHURCH, Esq., Barrister-at-Law.

LIVERPOOL SUMMER ASSIZES.

Monday, Aug. 14, 1871.

(Before the LORD CHIEF BARON (Kelly) and a Special Jury.)

MORRISON v. THE UNIVERSAL MARINE INSURANCE COMPANY.

Marine insurance—Signing "slip"—Usage among underwriters—Stamps on "slips."

Held, that a slip signed by underwriters is not admissible as evidence of a contract of insurance unless stamped.

Held, further, that a custom whereby an underwriter is held bound to issue a policy in accordance with the terms of the "slip," notwithstanding that it was discovered after the signing of the "slip" that the subject matter of the insurance was lost, is bad (a).

This was a claim for 500*l.*, the amount of a policy of insurance effected by the plaintiff with the defendants upon a chartered freight which the plaintiff's vessel, the *Cambria*, was to take in at one of the South American ports and bring to Liverpool. The claim was resisted by the defendants upon the ground that, as they alleged, the policy had been effected by means of fraud, the plaintiff having concealed a material fact which should have been made known to the underwriters.

Holker, Q.C., and Herschell were for the plaintiff, *Quain, Q.C., Butt, Q.C., and Mellor* for the defendants.

(a) This decision is in entire accordance with a previous dictum of Lord Kenyon in a case of *Rogers v. McCarthy*, sitting after Hilary Term 1800, cited in a note in *Park on Marine Insurance*, vol. 1, p. 45, 7th edit., and in *Arnould on Marine Insurance*, vol. 1, p. 253, 3rd edit. By sect. 7 of the Stamp Act (39 Vict. c. 23), no agreement for sea insurance is valid unless the same is expressed in a policy; and by sect. 9 no policy can be given in evidence unless stamped, and as the same section says that the Commissioners of Inland Revenue cannot stamp policies when once signed, the slips can never become policies, and can never be given in evidence. —Ed.

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THE STAFFORDSHIRE.

[ADM.]

The evidence material as regards the slip was this:

Mr. Pridgett, assistant underwriter to the company, said Mr. Preville, the plaintiff's broker, called at the office on the 12th Oct. He brought a "slip," and said he had seen Mr. Fisk, and that gentleman had quoted eight guineas per cent. for insurance of the freight of the *Cambria*. Witness thereupon accepted the risk for 500*l.* at the rate named, and signed the "slip." About a quarter of an hour afterwards he went up to Lloyd's, and saw in the loss book the following entry: "The *Cambria* (probably the *Callao*), from New Orleans, aground on the North Breaker." He went to Mr. Preville at once, and said to him, "This is very extraordinary; this looks like the *Cambria*, which I have underwritten for you," or words to that effect. Mr. Preville replied that he had seen the report before, and that he had investigated the matter, and found that it was the *Gamel*. After that the policy was made out in the usual way. He considered that the contract was concluded when the "slip" was signed.

Alfred Toser, the secretary of the company, was called, and asked by Quain whether, if after the signing of the "slips" it came to the knowledge of the underwriters that an important fact which ought to have been communicated before the signing of the "slips" had been withheld, and they intended thereupon to dispute their liability, it was the usage, nevertheless, to execute the policy.

KELLY, C.B. said he was clearly of opinion that if there were any such usage, it was void in law; because it was something almost like fatuity that people who intended to dispute their liability upon a contract entered into should, nevertheless, deliberately execute an instrument repeating and putting under seal the contract in question. It appeared to him to be something so irrational.

Quain said it was not so irrational, as the "slips" were not binding at all, and could not be enforced on either side.

KELLY, C.B.—What is there to prevent them being binding?

Quain.—Because they are not stamped at the time they are initiated.

KELLY, C.B.—I am of opinion if there be such a usage it is a usage intended to defraud the revenue of stamps.

Quain.—Oh no, my lord; on the contrary.

KELLY, C.B. said if people entered into contracts by means of these "slips," which could not be enforced because they were not stamped, the remedy was simple—they must take care to have them stamped.

Quain said a stamped "slip" would not do.

KELLY, C.B.—If a stamped "slip" will not do, a stamped "slip" constitutes no insurance.

In reply to questions by Mr. Holker and by the learned judge, the witness further stated that if a vessel were being insured, and between the signing of the "slips" and the issue of the policy he found out that she had been lost a month previously, he would still issue a policy. He was quite satisfied about that.

In summing up to the jury, KELLY, C.B., said: With reference to the practice of signing "slips" preliminary to the issue of a policy, the Chief Baron said it was his opinion that the "slips" constituted a contract between the parties that the underwriter would execute and deliver, and that the shipowner would accept a policy of insurance

upon the terms contained in the "slips." But as these "slips" were not stamped, they were not, under the Stamp Act, admissible in evidence in an action. His lordship drew attention to the fact that the policy was not executed until Oct. 14, so that though there might have been concealment of material facts on the 12th, when the "slips" were signed, it could not be said that there was a concealment of facts known to the plaintiff and unknown to the defendants at the time the policy was executed, because at this time their assistant underwriter had possessed himself of information which was to be found in Lloyd's books, and which was substantially the same as that possessed by the plaintiff. As to the point of honour which induced underwriters to deliver a policy after the signature of the "slips," notwithstanding that material information had been withheld, the Chief Baron said it was mere folly and nonsense to say that any men were bound to put their hand and seal to a contract when both parties understood that they meant something totally different from what was stated in the contract. If he might give a word of advice to the underwriters of Liverpool, he would recommend them, in cases where they found there had been an undue concealment which would vitiate the policy, to append a proviso to the policy.

The jury were unable to agree, and were discharged.

HIGH COURT OF ADMIRALTY (IRELAND).

Reported by ARCHIBALD J. NICOLLS, Esq.,
Barrister-at-Law.

April 15, 17, 18, 19, and 27, 1871.

THE STAFFORDSHIRE.

Bottomry bond—Communication with owner—Bill of exchange—Collateral security—Procedure in colonial court.

A British ship, under a charter from London to Callao, put into Melbourne for repairs. The master, who was also part owner, fearing that the shipwrights would, unless their claims were paid, detain the vessel, and that she might thus be unable to fulfil her charter, raised the necessary funds from the ship's assets at Melbourne upon a bottomry bond of the ship and freight.

Held, that the bond was not invalidated by the absence of previous communication between the master and the co-owner; and that the case was distinguishable from The Panama (L. Rep. 3 P. C. 199; 22 L. T. Rep. N. S. 73), and from all those in which the general duty of previous communications is laid down.

Held also, that, although a bottomry transaction cannot be based upon personal security, bills of exchange may be given in addition to the bond.

Held also, that the mortgages of a ship cannot, for the purposes of such previous communications as is necessary between the party hypothecating the ship and the owner, be deemed an owner; though it may be otherwise if the mortgagee be also the ship's agent and agent for the owner.

Held also, that it may be presumed that the procedure in the Vice-Admiralty Court of Victoria is so far analogous to that in the maritime courts of Great Britain and Ireland, that a shipwright of

Melbourne would be entitled to arrest a British ship and detain her until his legal demands upon her were satisfied.

This was a cause of bottomry, and the petition, which was instituted on behalf of the Bank of New South Wales, of Old Broad-street, in the city of London, stated, that the *Staffordshire*, while on a voyage from London to Callao, put into Melbourne, and, being in want of funds necessary to enable her to proceed on her voyage, the master, having no credit at Melbourne, and being unable to obtain the necessary money there, was compelled to and did take up and borrow from Henry Dickson and Walter Williams, of Melbourne, on bottomry of the said vessel and her freight, the sum of 3,265*l.*, for the aforesaid purposes; and by a certain bond of bottomry, dated the 7th Sept. 1869, the master of the said ship hypothecated her and her freight to the said Messrs. Dickson and Williams, their executors, administrators, and assigns, as a security for the said sum, which was thereby made payable to them within seven days next after the safe arrival of the *Staffordshire* at Callao, with a condition that if the said ship should be lost, cast away, or destroyed before her arrival at the said port, then the said sum should not be recoverable. That, in consequence of the second advance of money, the *Staffordshire* was enabled to proceed to Callao, where she arrived safely, having earned a considerable freight in respect of her said voyage; that the plaintiffs were now the assignees and lawful owners of the said bond; and that frequent applications had been made to the defendants for payment of the amount due thereon, but that they had neglected and refused to pay the same.

The answer put in by the defendant W. H. Smith, of Hyde-park, will be found set out, so far as is material, in the judgment of the court.

Elrington, Q.C., LL.D., Boyd, LL.D., and Corrigan, LL.D. appeared for the plaintiffs.

Todd, Q.C., Seeds, LL.D., and Madden appeared for the defendant.

The evidence of Mr. Currie and others, taken by commission in London, on the 6th Dec. 1870 and following days, was read at the hearing.

The following cases were cited:

The Lisie, L. Rep. 2 Adm. & Ecc. 254; 19 L. T. Rep. N. S. 71;

The Great Eastern, L. Rep. 2 Adm. & Ecc. 88;

The Royal Arch, Swab. 259;

The Jacob, 4 Chr. Rob. 245;

The Kurak, L. Rep. 2 Adm. & Ecc. 289; 21 L. T. Rep.

N. S. 159; and

The Ariadne, 1 W. Rob. 411; 1 Pritchard's Dig. 45.

Cur. adv. vult.

April 27.—TOWNSEND, J.—The facts of this case, which has been so fully and ably discussed, are these: The suit has been instituted to enforce payment of a bottomry bond for 3265*l.*, which was executed at Melbourne, in Australia, on 7th Sept. 1869, by William Barrett, since deceased, who was then the master of the *Staffordshire*, of London, and a part owner of twenty-two sixty-fourths of that vessel, to Henry Dickson and Walter Williams, ship agents, who have assigned the bond to the plaintiffs, the London Branch of the Bank of New South Wales. Neither the execution nor the assignment of the bond is disputed, but the defendant Mr. W. H. Smith, of London, who is owner of the remaining forty-two sixty-fourths of the vessel, disputes the validity of the bond on several grounds, to which I shall hereafter refer. No other party has appeared in the cause. The

bond binds the vessel and her freight to be earned on her then intended voyage from Melbourne to Callao, and from thence to any other port or ports, and it is made payable, with 50 per cent. bottomry premium, within seven days after the arrival of the ship at Callao. The condition of the bond recites that the ship had lately arrived from London at Melbourne; that she was in want of funds to enable her to proceed to Callao, where she was then bound and about to go; and that without such funds she could not proceed. It contains no reference to bills of exchange, or to any other security, collateral or otherwise. Before and at that time, the *Staffordshire* was subject to a mortgage to Mr. Gumm, of London, which is stated to bear date 22nd Dec. 1868, and to be still subsisting, but it has not been given in evidence in this cause, nor does the exact amount appear which it was intended to secure. On the same day as the date of the mortgage, the owners of the ship (Barrett and Smith) gave Mr. Gumm a letter, which is in evidence, assigning to him all the freights and earnings of the ship, and the insurances effected, and to be effected on the ship and freight, empowering him to effect such insurances as he might deem necessary, appointing him their attorney for receiving the freights and insurance moneys, constituting him ship's husband, giving him the sole management of the vessel, and appointing him to be her sole agent at home and abroad. It does not appear that this letter was specially communicated to Messrs. Dickson and Williams, but Mr. Dickson states that he understood that Gumm had the principal management of the ship. The latter, by a letter to Dickson and Williams, dated 19th Feb. 1869, consigned the ship before her arrival at Melbourne to their firm. They had been previously acquainted with Mr. Gumm, and had done business for him as ship's agents. The *Staffordshire* sailed from London in January 1869 with a cargo for Melbourne. She became leaky on the voyage, and when she anchored at Melbourne it appeared by her log that it had been necessary to keep her pumps going day and night. Captain Barrett placed himself in the hands of Dickson and Williams, as agents for the ship, and in a few days told them that he expected to be obliged to expend about 1000*l.* in repairs, but he did not then mention any other disbursements, nor ask for any advances. This is accounted for by the fact that a sum of 2100*l.* was payable at Melbourne for freight, which sum Messrs. Dickson and Williams were to receive, the ship being consigned to their firm. Dickson states that he knew it was their duty to make the necessary ship's disbursements out of the freight, but they had no reason to suppose they should have occasion to advance anything beyond the amount of that freight; and I do not doubt that he was also at that time confident that the freight would supply a sufficient fund for all the ship's expenditure at Melbourne. When the cargo was discharged it was found necessary to get the ship into dock to be examined and repaired; and it appears to have been necessary to keep the ship waiting for a ship until some days after the 16th July. The repairs were completed, and the vessel got off the ship before the 13th Aug., but the shipwright's bill was not furnished until about the 24th of that month. The only evidence of what then occurred is that of Mr. Dickson. The bond was then executed. Two bills were also drawn by Captain Barrett on Mr. Gumm, one for 3586*l.*

ADM.]

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[ADM.]

and another for a sum of 19l. The former was endorsed by Dickson and Williams to the Bank of New South Wales at Melbourne, and the bond was also made over to the bank in the usual manner. The *Staffordshire* sailed from Melbourne for Callao on the 11th Sept., the bond being sent in her, with a letter written by Mr. Dickson, with the permission of the bank, instructing Gibbs and Co. of Lima to take the directions of the Bank of New South Wales in London as to enforcing the bond. Dickson states that he informed the captain of the fact, and that if the bill was not honoured the bank would instruct Gibbs and Co. to enforce the bond. These, he says, were the instructions given to the bank. On the day that the vessel left Melbourne Dickson and Williams wrote to Mr. Gumm a letter, which was the first intimation that appears to have been given to anyone in England of any intention to hypothecate the ship, or of the fact that the bottomry bond had been given. Mr. Gumm died in the month of October, before the letter arrived in England. It reached his office in London, as appears from the evidence of Forde, who had been in his employment for some time, who had for a long time the management of the transaction, and who took part in the subsequent transactions respecting the bill in London. Forde says that Mr. Gumm was not advised that funds were needed for the repairs; but a letter to him from Capt. Barrett, dated 13th Aug. 1869, must have apprised him that the repairs were likely to cost about 3000l.; and a letter of the same date from Barrett to the defendant stated the same fact, and expressed a doubt as to how he was to get the money. Neither letter alludes to bottomry, or a necessity for it. Dickson left Melbourne on 12th Sept., and arrived in England on 30th Oct. The bill drawn at Melbourne, together with the accounts of Dickson and Williams with Mr. Gumm, reached London on 2nd Nov. On that day the bill was presented at Mr. Gumm's office for acceptance, by direction of Mr. Currie, the secretary of the London branch of the Bank of New South Wales. It was returned to the messenger who presented it, who was merely told that Mr. Gumm was dead. It was not accepted, nor was he referred to Mr. Gumm's executor, or to any other person; nor was any offer made to consider the matter. On the next day the bill was presented again by a notary, and the only answer given was "No advice," whereupon it was protested for non-acceptance. Mr. Gumm's will was not proved until the 10th Dec. 1869; and on the 5th Nov. Mr. Forde wrote a letter, signed by him on behalf of the executors of Gumm, requesting the bank to present the bill again when due. It was never again presented, nor was any direct application ever made to the executors of Gumm respecting it. On the 5th Nov. Mr. Taylor and Mr. Dickson had an interview with Mr. Currie, at which Taylor told Currie there would be no difficulty about making an arrangement as to the bill, but that it could not be done that day; to which Currie replied, "Unless the money is here by four o'clock this afternoon, the bill will go back to the colony." Taylor also states that he had another interview with Mr. Currie in presence of the defendant on the same evening, when the defendant gave to Mr. Currie Ford's letter of the 5th Nov. At this interview one of the directors was also present, who asked, "Why didn't you pay the money?" to

which Taylor replied, "You shall have it when due; surely you do not want it before. Nothing seems to have been said respecting acceptance, or about the executors. The next mail for Lima left London on the following day (6th Nov.), and by it Mr. Currie advised Gibbs and Co. that the bill had been dishonoured, and directed them to put the bond in force. On the 11th Nov., before that direction could have reached Lima, and again on the 16th Nov., offers were made by Mr. Forde to Mr. Currie to take up the bill by actually paying the amount. These offers were declined, unless the bank should be indemnified against any consequences that might ensue from the bond being enforced in Callao, where there was likely to be a loss on the sale of the vessel. Mr. Currie's version of this is very different; but his recollection of the transactions is not perfect. Another unsuccessful attempt at negotiation was made on the 16th Nov. The bond was not paid or enforced at Callao, from which port the *Staffordshire* sailed on her homeward journey about the 25th Jan. 1870, and on her arrival at Queenstown, on the 13th July, 1870, she was arrested in this suit. The defendant then appeared, and on the 21st July gave bail generally for the ship and freight. The petition prays the condemnation of the defendant and the bail in the sum alleged to be due, the bottomry premium, the interest, and the costs of suit. The answer opposes the bond on several grounds: First, that the money was not laid out in expenses necessary to enable the ship to proceed on her voyage; secondly, that the bond was but a collateral security for the amount of the bill, which amount was, it is alleged, tendered to the plaintiffs' manager shortly after the bill arrived at maturity, and was refused by him unless on the terms of getting the guarantee, to which the defendant contends the plaintiffs were not entitled; thirdly, that the freight sought to be attached was not earned on the voyage from Melbourne to Callao, where the sea risk ended, but since, and was earned in respect of a different cargo from that which was on board when the bond was given; fourthly, that neither Dickson and Williams, nor Captain Barrett, communicated with the defendant as to requiring an advance of money, nor as to any intention to get or to give the bond; fifthly, that the bottomry premium is excessive. Two of these defences, the third and fifth, may be at once disposed of. The bond might be good as regards the ship, and yet be invalid as regards the freight, against the mortgagees. But *The Jacob* (4 Cl. Rob. 245) shows that the mere including of the freight of a subsequent voyage would not of itself invalidate a bottomry bond; and in *Parsons on Shipping*, vol. 1, p. 160 (where *The Zephyr*, 3 Mason, 441, is cited), it is stated that a general hypothecation of the freight of a ship is construed to include all the freight of the whole voyage, whether earned at the time the bond is given or not, provided it has not been paid to the master or owner. I have now to determine, in the first place, is the bond valid as a bottomry transaction? The alleged excessive amount of the premium is no objection to the validity of the bond, because, if it be excessive, the court has authority to moderate it: *La Yabel* (1 Dod. 277). There is no evidence that the transaction was any fraud between the Melbourne agents and Captain Barrett. It is admitted, and indeed cannot be denied, that a ship agent may, when acting with good faith and

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integrity, lend money on bottomry, provided that the transaction be in other respects legally valid. And here we have ship agents dealing with a part owner of the ship, and making every reasonable effort to correspond with the gentleman who had consigned her to them; nor is there a single misstatement in any one of their communications with him that had been read. The first ground of objection to the bond cannot, in my opinion, be sustained. If the amount for which the bond was given includes any expenses not necessary for enabling the ship to proceed on her voyage, such expenses may be disallowed in a Court of Admiralty, and a decree might be made for so much as is not open to objection and is sustained by sufficient proof. But I find it is given principally for the shipbuilder's accounts for repairs done, with the concurrence of Captain Barrett, interested as a part owner, and under the inspection of the surveyors of the Chamber of Commerce, to a vessel which could not possibly have gone to sea leaking as described. The questions in the case are thus reduced to two—both very important—the second and the fourth. It is quite certain that the fourth objection is true in fact, whatever be its effect in law. The defendant contends that notice of the intention to hypothecate a vessel must be given to the owner, if possible; and in support of that proposition the cases of *The Olivier* (Lush. 484) and *The Oriental* (7 Moo. P. C. 388) have been cited. In the former case Dr. Lushington stated the rule as laid down by the Superior Court to be that the master, before giving a bond on ship and cargo, should, if practicable, correspond with the owners of the cargo, as well as with those of the ship, and receive instructions from them; and that the lender on bottomry, before he enters into an engagement to advance, should satisfy himself that such communications have been made. He says: "The whole question resolves itself into this, Was it reasonably practicable for the master to have any such correspondence with the shippers and consignees of the cargo?" *The Oriental* (7 Moo. P. C.), decided by the Court of Appeal, lays down the rule that, to justify the agent of the ship in taking a bottomry bond on the vessel, an express communication must be made to the owner, by telegram, if possible. In *The Hamburg* (Br. & Lush. 253) a question arose on the validity of a bond affecting a cargo; and Lord Kingsdown laid down the rule after the previous cases had been cited. So in *The Karnak* (sup.), Lord Kingsdown treats the fact of no communication having been made with the owner before the bond was taken as one of the facts of which cannot be appreciated without taking it in connection with the other facts of the case. It is, therefore, my duty to examine whether a necessity existed which justified the loan, and whether it was practicable, compatibly with that necessity, to consult the owner previously. No question arises here as to consignees of a cargo; nor would it, I conceive, have been the duty of either the master or the lender to consult the mortgagee merely as such. The mortgagee cannot for that purpose be deemed an owner; though, considering him as ship's agent and agent for Mr. Smith, the case might be different. It is necessary to observe that there is evidence that the mail left Melbourne for England on the 19th June, but one fortnight after the ship's arrival, and before she could be examined on the slip. The next mail left on the 17th July, the

next on 14th Aug., and the next appears to have gone on the 13th Sept. On the 19th June Dickson and Williams wrote to Mr. Gumm, informing him that it was expected that the vessel must be docked to be examined, and stating that the captain thought it better not to remit any money on account of freight by that opportunity. They add: "We hope the repairs may not amount to any great sum, but it is hard to say what may be required when the vessel is out of water." That letter was received by Mr. Gumm, and it can hardly be doubted that they knew he was the agent for the owners to receive the freight. They would not have written this to a mere mortgagee. It seems a fair letter, and was written by an early opportunity. They wrote again by the next mail (16th July), inclosing copy of their former letter, stating that they were since without any of his favours, and informing him of the delay about the ship. This letter also was received, but appears not to have elicited any reply. Was there fraud or concealment here? They write again by the mail of 13th Aug., and inform Gumm that the repairs would cost over 2000*l.*, but they could not give him the exact amount, and they refer him to the captain for the expenditure. They also refer to the "almost impossibility of Capt. Barrett reaching Callao in time to conform to the guano charter." From the documents put in evidence it seems probable that the existence of a charter to Callao was a fact well known to Gumm and to the defendant. On the evidence I cannot have a doubt that the vessel when at Melbourne was under a charter for Callao, which it was deemed of great importance both by the master and agents to fulfil. No charter was entered into at Melbourne, so no confusion can arise in respect of any second document of that nature. Having then evidence of a charter, the time for fulfilling which was the 30th Sept., and that the ship was bound to comply with it, I regard that fact as one of the elements to be considered with reference to the necessity of the case, according to the interpretation of that term given by the Superior Court in the *Karnak*. The amount of the shipwright's bill appears to have been taken both the ship's agents and Capt. Barrett by surprise; but the repairs done were extensive, and Barrett has made no objection to it as unfair. No doubt it would have been the duty of the master to telegraph with the owner if a reply could have been received in time to prevent an obvious loss of delay. But it appears that, even by telegraph, a reply could not have been received from London much, if at all, before Christmas. It has not been argued whether the colonial law at Melbourne enabled the shipwright to arrest the vessel. The statute 26 Vict. c. 24, gave the Vice-Admiralty Courts of certain British possessions, jurisdiction over claims in respect of the repairing of ships of which no owner is domiciled within the possession when the work is done, and the schedule to that Act extends its provisions to the Vice-Admiralty Court of Victoria. I think it may be presumed that the procedure in that court is so far analogous to that in the maritime courts of Great Britain and Ireland, that the shipwright had a right to arrest the ship to satisfy his demands. The circumstance alone, or even his threat to enforce such a right, would not, according to the principle laid down by Lord Stowell in *The Augusta* (1 Dod. 283), and recognised in *The Royal Arch* (Swab. 279), justify the granting

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of a bottomry bond; but, as Dr. Lushington has said in the last-mentioned case, as in the *The Vibilia* (1 W. Rob. 1), there could hardly be a stronger necessity for the execution of a bottomry bond than that a vessel might otherwise be arrested, and either remain under detention or be sold, and that circumstance, combined with others, ought to be taken into consideration. In *The Karnak* (sup.), as in the present case, the money was required to pay for repairs which had been previously executed, and other charges and expenses incurred in the port of bottomry. The Court of Admiralty held the bond valid, and the decision was upheld on appeal. Dickson did not interfere with the arrangements made by Capt. Barrett; but it is clear, from the judgment in *Duncan v. Benson* (1 Ex. 554), that a merchant advancing money on bottomry, though bound to show a reasonable cause of unprovided necessity for the advance, from the want of repairs or otherwise, is not bound to inquire into the expediency of incurring those repairs with reference to the interests of the owner. The judgment of Dr. Lushington in *The Vibilia* is to the same effect. Considering all these things, I think this case is distinguished from *The Panama* (L. Rep. 3 P. C. 199; 22 L. T. Rep. N. S. 73), and indeed from all those in which the general duty of previous communication has been asserted. I think the choice of Capt. Barrett was prudent, for his own advantage, and that of his co-owner, was an act of necessity, in the sense in which that term is to be used, where he gave Mr. Dickson the security he required, to avoid the alternative of losing the chance of performing the charter, of leaving the ship unemployed for nearly four months, and possibly of being involved in expensive and ruinous litigation. A wrong choice would have involved a severe loss. There was a necessity, as laid down by Sir W. Erle in the *Karnak*. Necessity creates the law of bottomry; it supercedes the ordinary rules of conduct, it justifies what it requires, and whatever is just and reasonable in such cases is also legal. Capt. Barrett was himself an owner when he signed the bond. Mr. Dickson says the money was not advanced by his firm on personal credit; I think the facts confirm his statement. He might have been willing to risk something for the benefit of Mr. Gumm, but he was under no obligation to advance 3000*l.* on the personal security of Gumm, whom, it is to be remembered, Capt. Barrett had no authority to bind. I therefore, must conclude that the bond is not invalidated in this particular case by the want of previous correspondence with the defendant respecting it. But there is yet one other question to be determined—namely, whether, although the bond may not be invalid *ab initio*, the bill for 3566*l.* is to be deemed the primary security, and the plaintiff is precluded by the agreement made between Mr. Dickson and Capt. Barrett to hold over the bond, from now endeavouring to put the bond in suit. It is admitted that there was no tender made in cash of the payment of the bill, but the offer to pay is regarded on all sides as equivalent, for our present purposes, to an actual tender. The defendant is certainly not to be affected by the instructions given to the agents at Lima, and I think this question must turn, not on those instructions, but on the original arrangement. If the bill was the security on which the money was originally advanced, I must agree with the

proposition admitted by the plaintiff's counsel, and unquestionable in law, that the subsequent bond could not convert the transaction into a valid bottomry bond. But though it is an indubitable rule that a bottomry transaction cannot be based on personal security, bills of exchange may be given in addition to the bond, and such is a very ordinary practice. [His Lordship here commented upon *The Ariadne*, 1 W. Rob. 421.] The defence is that the bond was given as a collateral security for the bill. But it is admitted that both securities were collateral with each other; that is according to the plaintiff's construction, the bondholder had his option to contract himself with the bill, or to enforce the bond. That is the usual course. In *The Tartar* (1 Hag. 1), where a bottomry bond and bills of exchange were given, and the bond was indorsed "an instrument to be considered as a collateral security for bills of exchange drawn by Captain Sharp (master of the vessel), which bills being duly honoured, this bond is to be cancelled and of no effect;" and it was contended that the bond was therefore given manifestly as a security for the bills; Lord Stowell held the bond valid. The considerations to bottomry bonds and to the duty of the court in enforcing them are well stated by Sir C. Robinson, in *The Huntcliff* (2 Hag. 285). I think it of no moment whether we call the bond collateral with the bill, or the bill with the bond, but that the real question is, was the money advanced on the personal credit of Gumm, or was the bond regarded by the parties as the primary security. I think there is no doubt that Mr. Dickson states truly that he did not consent to advance the money except on the clear understanding that the bond should be given, and that the ship should be his security, in case, as he says, the bill was not arranged for. But, undoubtedly, Mr. Dickson and the bank in Melbourne likewise assented to the holding over the bond until the bills had reached London and advice been received thence. The bills were expected to reach London about the time when the ship might be expected to reach Callao; and I do not see anything suspicious or unfair in making the bond payable at Callao, where the risk was to terminate, or in making the bills payable in London about the time when the bond should become due. The holding over the bond was for the advantage of those concerned in the vessel; and if Mr. Gumm had lived, and had at once accepted the bill, and paid it when due, the bond would have become inoperative. However, he was dead; but the person who had the management of the affair of the *Staffordshire* was still in his office, carrying on his business. Mr. Currie's clerk presented the bill, not intended to the executor, whom he did not know, but at the office. He is merely told that Mr. Gumm is dead. The following day the bill is again presented by a notary. The only reply is "no advice." Mr. Currie, rightly vigilant, sends out the protest by the next mail, advising the agent at Lima that the bill had not been arranged for, had been, in fact, protested. It may have been unfortunate that the mail left London so soon; it may have been deemed hard by Mr. Forde that his request on behalf of the executors of Mr. Gumm was not complied with, or that Mr. Currie did not delay his letter to Lima or accept subsequent offers of payment. But it is no part of my duty to criticise the mode in which these gentlemen transacted their mercantile business; I am merely to endeavour to ascertain legal rights; and

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THE BRIG J. L. BOWEN AND HER CARGO.

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and I think the plaintiffs' agent fulfilled the arrangement made between Mr. Dickson and Captain Barrett by presenting the bill for acceptance at Mr. Gumm's office. The circumstances of the case had rendered it impossible that the bill could be accepted by Mr. Gumm, and the gentleman who appeared to be transacting his affairs disclaimed the acceptance. There was no reference made to the executor, no prospect held out that the money would be paid before the departure of the next mail. The bill was not "arranged for" in any sense. This may have been unfortunate, but I cannot charge Mr. Currie with unjustifiable precipitancy merely because he did not think proper to wait the convenience of those who represented Mr. Gumm, or re-present, when due, the bill which had not been accepted, and of the payment of which there was no very strong hope up to the hour when he sent his advice to Lima. I do not think he was bound to accept payment of the bill on any terms different from those which he deemed it his duty subsequently to propose. Now, it has been held that, if a bill be taken in payment, which turns out to be unavailing, the person to whom it is given may at once proceed upon his original demand: (*Mussen v. Price*, 4 East, 147; *Hickling v. Hardy*, 7 Taunt. 312). If the drawee refuse to accept, it is not incumbent on the holder to present it a second time for acceptance: (*Hickling v. Hardy*, 7 Taunt. 312). I cannot involve the original security in the collateral considerations which may arise. It is, indeed, generally true that when the drawee of a bill of exchange is dead, the bill, unless made payable at a particular place, must be presented to his personal representative, and if there be none, the holder should demand acceptance at the house or place of business of the deceased. That would be necessary to enable the holder to sue. But it is the law of this court that the general validity of a bottomry bond is in no degree impaired by the additional security of a bill of exchange, and that the bond may, if necessary, be enforced here in the same manner as if no such security had been taken. I cannot come to the conclusion that Mr. Dickson, if still the holder of the bond, would have been bound, after the transactions of the 2nd and 3rd Nov., to hold his hand with respect to it, and to look to the bill alone for his security, when he had found that the bill did not afford the easy mode of settling his account which he and Capt. Barrett had anticipated. This being my opinion, I need not decide the point whether the bond, being an assignable instrument, is to be regarded, as concerns the plaintiffs, as a bill of exchange in the hands of an indorsee for value. I think it is plain that the master's draft was not duly honoured in England at such a time or in such a manner as to render the enforcement of the bond an illegal proceeding, or so inequitable that I should refuse the aid of this court in enforcing it. The instant the plaintiffs found that the bill was not to be met, they were discharged, in my opinion, from the stay they had imposed on the execution of the bond. The argument that Mr. Currie might have given some more time is surely not one that can have much weight in a court of justice. The very meaning of collateral securities appears to me to be that a creditor may have recourse at his option to either of them. On this ground I do not deem that the original security of the bond has been invalidated by the offers

made in London after the notice had been given by Mr. Currie to the agents at Lima, and I must, therefore, pronounce for the validity of the bond. The whole affair has been an unfortunate one; and I would gladly have availed myself of any fair reason to exonerate the vessel from the costs of this litigation; but I can see no just legal grounds for departing from the ordinary principle that a successful litigant is entitled to his costs, and I must give the plaintiffs the general costs of this suit. But I shall refer it to the registrar to take the account and ascertain the sum fairly and properly due in respect of the bond, taking into consideration the several items of the account, the maritime premium, and the interest; and I shall especially reserve the question of the costs of the reference till the return of his report.

Proctor for the plaintiff, *The Queen's Proctor*.
Solicitor for the defendant, *Hayes*.

UNITED STATES DISTRICT COURT— SOUTHERN DISTRICT, NEW YORK.

Reported by E. D. BENDIS, Proctor and Advocate in
Admiralty.

IN ADMIRALTY.

THE BRIG J. L. BOWEN AND HER CARGO.

Salvage—Mutiny—Furnishing navigation.

A brig was four days out from port when an affray occurred between the officers and four of the crew in which the master was killed, the second mate disabled, and the first mate seriously injured. The first mate was able, however, to do duty, and turning the ship about, sailed her for two days, when a ship came to her, in answer to a signal of distress, and the mate of the ship went on board and navigated her sixty hours to a place of safety. The brig and her cargo were worth 50,000 dols., and a libel was filed by the mate of the ship, on behalf of all interested, to recover salvages.

Held, that it was a clear case for salvage compensation, 3000 dols. salvages was awarded; to the owners of the ship 1600 dols., to her master 450 dols., to the libellant 650 dols., and to her crew 300 dols., according to their wages.

THE BRIG J. L. BOWEN, was bound from New York to Gibraltar, with a ship's company of a master and two mates, a coloured cook and six coloured men before the mast, and with one passenger. The vessel and cargo were worth 50,000 dols. When four days out, on Thursday, June 1, 1871, an affray occurred between four of the seamen and the officers, in which the master was killed, the second mate was so injured that he was incapable of doing duty, and the first mate was very much hurt. He, however, remained on deck at his duty, and headed the vessel back for New York. His orders were obeyed by all the men who were fit for duty, two of the four who were concerned in the disturbance having been disabled. The passenger rendered what assistance he could, but the first mate was the only officer left for duty, and the only man left alive, except the second mate, who understood navigation, and he remained on deck all the time without sleep, from the affray till Saturday morning. On Friday a signal of distress was set, and on Saturday morning the ship *Europa*, bound from Bremen to New York with a general cargo and 130 passengers, came in sight, noticed the signal

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THE MISSIONARY v. THE VIRGINIA.

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of distress, and made for her. The *Europa* had but one mate, Charles H. Hilmer, and he was the only one on the *Europa*, except the master, who could navigate the ship. The cook of the brig and one man were sent in a boat to the *Europa*, and her master was informed of the condition of things, and he sent his mate on board the brig, who had an interview with the mate of the brig, and learned from him what had happened.

The mate of the brig requested assistance, and Hilmer, having returned to the *Europa* and reported, went, by permission of the master of the *Europa*, on board of the brig to assist in her navigation. On board of her he discharged the duties of his position as mate, the first mate of the brig also assisting. The brig reached New York late on Monday night, the services of Hilmer covering a little over sixty hours. The weather was fine all the time, though soon after Hilmer went for service on board of the brig a fog came on, and the vessels lost sight of each other. The *Europa* reached New York twenty-four hours sooner than the brig did.

Hilmer filed a libel against the brig and her cargo on behalf of himself and all others, claiming salvage compensation. An answer was put in denying that the service was one of great peril or danger, and denying that the brig and her cargo were rescued from any considerable peril, or were in any peril beyond the power of her mariners to control.

For libellant, *Beebe, Donohue, and Cooke*.

For claimants, *Newdler and Carter*.

BLANCHFORD, J.—There can be no doubt that the service in this case was a salvage service, in respect of which the owners of the *Europa* and her master and crew are entitled to a salvage compensation: (*The Alphonso*, 1 Curtis's C. C. R. 376; *The Csarina*, 2 Sprague, 48; *The Roe*, Swabey's R. 48; *The Janet Mitchell*, id. 3; *The Golondrina*, L. R. 1 Eccl. & Adm. 354; Jones on Salvage 14.) The only contest in the case is as to the amount to be awarded. The answer avers that the owners of the brig and cargo are willing to make ample compensation for the service rendered, but that the sum demanded has been so unreasonable and inequitable that no settlement could be made. What that sum was is not stated in the answer nor shown by the evidence. The libel specifies no amount, but demands reasonable compensation. In the case of *The Alphonso* (1 Curtis's C. C. R. 376), the two mates of the *Alphonso* were disabled, the master was ill with the yellow fever, a signal of distress was flying, and the mate of the salving vessel took command of the *Alphonso*, and ran her a distance of twenty-three miles to a port of safety, and the *Alphonso* and her cargo were worth 15,000 dols. The court allowed 750 dols. salvage, giving 300 dols. of it to the mate. In the case of *The Csarina* (2 Sprague 48), the master and the two mates of the *Csarina* had been killed, no one was left to navigate her; she and her cargo were worth about 50,000 dols., and the chief mate of the salving vessel was put on board of the *Csarina* and navigated her for twenty days. The owners, master, mate, and sailors of the salving vessel brought suit, and the court awarded to them 5485 dols., of which the owners received 3500 dols., the master, 800 dols., the first mate, 1000 dols., the second mate 25 dols., and sixteen sailors 10 dols. each. (See also the cases of *The Roe*, *The Janet Mitchell*, and *The Golondrina*, above

cited.) In the present case, I think the sum of 3000 dols. is a proper allowance. Of this I award to the owners of the *Europa* 1600 dols., to her master, 450 dols., to the libellant Hilmer, 650 dols., and to the rest of her crew, 300 dols., to be divided according to their wages. I give the libellant costs.

UNITED STATES CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS.

Collied by F. O. Crump, Esq., Barrister-at-Law

June, 1871.

THE MISSIONARY v. THE VIRGINIA.

Salvage—Loss of salving vessel—Dangers of service—Liability of vessel saved—Negligence.

The V. having got aground, the M. came to her assistance. They were lashed together, the V. being by far the more powerful vessel. The V. got off, but the M. ran upon a snag and made a hole in her bottom, and was lost. The V. had been aground more than a day, and had had ample opportunity of knowing the locality:

Held, that in having failed to make the necessary investigations as to the dangers of the place, and being the chief and controlling motive power, the V. was liable for the services and loss of the M. (a) OXIMON by Drummond. Circuit Judge.

This is an appeal by the claimants of the steam-boat *Virginia* from a decree of the District Court against them for services and for the loss of the steam ferry-boat *Missionary*. The libel was filed by the owners of the latter.

The *Virginia*, while on a voyage from St. Louis to New Orleans, in the fall of 1868, ran on a "log heap" in the Mississippi river, a few miles below New Madrid. She struck with her bow and thus lay fast, with her stern up stream. After several ineffectual efforts to get off by lighting, and by the use of the engines, a message was sent to Cairo for assistance on the evening of 24th Oct. and on the morning of the 25th the *Missionary*, in answer to the message, arrived and rounded to on the starboard side of the *Virginia* in a reverse position,—the bow of the *Missionary* being up stream. They were thus fastened together side by side, the stern of the *Missionary* and the bow of the *Virginia* being nearly opposite to each other. They were, how-

(a) This case is calculated to mislead, as it would almost induce us to suppose that a salvor is not entitled to recover compensation for loss of his vessel, except in case of negligence on the salvaged vessel. We fail to see the necessity for deciding the case on the question of negligence. It is a well recognized practice in courts of Admiralty to award compensation for loss and damage sustained in rendering salvage services, quite independently of any negligence on the part of the salvaged vessel: (*The Saratoga*, Lush, 318.) In one instance a lugger, rendering salvage service, was crushed and sunk, and Dr. Lushington gave her owners compensation, saying that where a vessel was injured in rendering salvage service, the presumption was that the injury arose from the risk and necessity of the service, and that if the salvages alleged negligence, the onus of proof lay upon them: (*The Thomas Blyth*, Lush, 16.) It is quite clear that if there was negligence on the part of the *Virginia*, she was liable as in an ordinary case of damage, but when she is liable to pay for the damage in another way it is dangerous to introduce a doctrine capable of misconstruction. The question asked, as to "whose duty it was to force and guard against the possible consequences of success?" has nothing to do with the real question of whether the vessel was injured whilst performing a salvage service, and would imply that negligence alone created liability.—En.

ever, of very unequal length. The *Virginia* was of considerable size and power,—226ft. long, 860 ton burthen, and had on board at the time she struck 450 tons of freight. The *Missionary* was 138ft. long, and about 100 tons burthen. After the arrival of the *Missionary*, about sixty tons of freight—more or less—were removed from the *Virginia* to the *Missionary*. It was then resolved that another effort should be made to get the *Virginia* off. The undisputed facts are, that the two were fastened together at the time in the manner stated, steam raised on both and the engines of each put in operation at about the same time; the *Virginia* was thus backing and the *Missionary* trying to go ahead. Very soon both started, and the result was that the *Virginia* got off the "log heap" and the *Missionary* ran on a snag, stove a hole in her bottom, and shortly after sunk and became a loss, except to some part of her machinery. The libellants claim that the captain of the *Virginia* took entire control of the *Missionary*, and that the former is liable for the loss as an act of negligence as well as for the value of the services rendered. On the other hand it is insisted the *Missionary* was under the management of her own officers and men, and took the ordinary risks incident to a salvage service. These facts are established in addition to those already mentioned; the two steamers were fastened together by the joint act of the officers and men of both. (It is not material who attached the lines.) The co-operation of the *Missionary* in removing the *Virginia* from the "log heap," was with the consent and acquiescence of the officers of the *Missionary*. Webb, the *quasi* captain of the *Missionary*, and Kanfmann, the engineer (who, if Webb was not, was the captain) agreed to assist by the action of the engines in getting the *Virginia* off. But this seems to have been the extent of the aid given by the *Missionary*. The general direction and control of the movement was with the *Virginia*. If it be conceded the services of the *Missionary* was a salvage service, which is apparently the footing upon which the libellants seek to place it, then it involved the ordinary risks of that kind of service, and no more. It may be admitted that if a steamer, in trying to save a stranded vessel by its own motive power, is lost or injured by the movement, it is one of the necessities of the service, and is a risk assumed as such. It is because as well of the peril to the vessel or property saved, as the risk to the salvor, that courts of admiralty allow more than a *quantum meruit* compensation. If the *Missionary* had, in this case, been the sole motor, a more rigid measure of responsibility would have attached. And the case must turn mainly on this: Whose peculiar duty was it under the circumstances to foresee and guard against the possible consequences of success in the effort which was about to be made? The *Virginia* had employed the *Missionary* to aid in the relief without any special contract as to the terms on which it was to be effected. The former was many times larger and more powerful than the latter, and in case of motion, even though lashed together, would substantially control the *Missionary*. It was therefore the duty of the *Virginia*, in a special manner, to explore the spot that might be passed over in the movement proposed to be made, and to see that there was no obstacle in the way which would be likely to cause disaster. The fact that the officers of the

Missionary acquiesced in the demand made for the assistance of the engines, did not make them responsible farther than for the consequences necessarily growing out of such consent. If the case had been reversed, and the *Virginia* had been lost, it could scarcely be maintained in the absence of wilful fault on the part of the *Missionary*, that the latter would have been liable for the loss, or even for an apportionment of the loss: (2 Parsons on Shipping, 263.) The *Virginia* had been on the "log heap" more than a day, and had had every opportunity of examination; in fact, had sounded, in order to ascertain the depth of water. The *Missionary* was employed by the *Virginia* to perform a special service—to aid in moving the latter from the "log heap." If the assistance rendered had been that of lighting only, there can be no doubt it would have been the duty of the *Virginia* to take reasonable care of the *Missionary*, and the *Missionary* in such case could scarcely be held accountable for the dangers of navigation, and the fact that the officers of the *Missionary* merely assented to the action of the engineers, cannot change the rule. Webb, on the *Missionary*, gave notice to the captain of the *Virginia* of the approaching danger. It is asserted the warning was not heard, but it at least shows that some of the parties foresaw the peril of the movement—something which the *Virginia* ought also to have foreseen, and guarded against. The evidence shows that if proper vigilance and prudence had been used by the *Virginia*, the disaster might have been prevented. The open snags could have been seen, the hidden ones discovered. The District Court allowed 500 dols. as the value of the services rendered, and 4000 dols. for the loss or damage. I shall not give any interest on the decree of the District Court, but will affirm the decree as the decree of this court for that amount as found of the present date.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by DOUGLAS KINGSTON, Esq., Barrister-at-Law.

Friday, June 16, 1871.

(Present: the Right Hon. Sir JAMES W. COLVILLE, Sir JOSEPH NAPIER, Lord Justice JAMES, and Lord Justice MELLISH.)

THE ORIENT.

Damage—Pleading—Special defence—Costs—Judgment for same cause of action at law—Right of parties to decision of issues on the record.

Where there has been a mistake on a matter of law that governs or affects costs, the party prejudiced is entitled to have the benefit of correction by appeal.

Defendants in a cause in the Admiralty Court may prove a special defence under a general traverse, if such defence is no surprise to the plaintiffs, and on such defence being established, the defendants are entitled to costs.

When a special defence is raised on the pleadings, if such defence is established, and even though the case is concluded under the general traverse, the defendants are entitled to judgment and costs on the second defence.

THIS was an appeal from a judgment of the Admiralty Court in a cause of damage instituted by the respondents against the appellants. The respondents, in their petition alleged that the

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damage complained of was attributable solely to the acts of the owners of the *Orient* and their servants. The answer to the petition set out, first, a general traverse or denial of the statements in the petition; and, secondly, a special defence, "that the cause of action in the said petition mentioned, and also the damage sought to be recovered for in this cause by the plaintiffs, are respectively the same cause of action, and the same damage in respect of which the plaintiffs commenced an action in her Majesty's Court of Common Pleas, and afterwards, and before the institution of this suit, obtained judgment therein, in which said judgment the said cause of action became and was merged, and which said judgment was satisfied before the commencement of this suit." The reply admitted such action, but set out that it was brought to recover compensation for trespasses to, and wrongful detention of, the ship, and that this suit was to recover for damages done by the *Orient* to the respondent's vessel, and that this was a proceeding *in rem* and against different defendants. At the trial it appeared that the *Orient* was placed in the position in which she did the damage by a person who had possession of the ship simply for the purposes of completion and sale, and who was neither owner nor a servant of the owners of the *Orient*: but these facts did not appear on the pleadings. The appellants declined to amend their pleadings, and requested the learned judge to hear and determine the other issues raised on the record. His Lordship dismissed the suit, but held that, as the defence had not been specially set forth in the pleadings he was bound to give no costs to the defendants. He also held that in consequence of his being bound to act upon the evidence as to the possession he was not bound to take into consideration the second part of the defence, although it was properly pleaded and proved, and his judgment was required upon it by counsel for the defendants. The suit was dismissed without costs being given to the defendant either on the general or the special issue: (*ante*, vol. 3, p. 321.)

Bull, Q.C., Cohen and Bullen for the appellants.—This is not an appeal for costs merely, but there has been a misapprehension on the part of the Admiralty Court.

Attenborough v. Kemp, 14 Moore, P. C. C. 351;

5 L. T. Rep. N. S. 67;

Richards v. Birley, 2 Moore P. C. C., N. S. 96;

10 L. T. Rep. N. S. 142.

The case must be proved *secundum allegata*, and here the petition alleges that the ship was in the hands of the defendants' servants, and it was not: *The Haswell* (Bro. & Lush. 247.) The plaintiff must establish his case: *The East Lothian* (14 Moore, P. C. C. 173.) The plaintiff was entitled to a decision in the second defence, if that would have entitled them to costs.

The Admiralty Advocate (Dr. Deane, Q.C.) and Cottingham for the respondents.—The defence set up at the trial was a surprise to the plaintiffs and ought to have been pleaded. The court exercised a discretion as to costs, and ought not to be interfered with. *Bona fide* care was used:

Attenborough v. Kemp (*sup.*);

Richards v. Birley, (*sup.*).

If the first objection to the suit was fatal, there was no necessity for inquiring into the second.

Judgment was delivered by Sir JOSEPH NAPIER, after a summary of the proceedings in the court below.—Now, the first duty with regard

to the reception of evidence upon which a court has to act in a suit, is to see that the fact which the evidence is offered to prove or disprove, has been sufficiently put in issue by the pleadings. Here there is a comprehensive denial of each and all of the material allegations in the petition. It was just defence on the part of the owners of the *Orient*, who are sought to be made responsible in this proceeding, although not resident in England. They in effect say to the plaintiffs, "We require you to establish and prove the essential allegations in your petition, one of which is, that the damage of which you complain was done by us, or by some one for whose acts we are responsible. If we are (as you allege) legally responsible, you have been legally satisfied by a proceeding at law in an action in which you had the opportunity of making the best case you could as to your claim for this damage." It appears on the admissions of the plaintiffs, that before this proceeding was commenced, the sum for which judgment was recovered in the action at law had been paid. If the security for damages adjudged and not paid was insufficient, or if the owners of the ship were responsible but insolvent, the plaintiff would have had a cumulative remedy by proceeding *in rem* in the Court of Admiralty; but it could only be to realise one compensation for the same cause of action. Where there is a remedy both *in personam* and *in rem*, a person who has resorted to one of the remedies may, if he does not get thereby fully satisfied, resort to the other. Here the plaintiffs proceeded against the party who was the primary trespasser, and properly responsible. The amount of compensation for the damage which the law had reduced to certainty in the action had been paid; and having been by the law so reduced to certainty, and the amount having been paid before the commencement of this proceeding, there was an end of the matter both in law and justice. A question is made as to what the effect of the general traverse is as to costs of the defence admissible under it, when proved; whether the judge was bound to decide the other issue raised by the special defence, which became material only so far as related to the costs on that issue; and whether the judgment, as involving costs only, was subject to an appeal. Their Lordships do not mean to question or recede from the decisions that have been pronounced about not allowing an appeal for costs, but where there has been a mistake upon some matter of law that governs or affects costs—some matter that involves the due application of principles of law—the party prejudiced is entitled to have the benefit of correction by appeal. At common law, where there are several issues raised by the pleadings, it may be that some are found to be quite immaterial, and the judge at the trial has the powers of discharging the jury from finding a verdict on such; but as to those that involve a substantial question of costs, the party interested has a right to have the proper findings entered on the record, in order to secure the costs to which he is lawfully entitled on such issues: *R. v. Johnson*, 6 Cl. & Fin. 60.) The plaintiffs are here proceeding against parties who are resident in a foreign country, and they seek to make their claim available against the vessel of the defendants, who have a right to call upon the plaintiffs to prove the allegations in their petition. It seems to their Lordships to be the effect of the

general traverse and denial, that it puts in issue the material allegations in the petition of the plaintiffs, and requires them to prove their case as alleged. According to the general rule of law, as stated by Serjeant Williams (2 Benn. 158, a. n. 3), whatever facts a plaintiff or a prosecutor is bound to prove on the general issue pleaded, the defendant may controvert the truth of, by opposite evidence. Here a material allegation is that the damage to the ship of the plaintiffs was done by the owners of the *Orient* or their servants, and therefore it was open to the defendant, under the general traverse, to controvert the truth of this allegation, which the plaintiffs were, on the other hand, called on to sustain. The law of the Court of Admiralty is laid down in the case of the *East Lothian* (4 L. T. Rep. N. S. 487; 14 Moo. P. C. 173), followed and further explained by the judgment delivered by Lord Kingsdown, in the case of the *Minnehaha* (4 S. T. Rep. N. S. 810; 15 Moo. P. C. 133.) In the case of the *East Lothian*, where the defendant in answer to the petition stated a particular defence, in addition to the denial of the plaintiff's case, it was held that he was not bound to prove his special defence as pleaded, but that he was at liberty to avail himself of the failure of the plaintiff to make out the case alleged in the petition. The distinction is taken and explained between the case on the part of the plaintiff and that on the part of the defendant. The plaintiff is bound to state distinctly what his grievance is and the defendant has a right to call on him to prove it as it has been stated. If the plaintiff fail in this, the defendant may say—that is in itself a good defence for me, albeit that I am unable to prove the special defence which I have put forward. In the judgment delivered by Lord Chelmsford, after having pointed out that the defendant might have contented himself with a denial of the plaintiff's allegation (14 Moo. P. C. 181), his Lordship says: "An erroneous allegation of the mode in which the injury occurred, made by way of answer to a libel, does not narrow the issue down to the particular fact alleged, so as to entitle the complaining party to recover, if the proof of it should fail. He must rely on the establishment of his own case, and not upon the failure of his adversary, and must succeed upon the truth of his own allegation, or not at all." It is said that in a suit in the Court of Admiralty, if the defence be not distinctly pleaded, the plaintiff might be taken by surprise. Now there was no difficulty as to this in the present suit. It was open to the plaintiffs, if they had grounds sufficient, to have applied to the court to alter or amend or set aside the general traverse as embarrassing. By the 77th rule of 1859 every pleading shall stand admitted, if within four days from the filing, the adverse proctor does not file a notice of motion objecting to the admissibility thereof. No such notice was filed, and no application was made by the plaintiffs, and therefore it must be taken that they consented to go to trial on the pleadings as they stood. It does not appear that in fact there was any ground of surprise. On the contrary, the learned judge in his judgment points out that he was himself obliged to take judicial cognizance from the report of the proceedings in the action at law (which was put in evidence) that the plaintiffs could not have been ignorant that Mr. Yeo was only an agent of the owners of the *Orient* for the purposes of sale: There

was no case then for the exercise of equitable interference, because there was no danger of doing any injustice to the plaintiffs, by adhering to the general rule of law, as to the sufficiency of the general traverse to put in issue every material allegation of the plaintiffs. In the judgment in the *Minnehaha*, where the question was whether negligence could be relied on as a defence where it had not been specially pleaded—Lord Kingsdown says: "It is then contended by the appellants that as to negligence or error in judgment there is no case brought forward by the answer, and that the court is precluded from inquiry into the matter. We are not prepared to go that length. The claimants must prove their own case, they must show that the ship being in danger, from no fault of theirs, they performed services which were not covered by their towage contract, and did all they could to prevent the danger." (15 Moo. P. C. 158.) He afterwards says: "Though we think that the appellants must make out their own case, and that the objections to which we have referred are open to the respondents, still in judging of the effects of the evidence we must have regard to the degree of notice which was given by the respondents to the appellants of the nature of the objections on which it was intended to rely. Certainly the defence here is framed that although it puts in issue all the facts alleged by the appellants, it does not give them notice of any particular point to which their evidence should be especially directed." The general traverse was taken to be legally sufficient to put in issue the allegations that were material to the plaintiff's case, but subject to such equitable treatment as would give no undue advantage to the defendant from not having put forward his defence specially. Here the essential defect in their case was known to the plaintiffs before the suit was commenced; the defence as pleaded required them to prove their case; they made no application to the court to amend or set aside the general traverse, or for leave to discontinue the suit, but when the evidence of Mr. Yeo was given they admitted that their proceeding against the defendants could not be maintained. The court certainly was not bound to interfere in order to assist a proceeding which was admitted to be unfounded; and this must be taken to have been known to the plaintiffs and their advisers, before this suit was commenced. It was an abuse and perversion of the procedure of the Court of Admiralty for the unjust and illegal purpose of trying to augment the compensation, which had been legally assessed and paid to the plaintiffs—in respect moreover of acts done, for which these defendants were not responsible in any court. As to the general traverse, it was legally sufficient to put the plaintiffs upon strict proof of their case, and to admit the defendants to controvert any of the material allegations in the petition. If these were put in issue in a form that was embarrassing, the remedy was by a motion to the court. If the form was inadmissible and insufficient, the evidence of Mr. Yeo as to his limited agency ought to have been objected to on the part of the plaintiffs; the learned judge ought to have been called on not to receive it; or when it was found what the effect of it was, he should have been requested to strike it out of his notes as inadmissible. A judge is not at liberty to act upon evidence that he does not hold to be admissible on some one of the issues raised by the pleadings. Indeed, the learned

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judge of the Court of Admiralty said that he "must not reject the evidence, but must apply, it to the general averments and denial." How could this be allowed unless these averments and denial were legally sufficient? He was not required by the plaintiffs to exercise an equitable control, or to make any order alleged to be material to the assertion of the plaintiffs' rights. The leading counsel for the plaintiffs not having objected to the admissibility of the evidence of Mr. Yeo, and having admitted that it could not be controverted, upon that issue and upon the very right of the case, there was an end of the plaintiffs' suit, which ought never to have been commenced. But, although there was so far an end of the case, it did not follow that the other defence that was raised was not also to be decided as required on behalf of the defendants as material to them, at least in respect of cost. Their Lordships, therefore, are of opinion that the defence admitted under the general traverse, and established by Mr. Yeo's evidence, should have been followed by the legal result as to costs; and as to the other defence, that it ought also to have been decided in favour of the defendants, with a like result as to costs. It is only necessary to look into the pleadings and proceedings in the action, and at the way in which the learned Lord Chief Justice of the Common Pleas left the case to the jury, to see that, in point of law, the claim for damage to the plaintiffs' ship was substantially comprehended, and compensation was adjudged in that action. This has been paid, and the present suit should not have been instituted. Their Lordships, therefore, will humbly recommend Her Majesty that this appeal be allowed, and that the judgment that has been pronounced by the learned judge of the Admiralty be varied, by directing that the suit be dismissed with costs; the appellants to have their costs of this appeal.

Judgment reversed.

Proctors for the appellants, *Fielder and Sunner*.
Proctor for the respondents, *Peckham*.

EXCHEQUER CHAMBER.

Reported by H. LUSH, Esq., Barrister-at-Law.

Tuesday, June 20, 1871. (N)

ERROR FROM THE EXCHEQUER.

(Before COCKBURN, C.J., and BYLES, KEATING,
M. SMITH, and LUSH, J.)

BYRNE v. SCHILLER AND OTHERS.

Ship and Shipping—Charter party—Prepayment on account of freight—Failure of voyage by loss of cargo—Freight not earned—Construction of charter—Difference between English and foreign rule of maritime law.

The plaintiff, by charter party between him and the defendants, chartered a vessel to the defendants for a homeward voyage from Calcutta, with an option to the defendants to send the vessel on an intermediate voyage at a rate of freight mentioned in the charter, "such freight to be paid as follows: 1200*l.* in rupees to be advanced to the master by the freighter's agents at Calcutta, against his receipt, to be deducted together with $1\frac{1}{2}$ per cent.

commission on the amount advanced, and cost of insurance, from freight on settlement thereof, and the remainder, on right delivery of the cargo at port of discharge, in cash as customary." The charter party contained another clause as follows: "The master to sign bills of lading at the current rate of freight required, without prejudice to the charter party, but not under chartered rates, except the difference be paid in cash."

The defendants elected to exercise their option of sending the vessel on an intermediate voyage, and paid the above-mentioned 1200*l.* and prevailed upon the master to sign bills of lading below the chartered rate without being paid the difference in cash, on the understanding that such difference, amounting to 737*l.* would be paid upon completion of the full cargo. The difference was not paid, the defendants refusing to pay it, and contending that they had fulfilled the obligation imposed on them by the charter party in that respect by the payment of the 1200*l.*

The vessel was lost in the river on her way out to sea from Calcutta on the intermediate voyage: and in an action by the plaintiff to recover the above difference of 737*l.* it was.

Held, by the Court of Exchequer Chamber (affirming the judgment of the court below), that the shipowner, the plaintiff, was entitled to recover the amount of the difference between the two rates of freight, notwithstanding that the freight had not been earned by reason of the loss of the cargo. A payment made in advance of freight was not recoverable, even though the cargo was lost, and by the terms of the charter party the payment was to be a payment in the nature of freight, and not an indemnity pro tanto to the shipowner for the loss of his lien; and, therefore, inasmuch as if the defendants had paid it in advance, they could not have recovered it back again on the loss of the cargo, the plaintiff is now entitled to recover it from them, it never having been paid to him.

This was error brought by the defendants on a special case in an action upon a charter party, dated 4th Feb. 1868, by which the plaintiffs' ship *Dynna* was chartered to the defendants for a voyage from Calcutta to London or Liverpool.

The clauses of the charter party which are material to this report are the two following:

The freighters are to have the option, to be declared within twenty days of the vessel's arrival at Calcutta, of sending her, subject to the general provisions of the charter party, on an intermediate voyage from Calcutta, at their option either to Port Louis, Mauritius, or to Colombo, with a full and complete cargo of rice in bags, paying freight on the same at and after the rate, if to Port Louis, of 1*l.* 12*s.*; and if to Colombo, of 1*l.* 8*s.* per bag of rice delivered, such freight to be paid as follows: 1200*l.* in rupees to be advanced to the master by the freighter's agents at Calcutta against his receipt, and to be deducted, together with $1\frac{1}{2}$ per cent. commission on the amount advanced, and cost of insurance, from freight on settlement, and the remainder, on right delivery of the cargo at port of discharge, in cash, as customary.

And in a subsequent clause it was provided as follows:—

The master to sign bills of lading at current rates of freight required, without prejudice to the charter party, but not under chartered rates except the difference be paid in cash.

The defendants elected to send the vessel on the intermediate voyage to Port Louis, and required the master to sign bills of lading at Calcutta for Port Louis, at rates considerably under the chartered rates; and they induced him so to sign them

(a) The argument in this case was commenced and part heard after Hilary Term last (Saturday, Feb. 11), before Cockburn, C.J., and Willes, Keating, Mellor, M. Smith, Lush, and Brett, J.J., but as the court was now differently constituted, it was thought advisable to commence it again from the beginning.

on board, without being paid in cash the difference between the two rates of freight, upon their assurance that all would be settled upon the completion of the lading of the vessel. According to the chartered rate, the total freight would have amounted to 3382l., which was 737l. more than the amount of the bills of lading freight. Upon the vessel being about to sail, the master demanded payment of this difference (737l.) from the defendants, but they refused to pay it, and claimed to set off against it the advances made by them on account of the vessel. The difference, therefore, was not paid, and the vessel sailed on her voyage and was lost in the river on her way out to sea.

The present action was then brought to recover the difference, amounting to 737l., and the Court of Exchequer gave judgment in favour of the plaintiff (the shipowner), holding that he was entitled not only to the 1200l. which had been paid to the master, and which was to be taken as an advance on account of freight and not as a payment by way of loan; but also to the difference of 737l. the united amount of the two sums not exceeding the amount of the freight according to the chartered rates (see case fully reported below, ante vol. 3, p. 514; L. Rep. 6 Ex. 20; 40 L. J. 40, Ex.).

Upon that judgment the defendants brought error, and the question for the opinion of the Court of Exchequer Chamber was whether or not the plaintiff was entitled to recover this sum of 737l.

Butt, Q.C. (with him was *Baylis*) for the defendants, said that the main question for decision by the court in this case was whether a prepayment of freight having been made, and the contract having failed by reason of the loss of the cargo, the sum so prepaid can be recovered back by the charterer where there is nothing in the terms of the charter party expressly preventing it, or whether such a prepayment is absolute, final, and unconditional, and irrecoverable, even though the cargo be lost and the freight be never earned? The true rule, taking the English and American authorities together, is that it is recoverable in the absence of an express indication in the terms of the charter party of an intention to the contrary, and this is the rule adopted by the codes of all other European countries. The plaintiff contends that money so prepaid is not recoverable by our law, but if that be so our law is directly opposed to that of every other country in Europe, and also to that of America. In *Watson v. Dyke* (3 Johnson's Rep. 335, American), decided so long ago as 1808, Kent, C. J., after saying that little light was afforded on the point by the English authors, says, "Cicero in his commentary on the judgments of Oleron, Art. 2, No. 9 (Les Usages et Coutumes de la Mer. p. 42) declares that in cases of shipwreck the master is bound to render to the merchants the advances which they may have made upon the freight, and he cites a decision of one early jurist confirming his doctrine. The Ordinance de la Marine (tit. du Fret, Art. 18), recognises the old rule, and ordains that if goods be lost by the perils of the sea, the master shall be bound to refund the freight which had been previously advanced to him, unless there be a special agreement to the contrary, containing (according to Valin, in his Commentary on the Ordinance, tom. 1, p. 661) an express stipulation that the advance by money shall be retained in any event which may happen in the course of the voyage. The principle is that

freight is a compensation for carriage of the goods, and if, after prepayment the goods be not carried, owing to any accident for which the shipper is not responsible, then it forms the ordinary case of money paid upon a consideration which happens to fail." The learned Chief Justice alludes to a dictum of Saunders, C.J., in an anonymous case in 2 Show. 283, seeming to imply that money advanced for freight was in no event to be refunded, but he says he places no reliance upon that very imperfect report in opposition to the explicit opinion of various writers whom he refers to. The rule is established and acted on in America is clearly stated in 1 Parsons on Shipping (p. 210), where it is said: "Sometimes the freight money is paid in advance, in whole or in part, or other advances are made to the owner of the ship. Then, if the goods are not delivered, or the voyage not performed, under circumstances which would give the shipowner no right to claim freight if it had not been paid, the question arises whether he is bound to pay it back; and a little further on it is said: "It is now quite certain that if the payment be merely a payment of freight in advance, it must be repaid, if freight is not earned." In support of that proposition, the judgment of Story, C.J., in *Pitman v. Hooper* (3 Sumner's Rep. 50), is cited where at page 56, he says: "Besides in the ordinary case of freight paid in advance, I do not understand that, if the voyage is not performed, the owner can, without an express stipulation to the purpose, retain it, but the shipper is entitled to recover it back; and further on he says: "I am aware that some of the English cases look the other way, and whilst they admit the doctrine, fritter it away upon very nice distinctions." The following more recent American authorities are also to the same effect, showing that the rule has been uniformly followed there:

Minturn v. Warren Insurance Company, 2 Allen's Rep. 86;

Benner v. Equitable Safety Insurance Company, 6 Allen's Rep. 222;

Griggs v. Austin, 3 Pick. Rep. 30.

The same doctrine is found laid down also by Roccus, in his work *De navibus et Naulo*, Art. 80, and p. 288, and the like rule is adopted by the Code de Commerce, Art. 302 (French), as well as by the codes of Italy, Spain, Holland, and Germany. There are some English cases, too, which support the view of the defendants, viz., *Mashiter v. Buller* (1 Camp. 84), and *Leman v. Gordon* (8 C. & P. 392), where the law was laid down in the same way by Lords Ellenborough, C.J., and Abinger, C.B., respectively, and in *Blakey v. Dixon* (2 B. & P. 321), the general principle that freight was due only on performance of the voyage was clearly stated. It cannot be denied, however, that the majority of the English authorities show that the rule as construed and acted upon in America and on the Continent does not prevail in this country. All these cases would seem to be founded upon the before mentioned anonymous case (in 2 Shower's Rep. 283), but upon a careful scrutiny of them, and the point decided in each, distinctions may be drawn sufficient, it is submitted, to prevent their being of such undeniable authority as to prevail against the rule which is in force and operation in every other country. The following are the cases in question:

Blakey v. Dixon (ubi sup.);

Manfield v. Matland, 4 B. & Ald. 582;

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Andrew v. Moorhouse, 5 Taunt. 435;
De Silvala v. Kendall, 4 M. & S. 37;
Saunders v. Drew, 3 B. & Ad. 415;
Hicks v. Shield, 7 E. & B. 633; 26 L. J. 205, Q.B.;
Frazer v. Worms, 19 C. B. N. S. 159; s. c. nom
Frayer and another v. Worms, 12 L. T. Rep. N. S.
 547; 34 L. J. 274, C. P.

No doubt the English rule differs to a certain extent from the American and continental rule, that express words are not necessary, but none of them go so far as to say that some distinct indication of intention is unnecessary, and it is open to this court, sitting in error, to correct or depart from the previous decisions on this point, if they see fit so to do. But the defendants deny any intention that this should be a prepayment on account of freight. The intention was that it should be an indemnity *pro tanto* to the shipowner for the loss of his lien. The two clauses of the charter are perfectly independent of one another. Nothing is to be paid on account of the difference unless the difference exceed £1200*l.* and even then it is not to be paid absolutely. The consideration was the right delivery of the cargo at its destination, which has totally failed, and if the defendants had paid this money they could have recovered it back, and therefore it is open to them now, in order to avoid circuits of action, to set off that right of recovery as a defence to the plaintiff's claim in the present action. [COCKBURN, C.J.—We are all agreed that the law is too firmly settled for us to depart from it even in a court of appeal, that where freight is paid in advance it cannot be recovered back. The plaintiff's counsel will therefore address themselves only to the question whether, under the terms of the charter party, the payment here was a payment on account of freight. The general principle we cannot shake, though we are not inclined to extend it any further.]

Milward, Q.C. (with him was *R. G. Williams*), for the plaintiff, urged that but for the special clause in question the charterers could not call upon the captain to sign bills of lading for any but the chartered rates. The immediate payment of the difference in cash is the price paid by them for the exercise of their option, and it would be inconsistent with the whole tenor of the contract, and particularly with the words that the difference should be "paid in cash" to construe this payment as anything but a payment in advance of freight. He cited

Kirchner v. Fenzl, 12 Moo. P. C. 861;
Yeames v. Lindsay, 3 L. T. Rep. N. S. 855;
 and was then stopped.

Butt, Q.C. did not reply.

COCKBURN, C.J.—I am of opinion that the judgment of the court below in favour of the plaintiff must be affirmed, and upon the ground that, looking at the language of the clause in the charter party in question, the true construction of it is, that the payment of the difference to be made under and according to it was to be a payment on account of freight. Now it is settled by the numerous authorities, which have been cited before us in the course of the argument, that, by the law of England, such payment in advance on account of freight cannot be recovered back in the event of the goods being lost, and the freight consequently not becoming payable. I very much regret that the law is so. It seems to me, I must confess, to be founded upon an erroneous principle, and to be anything but satisfactory; and I am emboldened

to say this much because I find that the highest American authorities have settled the law of America upon directly opposite principles, and that the law of all other European countries is in conformity with the American, and contrary to our law in this respect. Indeed, it seems that the rule of law has been so settled in France and Germany for a very long period of time. Valin even doubts the wisdom and propriety of any exception whatever being allowed to the rule that an advance on account of freight must be repaid in the event of the goods being lost, and the freight not becoming payable; and I see by Bedarride's great work upon mercantile law (Bedarride Comm. on the Code de Commerce, vol. 2, p. 436) that at the time of framing and settling the Code de Commerce, the question was very seriously and anxiously discussed, whether such an exception should be introduced into the code, but that eventually the principle of the freedom of contracts prevailed, and the exception was inserted in art. 302 of the code (a) which provides that, in the absence of any stipulation to the contrary, a payment in advance on account of freight shall be recovered back in the event of freight not being earned, by reason of the loss of the goods. The article in question is as follows: "Il n'est dû aucun fret pour les marchandises perdues par naufrage ou écoulement, pillées par des pirates, ou prises par des ennemis. Le capitaine est tenu de restituer le fret qui lui aura été avancé, s'il n'y a convention contraire." However, whatever may be the right and true principle, I quite agree in thinking that the authorities which have been cited, founded probably on the ill-digested case in 2 Shower's Rep. p. 283, and which have been acted on ever since, to the contrary of the general European doctrine, are much too strong to be overcome; and that, if the law is to be altered, it must be by means of distinct legislation for the purpose, and not by judicial decisions to the contrary. That being so, we have to consider the clause of the charter party in question, and to see whether the payment thereby required to be made, in the event of the master being called upon to sign bills of lading at a lower rate than the charter party freight, was intended to be a prepayment on account of freight, final and conclusive, or whether it was, as has been contended for by the learned counsel for the defendants, merely banding over the difference to the master, with the view of making good, *pro tanto*, the loss of lien to the shipowner which would be so caused. Now, although I should be very glad to think that we could take the case out of the general rule, with which we are, as I have before said, dissatisfied, and which we by no means desire to see extended, still, when we come to look closely at the words of the agreement contained in the charter party, we must, I think, hold that the payment in question was a payment in advance on account of freight. I am very much struck with the use of the word "payment." I agree with Mr. Milward as to the meaning of that word there, and think with him, that this payment means *primâ facie* payment on account of the freight to which the shipowner would have been entitled in the event of the goods arriving at their ultimate destination. The shipowner is entitled to payment according to certain rates agreed upon and stipu-

(a.) Art. 18 of the Ordonnance de la Marine is substantially the same with art. 302 of the Code de Commerce.

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lated for in the charter party. But the charterers have stipulated on their side for the option, in case they find that they cannot get those rates, of calling upon the master to sign bills of lading for the conveyance of the goods at a lower rate; and, on the other hand, the shipowner has said, "Very well; by doing that the security which I have by my lien on the goods as freight is endangered to the extent of the difference between the two rates of freight, and, therefore, if you insist upon this being done, I, upon the other hand, shall insist upon your paying me down this difference at once, in cash, once and for all, so that, come what may no much of the freight at all events will be secured." That, in my opinion, is what the shipowner would be perfectly warranted in insisting upon, and I can see nothing unreasonable, or in the least savouring of extortion on his part, in his doing so, and claiming that, if the reduced rate of freight is to be signed for, the difference between it and the chartered freight shall be paid at once, and so that part of the original rate of freight shall be wiped out of the transaction. Looking at all the circumstances and there being nothing unreasonable in the shipowner's so insisting, and looking at the language of the charter party, the word "freight" being the word used, and seeing that the document contains no expression of any intention that this payment should be merely a substitute for the lien, and nothing at all inconsistent with its being a payment in advance on account of freight, I cannot come to any other conclusion than that the parties intended that this payment should be a payment on account of freight *pro tanto*, and so be wiped out of the transaction. I cannot get over the words of the charter party. That being so, the moment we arrive at the conclusion that this was a payment on account of freight, the case falls within the general rule, and the payment could not have been recovered back if it had been made. Inasmuch, therefore, as if it had been paid to the plaintiff, it could not have been recovered back from him, the plaintiff is now entitled to recover it from the defendants, it never having been paid to him. I think therefore that our judgment should be for the plaintiff, and that the judgment of the Court of Exchequer should be affirmed.

BYLES, J.—I am of the same opinion. If we were free to decide this case independently of authority, we might feel inclined to decide it in favour of the defendants, but the current of authority, though flowing from a somewhat feeble spring, is far too strong for us to resist it. It is binding, not only upon us, sitting here as a court of error, but also, probably, upon the highest court of judicature the House of Lords. This payment was a payment therefore to the master, not a loan, but on account of freight, which freight was never earned. I entirely agree with and will add nothing more to what has fallen from the Lord Chief Justice. The judgment of the court below therefore will be affirmed.

KELING, J.—I am of the same opinion. It is in my opinion quite impossible for us to act contrary to the current of authorities as to the prepayment of freight not being recoverable in the event of the loss of the cargo. Whether the principle upon which that doctrine was originally founded, be or not a sound principle, is, of course, an entirely different thing. It is no doubt always unfortunate when the law of our own country dis-

agrees with, and differs from the law of other civilised countries; but the rule of law is fixed on the matter, and ought not to be lightly shaken on such a point; and indeed to hold otherwise would be to disturb and upset a vast number of floating contracts which have been entered into upon the footing of that construction of the rule, throughout this great maritime country, which would be a consequence most injurious to the commercial interests of the kingdom. The question then is, in what character was this payment made? Does it, under the circumstances, and under the terms of the charter party, range itself under the cases in which there is a payment on account of freight? I think it does. It seems to me, for the reasons given by the Lord Chief Justice, with which I entirely agree, that it was manifestly the intention of the parties that this should be, in any event, an absolute payment, and one not liable to be affected by the subsequent loss of the goods. For these reasons I think that we ought to affirm the judgment of the court below in favour of the plaintiff.

M. SMITH, J.—I also am of the same opinion although I have felt much hesitation in arriving at a conclusion in this case, from the difficulty of precisely apprehending upon what ground it is that the rule of our English law has been placed. I apprehend, however, that the foundation of that rule, viz., a prepayment of freight is not recoverable that the charterer is the event of the failure of the voyage by the loss of the cargo, depends upon this, that at the time, when such prepayment is made there is an implied understanding that it is a payment which is made once for all, and which is not to be subject to any contingency. Now, undoubtedly, there was the character of the prepayment in the present case. The law of foreign countries, on the other hand, requires that, if such is their intention, there shall be an express agreement to that effect between the parties; whilst, on the contrary, our law would seem to enjoin that, there is an implied agreement to that effect, unless it be expressly excluded. Taking that to be the foundation of the rule, there was, without doubt, a prepayment here, and the question is whether it was intended that the money so prepaid was to remain in suspense, and to be kept by the shipowner only in the event of the safe arrival of the cargo, or whether it was a payment in the nature of a prepayment on account of freight, and so not recoverable. Now, looking at the rule of English law, which has been established and acted upon for so long a period of time, and assuming, as we must, that the parties had knowledge of that rule, and that they entered into this contract with such knowledge, I confess that it appears to me that their intention was that this payment of the difference should not be a payment to remain in suspense, but that it should be an absolute payment and subject, on the shipowner's part, to no contingency whatsoever. It is clear that the master could only be required to sign bills of lading at a less rate than the chartered rate of freight, upon condition that the difference was paid to him in cash. The words of the clause are, "the master to sign bills of lading at any rate of freight required, without prejudice to the charter party, but not under chartered rates, except the difference be paid in cash." It seems to me, gathering the intention of the parties from the language used by them in the document, that

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when they name a payment in cash—not in bills, but in money—they mean a payment which shall not be subject to any after contingency. We have to construe this contract by the rule of the English law, and ought therefore to hold that this money would not be recoverable back from the shipowner, if it had been paid to him before the loss of the cargo, and that the judgment of the Court of Exchequer should therefore be affirmed.

LUSH, J.—I am of the same opinion. I think it is of the very highest importance that a rule of our commercial law, which has been established for such a length of time as the one which we have been discussing in this case, should be upheld and adhered to. I confess that I was at one time much struck by Mr. Butt's argument that this payment of the difference was intended by the parties to be only a substitute, and an indemnity to the owner for the loss of his lien upon the goods. That might, no doubt, be a very reasonable agreement for the parties to make; but, looking at the terms used by them in the agreement entered into between them, I do not think that that was their contract or their intention. On the contrary, I think their intention was that the payment should be a payment out and out, and that it was a payment on account of freight, which, according to the rule of our law, cannot be recovered back. I am of opinion, therefore, that the plaintiff is entitled to recover, and that the judgment of the Court of Exchequer should be affirmed.

Judgment affirmed.

Attorneys for the plaintiff, Chester and Urquhart, agents for Haigh and Co., Liverpool.

Attorney for the defendants, R. T. Latley.

ERROR FROM THE QUEEN'S BENCH.

Nov. 29, 1870, Feb. 1, June 15, 1871.

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Charter party—Bill of lading—Lien—Short shipment—Dead freight—Demurrage—Detention beyond demurrage days—All other conditions.

By charter party of 18th Aug. 1866, it was agreed between an owner of the *Superior* and C. of London, merchant, that the ship "shall . . . proceed to Sulina, . . . and there load as customary from the factors of the . . . freighter a full and complete cargo of staves and [or] other things" which the . . . merchant binds himself to ship, . . . and . . . therewith proceed to London, and deliver the same on being paid freight" at specified rates . . . "in cash on . . . right delivery of cargo. . . Fifty running days . . . to be allowed for loading, . . . and ten days on demurrage, . . . at 8l. per day . . . The owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and the charterer's responsibilities to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge. . . . At Sulina a short cargo was shipped by the charterer's agents, and a bill of lading signed by the captain for 283,692 staves, to be delivered "at the port of discharge as per the aforesaid charter party unto order, or . . . assigns, he or they paying freight and all other conditions (a) or demur-

rage (if any should be incurred) for the said goods as per the aforesaid charter party." The vessel was detained at her port of loading during the whole of the ten days on demurrage, and also eighteen days beyond. The plaintiff, as owner of the vessel, claimed against the defendants, consignees named in the bill of lading, a lien on the goods for—first, 80l. demurrage; secondly, dead freight for the cargo short shipped; thirdly, damages for the detention of the vessel beyond the ten days. The cargo shipped was of value sufficient to cover these claims.

The court of Queen's Bench, following decided cases, and without hearing argument, gave judgment for the plaintiff on his first claim, and for the defendants on the second and third. Error was mutually brought by the parties in the Court of Exchequer Chamber, coram Kelly, C.B., Bramwell, Channell, and Cleasby, BB., Willes and Brett, JJ. This court—

Held, first, that by the charter party a lien for the 80l. demurrage claimed was given to the plaintiff, and that the bill of lading preserved such lien, (Willes and Brett, JJ., dissenting, on the ground that the lien, if any, was not so preserved); secondly, that by the use of the words "dead freight" no lien was given to the plaintiff for damages in respect of cargo, short shipped, (Bramwell and Cleasby, BB., dissenting); (b) thirdly, that the plaintiff had no lien for damages resulting from detention of the vessel at the port of loading beyond the demurrage days.

Thus the judgment of the court below was in toto affirmed.

ERROR from the Court of Queen's Bench on the following special case, stated without pleadings.

1. The plaintiff is the owner of the ship *Superior*, the defendants are merchants in London, and the consignees of certain timber shipped on board that ship.

2. On the 18th Aug. 1866, the plaintiff entered into a charter-party with R. Carnegie, of which the following are the material parts:

It is this day mutually agreed between N. Gray, managing owner of the ship *Superior*, of the measurement of 689 tons or thereabouts, now at Alexandria, Henry Whitehead, commander, and R. Carnegie, of London, merchant, that the said ship, being tight, staunch, &c., shall with all convenient speed proceed to Sulina, or so near thereto as she may safely get, and there load as customary from the factors of the said freighter a full and complete cargo of staves and [or] grain, seed or stowage goods, or lawful merchandises, which the said merchant binds himself to ship, not exceeding what she can reasonably stow; and being so loaded, shall therewith proceed to London, and deliver the same on being paid freight as follows: viz., 8s. per 100 pieces of oak staves, 34/36in. x 4/16in. 11/14 lines, all French measure; other dimensions in proportion; and other merchandise, if shipped, to pay in full and fair proportion. . . . The cargo to be brought to and taken from alongside at charterer's expense and risk, the ship's boats and crew to render all customary assistance in towing the lighters, &c. The freight to be paid in

(b) In *McClellan v. Fleming* (inf.), Lord Chelmsford says, that "it must be assumed that the parties understood the meaning of the terms they employed, and that, amongst others, the term 'dead freight' meant (according to Lord Kilmenburgh's definition in *Phillips v. Rodie* (inf.)) 'an unliquidated compensation for loss of freight.'" Here the majority of the court say that dead freight does not include unliquidated damages for short loading, but is a liquidated sum expressed on the face of the charter party. Bramwell and Cleasby, BB. who were in the minority, are on the side of authority and seem to have the weight of reasoning with them.—ED.

(a) The charter party and bill of lading were printed forms with written adaptations. The words "and all other conditions" were in writing.

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each on unloading and right delivery of the cargo; fifty running days, not to count before the 15th Oct., if required by merchant's agents, are to be allowed the said merchant (if the ship is not sooner despatched) for loading, and to be discharged as fast as ship can put the cargo out, and ten days on demurrage over and above the said laying days, at 8*l.* per day; detention by frost not to be reckoned as lay days. The owners to have an absolute lien on the cargo for all freight, dead freight, demurrage and average, and the charterer's responsibility to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge. Should any portion of the cargo be delivered in a heated or damaged condition, the freight shall be computed in the usual manner on the bill of lading quantity, or half freight paid on the heated or damaged portion at captain's option, provided no part of the cargo be thrown overboard, or otherwise disposed of on the voyage. Cash for ship's use at port of loading, not exceeding 200*l.*, to be advanced the master free of interest and commission, and deducted from the freight with insurance. . . .

3. The ship arrived at Salina on the 14th Oct. 1866, and on the 19th Oct. 1866 the captain gave notice to Mr. Theophilatus, the charterer's agent at Salina, that the ship was then ready to receive cargo, and that the lay days were to commence from the 20th Oct. 1866.

4. Although the master repeatedly inquired of Theophilatus after the cargo between the 20th Oct. and the 1st Dec. 1866, and required him to load the ship in conformity with the charter party, no cargo was supplied to the ship till the 1st Dec. 1866, on which day a number of staves were sent in lighters alongside the ship. The stowing of these staves was at once commenced, and it went on till the 5th Jan. 1867, but no cargo was shipped on the ship until the 3rd Dec.

5. On the 8th Dec. 1866, the master made a protest before the Vice-Consul at Salina, declaring, as the fact was, that neither the merchant nor his agent had completed the loading of the ship, notwithstanding the expiry of the lay days on that day, and that the vessel would from that day lie on demurrage on the terms of the charter party. A copy of this protest was sent to Theophilatus.

6. On the 26th Dec. 1866 Theophilatus sent a letter to the master to the effect following:

As your ship is down to the water allowed to cross the bar with, and in consequence you have stopped the work this morning to load the remainder of the cargo in the roads, I beg to notify to you that, as customary, your ship's time ceases counting henceforward.

7. The plaintiff contends that it was not customary that a ship's time should cease counting under the circumstances mentioned in the 6th paragraph; but the defendants dispute this contention; and should this circumstance be, in the judgment of the court, material to the case, it is to be determined by the arbitrator, as hereinafter mentioned.

8. On the 26th Dec. the ship crossed the bar into the roads, and the loading was there continued till the 5th Jan. 1867, on which day the loading and stowing of such cargoes as was furnished by the merchant was completed.

9. On the said 5th Jan. the master signed, under protest (but of which protest the defendants had no notice before the commencement of this action), a set of four bills of lading, as follows:

Shipped in good order and condition by Theodosius and Carneio, in and upon the good ship called the *Superior*, under English flag, whereof is master, for the present voyage, Henry Whitehead, and now lying in the port of Salina, and bound to consign his cargo as per charter party, dated London, the 18th Aug. 1866, 283, 682 oak staves, which

were to be delivered in the like good order and condition at the port of discharge as per the aforesaid charter party, or unto order, or to his or their assigns, he or they paying freight and all other conditions or demurrage (if any should be incurred) for the said goods as per the aforesaid charter party. . . . (a)

10. It is to be assumed, for the purposes of this case, that the merchant did not ship a full and complete cargo, and that the ship sailed from Salina, and performed her voyage with a short cargo. The plaintiff claims 364*l.* 19*s.* 5*d.* as dead freight for the cargo thus short shipped.

11. The vessel was also detained at her port of loading during the whole of the ten days on demurrage, which, at 8*l.* per day, amounted to 80*l.*, and also eighteen days beyond the said ten days. What would be a fair amount of compensation for such detention is still a matter of dispute between the parties, to be referred, in case of necessity, to arbitration, as agreed between the parties.

12. The ship arrived in London on the 23rd March 1867, and at once commenced unloading.

13. The cargo was of value sufficient to cover the plaintiff's said claims for freight, dead freight and demurrage.

14. The defendants were the consignees named in the bill of lading, and the property in the goods was vested in the defendants upon and by virtue of such consignment. The defendants had no notice until the arrival of the ship in London of the said claims of the plaintiff, but a copy of the charter party had been sent to the defendants with the original bill of lading.

15. The plaintiff claimed a lien on the goods for the amount of his claims for dead freight and demurrage, and ultimately delivered the goods to the defendants upon the terms that such delivery should not prejudice the plaintiff's claim if any, to a lien upon the goods for such amounts. The question for the opinion of the court was whether the plaintiff had a lien upon the cargo as against the defendants for the said amounts, or any, and which of them. The Court of Queen's Bench gave judgment on the 26th Jan. 1870, for the plaintiff for 80*l.* for demurrage, and for the defendants as to the dead freight and damages for detention beyond the days allowed for demurrage. This judgment was pronounced by the court, without arguments having been heard, on the authority of decided cases.

The plaintiff brought error on the ground that he was entitled to judgment on all three claims; and the defendants also alleged error on the ground that they were entitled to judgment as to the demurrage also.

Nov. 29, 1870.—*Watkin Williams (A. L. Smith with him)*, for the plaintiff, cited

Phillips v. Rodie, 15 East, 547;
Birley v. Gladstone, 3 M. & G. 295;
Bannister v. Breslau, 16 L. T. Rep. N. S. 418;
L. Rep. 2 C. P. 497;
Chappel v. Comfort, 4 L. T. Rep. N. S. 448; 10 C. B., N. S., 802, 810;
Wegener v. Smith, 34 L. T. Rep. 76; 15 C. B. 285;
Kern v. Deslandes, 10 C. B., N. S., 205;
Fry v. The Chartered Mercantile Bank of England, 14 L. T. Rep. N. S. 700; L. Rep. 1 C. P. 689;
Pearson v. Goschen, 10 L. T. Rep. N. S. 656; 17 C. B., N. S., 352;
Kirchner v. Fenus, 12 Moo. P. C. 361.

Feb. 1, 1871.—*Sir G. Honyman, Q. C. (Lanyon with him)*, referred to

(a) The bill of lading was a printed form, the words here in italics were written.

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Penderesen v. Löttinga, 28 L. T. Rep. 267;
Oglesby v. Tylesias, 31 L. T. Rep. 234; E. B. & E. 930;
Cunn v. Tyrre, 34 L. J. 124, Q. B.;
Cross v. Pakiano, 23 L. T. Rep. N. S. 430; L. Rep.
 6 Ex. 9;
Smith v. Stoecking, 26 L. T. Rep. 177, 182; 5 E. & B.
 589;
Milvain v. Peres, 3 L. T. Rep. N. S. 736; 3 E. & E.
 495;
Russell v. Nieman, 10 L. T. Rep. N. S. 786; 17 C. B.,
 N. S., 163;
Re The Norway, 10 L. T. Rep. N. S. 40; 1 Bro. & Lush.
 226.

The arguments are sufficiently stated in the following elaborately prepared judgments:

Cur. adv. vult.

June 15.—CLEASBY, B.—In this case the defendants were the holders of a bill of lading of the cargo of the ship *Superior*, of which the plaintiff was owner. The vessel had been chartered for a voyage from Sulina to London. Upon the arrival of the ship at the port of discharge the plaintiff claimed a lien upon the cargo for ten days' demurrage, for a proper allowance for a further period of detention, and for dead freight. The Court of Queen's Bench held the plaintiff entitled to the claim for demurrage, but disallowed the claim for dead freight and for detention. Error has been brought in this court, and the case has been fully argued. I am of opinion that the judgment of the Queen's Bench should be affirmed so far as relates to the demurrage allowed, and to the claim for detention disallowed. But it appears to me that the plaintiff is also entitled to the claim for dead freight. The charter party is between Gray, the managing owner, and R. Carnegie, of London, charterer, and contains a clause which is now not unusual, viz., that the charterer's responsibilities are to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at the port of discharge; and gives the owner an absolute lien on the cargo for all freight, dead freight, demurrage, and average. The first question to be considered is to what extent could the lien be enforced as between the parties to the charter party. The charter party allows fifty running days for loading the cargo, which is to be discharged as fast as the ship can put the cargo out, and ten days are to be allowed on demurrage over and above the laying days at 8l. per day. Now the word demurrage has a known legal meaning, viz., the additional period during which the vessel may remain by agreement of the parties. It was said upon the argument that by the understanding of shipowners and charterers it had a more extensive signification, and embraced the further period beyond the demurrage days during which the vessel was detained. If that be so, evidence that in such a document as a charter party the word was so usually understood should have been given, and the opinion of the jury taken, but in the absence of all evidence we must give to the word demurrage its known legal meaning, and this excludes from the operation of the lien the claim for damages caused by further detention. As regards the claim for lien in respect of demurrage, I do not see how there can be any doubt about its existing under the charter party. It appears clear to me that whether the demurrage days are occupied in the loading of the ship or in the discharge of it, the charterer is equally discharged from personal liability as soon as a sufficient cargo is loaded, and that in that case the claim of the

owner in respect of it exists only by virtue of the lien which is given by agreement. This is in conformity with the judgment of the Court of Common Pleas in the case of *Bannister v. Breslau* (*sup.*) As regards the lien for dead freight, I can see no sufficient reason why it should not be conferred by the charter party. Dead freight is an expression having a well known signification, viz., the freight which would have been payable for that part of the vessel which has not been occupied by merchandise, but ought to have been. I understand the objection to the lien existing in this case to be, that under this charter the claim for dead freight must be a claim for unliquidated damages, and that the expression has found its way into this charter from others where the claim would be for liquidated damages, and that as applied to a claim for unliquidated damages there would be such delay in the delivery of the goods, and such inconvenience in enforcing it, that it must be regarded as applying only to a charter where the claim for dead freight would be in the nature of a debt. This appears to have been the view taken of the subject by the Court of Common Pleas in the case of *Pearson v. Goschen* (17 C. B., N. S., 352). It was there said that the words "dead freight" were part of a printed form and ought to be rejected from such a contract as the present one. But the reason given does not apply to the present case. Upon looking at the printed parts of the charter the words which give the lien for dead freight are in print, but so are the words which make the claim for dead freight a claim for unliquidated damages. The printed part provides for the charterers loading a full cargo of grain, seed, or other stowage goods, and the freight is to be paid at so much per quarter of corn, and for other grain, seed, or stowage goods in proportion according to the Baltic printed rates; so that one cargo might be more profitable to some extent than another, and the calculation of damages for dead freight would be complicated by that consideration. In the charter, as it stands altered in writing, the calculation would be simple. It obliges the charterer to load a full cargo, and make the freight payable at so much per 100 pieces of oak staves and other cargo in fair proportion. It does not make the freight payable in respect of different cargo according to different specified rates, so as to make the freight earned vary with the cargo carried. But whatever be the cargo carried it would be paid at the same rate as if all had been oak staves, so that although the claim in form would be as damages for not loading a complete cargo, yet as soon as the capacity of the vessel for carrying oak staves is ascertained the claim is liquidated by deducting the freight actually carried. The shipowner could at once make his claim for the known capacity of the ship, and he would do so at his peril if he claimed too much and refused to deliver; and any two captains in the docks could settle the amount. I am informed that in a case like the present the House of Lords has decided very lately that the lien for dead freight applies. Some of my learned brothers have seen a note of the case and will refer to the name and particulars of it. If there was any authorised report of the case I should, of course, have referred to it and corrected my judgment by it, if necessary; so far as I can collect no correction would have been necessary. If there was a serious dispute the

cargo would be delivered either upon a deposit of a sum of money at a banker's or upon security by bond. The lien for a general average involves much greater difficulties. It appears to have always existed independent of contract both by the civil law and our law (Abbot on Shipping, p. 242, 5th edit.): and by the American law (which does not lightly esteem convenience) the captain may detain the goods until a bond to pay the sum contributable is paid, or even until the amount is paid (Kent's Commentaries, vol. 3, p. 339, 10th edit.) It is expressly contracted for in the present case. Now, we know how many weeks or months the adjustment of a general average claim may take, and what questions arise as to the proper item for allowance, and yet, practically, it never interferes with the delivery of the cargo, proper security being given as a matter of course to pay what in the result is found to be due. The rule contended for by the defendant, and which is to some extent sanctioned by *Pearson v. Goschen* (sup.), would come to this, that the only case in which there is a lien for dead freight it is not for dead freight at all. If there is an agreement to pay so much a ton upon the carrying capacity of the ship, it matters not whether the ship is full or empty, the same sum is to be paid by the agreement, and there is nothing like dead freight in the transaction; yet it is said that the clause for dead freight was intended to apply, and can only apply, to such a charter party. But if the agreement is to load a full cargo, and to pay so much a ton for the cargo delivered, then, if a short cargo is loaded, there is a claim for dead freight; in other words, the freight does not exist, or is dead, which would have existed if the cargo had been loaded, and in this, which is the only real case of dead freight, the agreed lien for dead freight is said not to be applicable, and in that way the agreement of the parties is set aside. As regards authority the judgment of all the Judges in the case of *Birley v. Gladstone*, 17 C. B. N. S., 352, may be regarded as almost in point, in favour of the view above taken. In that case the freighter engaged to ship a full cargo, and was to pay 2*l.* 5*s.* per ton for salt on the voyage out, and 12*l.* per ton of flax and hemp, and 8*l.* per ton for tallow on the voyage home. There was a claim for dead freight, 37*l.* 12*s.*, in respect of space unoccupied. The question argued was, whether the general clause in the charter party, by which the shipowner bound the ship and tackle, and the freighter bound the cargo, under a penalty for the due performance of all the covenants, amounted to a contract that the shipowner should have a lien for dead freight. It was held that it did not; and the ground of decision was that this clause was intended to give mutual remedies, and as it would not operate to give the freighter a lien, so it was not intended to give the shipowner a lien. But it was never suggested that if there was a contract for a lien in respect of dead freight, it would not apply to such dead freight as the present, because it was unliquidated. The case of *Phillips v. Rodie* (15 East, 547), is in entire conformity with this decision. I think it will appear that one of the learned judges who decided the case of *Pearson v. Goschen* (sup.), was under an erroneous impression as to the effect of the above two cases, though the error was corrected by the other learned judge, Mr. Justice Willes. In reality the inconvenience seems to be rather

one suggested in the interpretation of the contract than felt by the merchant in acting upon it. I do not think that we can, upon the ground of inconvenience, set aside a contract giving a certain security for dead freight, which must mean the dead freight accruing under the same contract. To do so would be rather adopting that construction which has been much condemned, and which the doctors called *interpretatio viperina*, because it destroyed the text. If the construction of the charter party which I have arrived at is the proper one, the remaining question is whether, on the bill of lading, the right of lien for the demurrage and dead freight is retained as against the holders of that document. Upon the particular words used in this as in similar documents, such as policies of insurance, there is abundant room for ingenious argument, both as regards the printed part—"he or they paying freight or demurrage if any should be incurred," and upon the written addition, "and other conditions," coming in so awkwardly as it does between the words "freight" and "demurrage." But, taking it altogether, the effect of it seems to me to be clear enough; when given to the charterer it was intended to retain the whole right of lien, and the fair meaning of the word is to do so. It was contended by the defendants that the words "if any should be incurred" showed that the demurrage previously incurred could not be intended. But these words are part of the usual form, and are in general really superfluous, because demurrage cannot be payable unless it has been incurred. It would be unwarrantable to make the effect of such an instrument depend upon the retaining of words generally inoperative. And, on the other side, it may be said that the word "demurrage" in the bill of lading must refer to demurrage at the port of loading, because, according to the language of the charter party, none could be contemplated at the port of discharge. And it may be observed that although the words are generally inoperative as regards the right to demurrage, yet they prevent the bill of lading from containing an admission that demurrage is due, and this would be a good reason for retaining them in the present case, because by the charter party days of frost are not to be included in the loading days, and it might not be known or agreed how much of the delay was from that cause. It appears to me, however, sufficient to say that the language in the present bill of lading includes all the conditions in the charter party upon the performance of which the cargo is to be delivered—viz., payment of freight, demurrage, dead freight, and average. This construction is in conformity with the authorities which have been decided upon the effect of the word "conditions" in such a document. In *Wegener v. Smith* (sup.), the words of the bill of lading were "and other conditions as per charter party," and the Court of Common Pleas held that the word "conditions" made demurrage due under the charter party payable upon delivery. And this decision was entirely approved of by the Court of Queen's Bench in *Smith v. Sieveking* (4 E. & B., p. 945), though in that case the only words being "paying for the goods as per charter party," the court held the fair meaning of those words was payment of freight at the rate in charter party. Error was brought in the Exchequer Chamber, and the case was considered too clear for argument. A remark was made re-

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ferring to the demurrage incurred before the signing of the bill of lading not being covered by the language, but this was not the ground of decision which Parke, B. stated to be that the words "payment for the goods" meant payment for the carriage of the goods. There is no authority giving a different meaning to the word "conditions," and it is the only rational meaning of the word, coupled as it is with "freight and demurrage," and thus signifying those payments provided for by the charter to be made on delivery, or as a condition for delivery. It must be taken by the reference in the bill of lading to the charter party that the defendant had notice of the contents; it indeed was admitted upon the argument that he had received a copy of it, so that he knew all the conditions upon which the cargo was deliverable. I am therefore of opinion that the Queen's Bench were right in giving the plaintiff the demurrage, that they were right in withholding the damages for the detention, that they would be right in giving the dead freight, and that their judgment must be corrected to that extent. I will only add that from what we were told took place upon the argument of this case in the court below there is no reason for supposing that the Court of Queen's Bench would not have given the dead freight if they had not felt bound by the decision in *Pearson v. Gouschen* (sup.).

BRETT, J.—This is a special case stated in an action in which the plaintiff sued the defendants for dead freight and demurrage. The plaintiff was the owner of a ship called the *Superior*. The defendants were merchants in London, and consignees of certain timber shipped on board the ship. The plaintiff chartered the ship to one Carnegie. By the charter party the ship was with all convenient speed to sail and proceed to Salina, and there load from the factors of the freighter a full and complete cargo of staves, grain, seed, or stowage goods or lawful merchandise, which the merchant bound himself to ship, and being so loaded should therewith proceed to London and deliver the same on being paid freight, according to certain specified rates. The freight to be paid in cash on unloading and right delivery of the cargo, fifty running days, not to count before 15th Oct., if required by merchants' agents, are to be allowed if the ship is not sooner despatched, for loading, and to be discharged as fast as ship can put the cargo on; and ten days on demurrage over and above the said lying days at 8*l.* per day; the owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and the charterer's responsibilities to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge. The ship proceeded to Salina and loaded a short cargo. The cargo was shipped by the charterer's agents. A bill of lading was signed by the captain for 283,182 staves to be delivered at the port of discharge as per charter party unto order or assigns, he or they paying freight and all other conditions, or demurrage, if any should be incurred, for the said goods as per charter party. The claim for cargo short shipped (claimed as dead freight) was 36*4*l.* 1*9*s.* 5*d.** The claim for demurrage in respect of the ship being detained ten days on demurrage proper at the port of loading was 80*l.*, and there was a further claim of reasonable damages for eighteen days' detention at the port of loading beyond the*

ten demurrage days. The defendants were the consignees of the goods named in the bill of lading, and the property in the goods vested in them upon and by virtue of the consignment. The plaintiff claimed a lien on the goods mentioned in the bill of lading for the dead freight and demurrage, and damages in nature of demurrage, which he alleged to be due. It was argued on behalf of the plaintiff, that he could have had, by virtue of the charter party, a lien on the goods shipped for the dead freight, demurrage, and damages, if the cargo had not been of sufficient value to cover freight and charges, &c., but as the cargo was of sufficient value, the charterer's responsibility under the charter party had ceased, and that, consequently, the bill of lading ought to be construed more favorably for the shipowner, and that the plaintiff had a lien on the goods to be delivered according to the bill of lading, because the bill of lading by reference imposed upon the goods to be delivered under it at the port of discharge, the lien from which the charterer was relieved under the charter party, and authorised the plaintiff to exercise that lien in respect of what had occurred at the port of loading against the defendants, the holders of the bill of lading at the port of discharge, and the owners of the goods mentioned in it. It was contended, on behalf of the defendants, that the printed words in the charter party, which were supposed to give a lien for dead freight had no effect, because no charge for dead freight was stipulated for in the charter party; that the non-responsibility of the charterers was applicable only to defaults which might occur after the sailing of the ship from the port of loading; that the bill of lading incorporated only such stipulations of the charter party as were applicable to the goods mentioned in it, and which might take effect in respect of those goods only, and that the claims of the plaintiff in the present action, even though they might come within the terms of the charter party, were not such claims as were imposed on the defendants by the bill of lading. These arguments raise two questions, namely, first, What is the right construction of the charter party? and, secondly, What is the right construction of the bill of lading? As to the charter party, I am of opinion in the first place, that it gave no lien to the shipowner for dead freight. It seems to me that a charter party which leaves the damages to be recovered in respect of short loading unspecified, and therefore, at large, gives no claim for dead freight properly so called. Such a claim for unliquidated damages is not dead freight (per Williams and Wiles, J., in *Pearson v. Gouschen* (17 C. B., N. S., 352)), and as I have always understood, was intended by Lord Ellenborough in *Phillips v. Rodie* (15 East, p. 555). I always thought that that great judge was pointing out that although many people called unascertained damages for not loading a full cargo dead freight, they were wrong. And inasmuch as the charter party gives an express lien in terms for dead freight only, it is not to be construed as giving it for unliquidated damages for not loading a full and complete cargo. Speaking of a similar claim in respect of prepaid freight, which was not freight in its ordinary sense, Lord Kingsdown laid it down that "where parties instead of trusting to the general rule of law with respect to freight, have made a special contract for themselves for a payment which is not freight, it must depend upon the

terms of that contract whether a lien does or does not exist, and that when the contract made gives no lien the law will not supply one by implication (*Kirchner v. Venus*, 12 Moo. P. C. C., p. 398), and the application of this doctrine to the present case is not affected by the printed clause, which would, if there had been any dead freight stipulated for by the charter party, have given an absolute lien for it: (*Pearson v. Goschen*, 17 C. B., N. S., p. 352). That case seems to me, if I may be allowed to say so, rightly, and according to the true mode in which the courts ought to deal with mercantile business, to point out a necessary and timely modification of the older rule of construction as to giving, if possible, a meaning to every term in the contract in cases where a modern mercantile instrument is known to be in a printed and general form, with parts of it to be filled up in writing, to apply it to particular transactions. As to the second point argued with regard to the charter party, namely, that the liability of the charterer in respect of damages for short loading and for demurrage and damages for detaining the ship at the port of loading beyond the demurrage days, ceased on the loading on board the ship of a cargo of sufficient value, and that as a consequence, the bill of lading ought to be construed in favour of the shipowner, so as to throw the burden of the lien on the consignee under the bill of lading at the port of discharge, I cannot agree that the second proposition could properly be affirmed, merely because the first were made good. But, farther, I do not think that the first proposition is sound. With all respect for the judges who decided *Bannister v. Breslau* (sup.), I think that their interpretation of the charter party was too severe. The case was decided on demurrer. The judges relied much on the lien given in respect of demurrage which they assumed was for delay at the port of loading. But if by other terms of the charter party than those which were before the court, demurrage was stipulated for in respect of delay in loading at the port of discharge, the chief ground on which they based their interpretations would be cut away. I cannot but think that the safer and juster, and more correct construction of the clause then and now under discussion is, that it solves the charterer, when once a cargo of sufficient value is on board, from all liabilities which, but for it, he might incur in respect of anything happening after the sailing of the ship or more properly speaking after the bill of lading is given, as it were, to replace the charter party. The next question is, what is the true construction of the bill of lading? Even if the charter party does give to the shipowner the alleged lien with regard to the alleged dead freight, the demurrage and damages in nature of demurrage, is such lien imposed upon the goods mentioned in the bill of lading as against the defendants the owners of such goods and consignees of them under the bill of lading? The answer, as it seems to me, depends entirely on the construction to be put on the terms of the bill of lading. Upon that construction alone depends the question whether there is any evidence from which a contract between the plaintiff and the defendants to the effect contended for by the plaintiff can be implied. The rule or canon of construction is to be deduced from the cases which have been cited. In *Smith v. Sieveking* (4 E. & B. 985) the action was brought against the consignee at

the port of discharge under the bill of lading for demurrage incurred at the port of loading. By the terms of the bill of lading, which was for the whole cargo, the goods were to be delivered in London to order, &c., he or they paying for the said goods as per charter party. By the charter party an ascertained sum of 5*l.* per day was stipulated for as demurrage for delay at the ports of loading and discharge; and it was agreed and understood that for the payment of all freight and demurrage the captain should have an absolute lien and charge on the cargo. The Court of Queen's Bench decided in favour of the defendants (4 E. & B. 945), and Parke, B., in affirming that decision in the court of error (5 E. & B. 590), said, "In this case you must contend that the consignee at the port of discharge contracted to pay for the antecedent delay of the charterer, which occurred at the port of loading before the consignee had anything to do with either goods or ship. Such a contract is one which requires strong evidence to support it, for it is, to say the least, not a reasonable one." In *Chappell v. Comfort* (10 C. B., N. S. 802) the action was against the indorsees of the bill of lading for demurrage at the port of discharge. By the charter party sixteen lay days were allowed for loading and unloading, and there was demurrage at 2*l.* per day for any detention beyond that time. By the bill of lading the goods were deliverable to order "paying freight as per charter party," and there was a memorandum written in the margin, "there are eight working days for unloading in London." Upon this memorandum the claim was founded. The court gave judgment for the defendants. Willes, J. says, "It may be, and it does often happen, that the person who receives the goods intends to pay all the charges mentioned in the charter party. But when it is intended that such an obligation should be imposed upon him it should be done in plain words, as was done in *Wegener v. Smith* (15 C. B. 285) and other cases where by the terms of the bill of lading the goods were made deliverable to order against payment of the agreed freight, and other conditions as per charter party." And at the end he says, "There must be a plain intention expressed that the consignee of the bill of lading is to pay demurrage before he can be charged with it. This is an established rule to which it is highly important to adhere." So in *Fry v. The Chartered Mercantile Bank of India* (L. Rep. 1 C. P. 689), the charter party made the goods deliverable on payment of freight at 3*l.* 10*s.* per ton, the ship to have a lien on cargo for freight. The terms of the bill of lading were "freight for the said cargo, payable in London as per charter party." It was contended that the defendants, the holders of the bill of lading, were liable for the unpaid freight of the whole cargo. The court decided against the claim. "The charter party," says Erie, C.J., "also contains the clause, 'ship to have a lien on the cargo for freight,' and it is said that this entitled the shipowner to a lien on each part of the cargo for the whole freight. I think the judgment of Willes, J. in *Chappell v. Comfort* applies in terms to this case, &c. I agree with it that if it is wished to include more of the terms of the charter party," i.e., more than to make the freight payable as per charter words "ought to be introduced into the bill of lading, which would show that intention more plainly." The plaintiff's counsel, however, relied

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strongly on the case of *Wegener v. Smith* (15 C. B. 285). The case as reported states that the action was for demurrage, without saying whether for delay at the port of loading or discharge. The charter party provided for the delivery of the cargo at a certain measurement freight, and in case of detention the captain to be paid 5*l.* for every proveable lay day. The bill of lading made the goods deliverable to order "against payment of the agreed freight, and other conditions as per charter party." The court held that by the words "and other conditions," the liability to pay demurrage was incorporated into the bill of lading, and they decided in favour of the plaintiff. This would be a strong case in favour of the plaintiff if the demurrage therein claimed had been in respect of delay at the commencement of the voyage, "but it has been ascertained on inquiry," says Lord Campbell, in *Smith v. Sierck* (4 E. & B. 951, 952), that "the demurrage sued for in that case had accrued in the port of delivery, and had arisen from the default of the defendant in not sooner receiving the goods." And upon the case being again cited to the court of error, Jervis, C.J., remarks that "the action was for demurrage accruing from his (the defendant's) own delay in the port of discharge" (5 E. & B. 591). These remarks were intended to point out that the case is not inconsistent with the doctrine laid down in *Smith v. Sierck*. The case of *Kern v. Deslandes* (10 C. B. N. S. 205) was also relied on, and certainly in it, effect was given to a claim of a lien as being introduced from the charter party into the bill of lading, though the words of the bill of lading were only "he or they paying freight for the said goods as usual." Great stress was laid by the court in that case on the fact that the defendants, the consignees, claiming under the bill of lading, were mere agents of the charterers. Unless the decision can be supported on that ground, which it seems unnecessary at present to determine, I think it cannot be supported at all. It is stated with some significance, in a note by the learned reporters at the end of the case, that "error was brought upon this judgment, but the matter was compromised before argument." The rule, or canon of construction, seems then to be that which is laid down by Willes, J., in *Chappell v. Comfort* (10 C. B. 802), namely, that no liability other than such as naturally attaches in respect of the carriage of the particular goods, is to be held to be imposed on a consignee of goods mentioned in a bill of lading, unless such liability is clearly imposed by plain words. Applying that rule to the bill of lading in the present case, it seems to me that we ought not to hold that any liability attached against the defendants in respect of dead freight, demurrage, or damages in the nature of demurrage, incurred at the port of loading. The words "and all other conditions or demurrage, if any should be incurred," are satisfied by making them applicable to damages in the nature of demurrage for any delay which may occur through the default of the consignee at the port of discharge. Indeed, they are rather apt to such a liability in the present case, because by the charter party no specified number of lay days is allowed at the port of discharge, and no demurrage, strictly so called, is provided for. The ship is to be discharged as fast as she can put the cargo out. The bill of lading may, therefore, be construed as if the phrase, "conditions or demurrage," were intentionally alternative, that is

to say, applicable to a claim which may more properly be called a condition in the nature of demurrage, than demurrage. The proposed construction also gives full value to the words, "for the said goods." At all events the bill of lading does not clearly and plainly apply to claims made in respect of transactions which occurred before the particular goods were on board, and not in respect of those goods, and which claims therefore, when made against persons to the position of the defendants, are, to say the least, not reasonable. Therefore I am of opinion that the judgment below ought to have been wholly in favour of the defendants. I think that the part which was in favour of the plaintiff for 80*l.* for demurrage ought to be reversed, and the part of the judgment which was in favour of the defendants, as to dead freight and damages, ought to be affirmed. Since this case was argued, and since this judgment was written, our attention has been called to the case of *McLean v. Fleming*, in the House of Lords (L. Rep. 2 H. of L. Sc. 125), and if I had thought that that case overruled anything I have said in this, I should have willingly bowed to it. But in that case, as I understand the judgment, the charter party was in respect of the carriage of a uniform cargo, and the freight was payable at a fixed sum per ton, and the charter party ascertained the amount of the cargo that was to be loaded. It then put upon the charterers the liability of loading a full cargo, and gave a lien to the shipowner for dead freight. Now, under those circumstances, it was pointed out by some, if not all, of the learned lords who took part in the judgment, that the damages for not loading a full cargo were, in point of fact, ascertained, because they would be the specified amount per ton upon the quantity that was really ascertained; and if that were so, that would properly be dead freight within the ordinary meaning of the term, and the lien being given in terms for dead freight, that case would be within the recognised rule; and as I understand their Lordships, they declined to overrule the case of *Kirchner v. Venus*, and expressly declined to overrule the case of *Pearson v. Goseken*, which I think is decided on valuable principles, that ought to be generally applied. I therefore do not consider that that case overrules what I have said of this charter party. With regard to the question of the bill of lading, even although the charter in this case did give a lien for dead freight, it seems to me that the authority in the House of Lords leaves the case untouched, because the House of Lords in the case before it came to the conclusion that the action was between those who were virtually the charterers and the shipowner, and, therefore, they decided the case on the charter party alone, and held only that the fact of bills of lading being given to a charterer cannot alter or affect his liability under the charter party. It therefore seems to me that that case does not affect this case, and I adhere to the judgment which I had already written. The case seems to me to be one of great importance, because bills of lading are the documents on which goods are bought and sold before ships arrive, and if the value of the bill of lading is to be dependent on an unascertained amount to be paid in respect of antecedent transactions, which cannot be known or estimated, any legitimate, in the sense of wholesome, traffic to such a document cannot be undertaken. This consideration tends to the same

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conclusion as the legal reasoning which has been before applied.

CHANNELL, B.—In this case I think the judgment of the Queen's Bench should be affirmed. The question is, whether the plaintiff who is a shipowner, has a lien on certain timber carried in his ships, as against the defendants, who are indorsees of a bill of lading relating to the timber, for all or any of three distinct claims. These claims are, first 80*l.* for demurrage incurred by the detention of the ship at the port of loading for ten days, during which, according to the terms of the charter party, the charterer, if he detained the ship, was to pay 8*l.* per day demurrage; secondly, a further claim for damages for the ship's detention for a further period of eighteen days beyond the ten days; and thirdly a claim for what is called dead freight, which is said to be incurred in consequence of a full cargo not having been loaded. It is clear that the plaintiff can only have a lien for any of these claims by express contract, inasmuch as the lien which as shipowner he would have, independently of any contract, would only extend to the actual freight of the goods carried: (*Phillips v. Rodie*, 15 East. 547; *Birley v. Gladstone*, 3 M. & S., 205.) Further, although the charter party may contain an express contract giving him such a lien on the goods as against the charterer, yet he could not have the lien as against the indorsee of a bill of lading, unless it is stipulated for in the bill of lading, either by the incorporation of the clause in the charter party, or by its being expressly mentioned. The question what lien a shipowner has against the holder of a bill of lading therefore reduces itself into a question of construction, either of the bill of lading alone, or of the bill of lading and the incorporated charter party combined, as the case may be: (see *Wegener v. Smith*, and *Smith v. Siercking* (*sup.*)). It is important, however, in construing these documents, to consider both the nature of a lien and the nature of the documents in respect of which a lien is claimed. In *Phillips v. Rodie*, the difficulties which would be created by a lien for an uncertain amount are pointed out. Where the amount of the demand in respect of which the lien is claimed is capable of being calculated, the holder of the bill of lading will know what to tender; but where the demand is for unliquidated damages no tender can be made; and therefore, except by some arrangement between the parties, such as was arrived at in the present case, but which could not be possible where the solvency of the holders of the bill of lading was at all doubtful, the goods must be detained until these damages have been ascertained. In the very probable case of the parties as against whom the damages have to be fixed being foreigners, or, indeed, in any case, it is obvious that very considerable delay must take place. In the mean time the goods may deteriorate in value. The greatest inconvenience would therefore be caused by constraining the shipowner's lien to extend to unliquidated damages for breach of the charter party; and although it is not of course impossible for the parties to contract for a lien for such damages, unless there was in the contract a very clear expression of their intention to do so, the court would not so construe the contract. In the present case both the charter party and the bill of lading mention a lien for "demurrage." I think there can be no question that this extends to the

80*l.* claimed for the ten days during which the charterers detained the ship, as provided for by the charter party. The plaintiff is therefore entitled to this amount as decided by the Queen's Bench. As regards the further detention for eighteen days, the damages for this are not demurrage at all properly so called. Demurrage is a sum agreed to be paid for the detention of a vessel, and the term is not applicable to the damages caused by detaining her contrary to agreement. I have, therefore, no doubt at all that the plaintiff is not entitled to any lien for the damages caused by the further detention for eighteen days. The point of most difficulty in the case is, that relating to what is called "dead freight." The charter party gives the shipowner a lien for "dead freight," it does not, however, in any other way mention any dead freight, nor does it contain any covenant that full freight shall be paid on all the ship could carry, whether a full cargo is loaded or not. The bill of lading provides that the holder shall pay "freight and all other conditions and demurrage (if any be incurred) for the said goods, as per the said charter party." I think this sufficiently incorporates the charter party to entitle the shipowner to insist as against the defendants on any lien which he would have under the charter party for what is there called "dead freight": (see *Wegener v. Smith* (*sup.*)). The question, however, is, what is the true meaning of the expression "dead freight," so used in the charter party, and does it cover the claim in the present case, which, as pointed out by Lord Ellenborough, in *Phillips v. Rodie* (*sup.*), is not freight at all, but is unliquidated damages for the loss of the freight? In that case Lord Ellenborough says, that in order to give the lien claimed, "the covenant should have been to pay full freight as if the goods had been actually loaded on board, and that the master should have the same lien upon goods actually on board as if the ship had been fully laden with all goods covenanted to be loaded." In the present case, the latter part of the suggested covenant, or something like it, is found, but not the former. It is true that if we hold that "dead freight" in the charter party does not include unliquidated damages for loss of freight, we give no effect to the expression at all. I agree, however, with what was said on this point by Williams and Wiles, J.J., in *Pearson v. Gochen* (*sup.*), that when these words occur in an ordinary clause in a mercantile contract it is not necessary to find an application for them in this particular case. If the charter party had provided for any dead freight, strictly so called, being payable, the clause would have taken effect and conferred a lien, but as it is, it does not take effect, because there is nothing for it to apply to. In the case last referred to, the point in the present case was really decided, as the court held that a clause giving a lien for "dead freight" was wholly inapplicable to a claim for damages in respect to the charterers having failed to load a full cargo. In this court we should not be bound by that decision if we did not agree with it; but I do agree with it, and adopt the reasoning on which it proceeds. We have been pressed in the argument with the clause in the charter party that the charterer's responsibilities are to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at the port of discharge. It has been contended that all the charterer's responsibilities for all breaches of con-

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tract were to cease on shipment, and that, therefore, it must have been intended that there should be a lien on the goods, otherwise the shipowner would be without remedy. It is not, of course, necessary for us to decide whether the charterers were, or were not relieved from responsibility in respect of the claims which we now decide the shipowner cannot maintain against the defendants. As at present advised, however, I think the clause does not apply. At all events, it contains nothing to induce me to put a different construction on the previous claim than I otherwise should. Probably the charterer's responsibilities which are to cease, are the responsibilities in respect of those matters for which a lien is created; but the difficulties in the way of creating a lien for unliquidated damages, and the stipulation that the cargo is to be of sufficient value to cover the freight and charges only, and not the freight charges, and all damages, afford a stronger argument for holding that there is no lien, and, therefore, no cesser of responsibility of the charterers as regards the damages than for holding that there is a cesser, and, therefore, a lien. A case of *Bannister v. Breslower (sup.)*, has been quoted, in which it was held that, under somewhat similar though stronger words in a charter party, the charterers' responsibility for demurrage did cease. If the demurrage there referred to was demurrage properly so called, then I agree with the decision. If, however, as certainly rather appears to have been the case from the report, it was merely unliquidated damages for the detention of the ship, then I think the decision is somewhat doubtful, and to be supported, if at all by the fact that the words as to the cesser of responsibility were stronger there than here. The attention of the court there does not appear to have been drawn to the fact that the demurrage there claimed was not demurrage properly so called, but only unliquidated damages, and, therefore, the opinion of the judges that a lien was created for this so-called demurrage, is not entitled to the same weight as I should be disposed to give it, if the point had appeared to have been carefully considered. Besides which, it was merely an opinion not absolutely essential to the decision of the case, for although unlikely it is not impossible that the parties should so contract as to make the responsibility of the charterer cease, although no lien was effectually created. In such cases, where damages have been incurred prior to the shipment, it would be prudent for the master to refuse to sign any bills of lading which did not give express notice to the indorsee of the claim for damages which had accrued, and stipulate for the payment. For these reasons I am of opinion that the judgment of the Queen's Bench should be affirmed on all points. After the argument of this case, and I had written what I have read as my judgment on the point of dead freight, our attention was called to the case of *McLean v. Fleming* (L. Rep. 2 H. of L. Sc. 128), decided by the House of Lords on the 3rd April last. The delivery of the judgment of this court was postponed till we had an opportunity of inquiring into the case of *McLean v. Fleming*. My brother Bramwell considers the decision in the House of Lords governs this case, and must govern him, whatever his opinion otherwise would have been. My brother Brett, for reasons he has given, considers that *McLean v. Fleming* does not apply. Other of the judges, including myself, take the same

view of the effect of the decision in *McLean v. Fleming*. If I considered the decision of the House of Lords as one which governs the present case, of course I should be bound by it, and should withdraw so much of the judgment respecting the point of dead freight as I had prepared and have read; but, thinking that the decision of the House of Lords does not govern the present case, I abide by the opinion that the plaintiff cannot recover his claim for dead freight; and I therefore think the judgment of the Court of Queen's Bench should be affirmed on all points.

The judgment of BRAMWELL, B., was read by WILLES, J.—The questions in this case depend on the construction of the bill of lading and charter party. The former refers to the latter; the captain is "bound to consign his cargo as per charter party, dated London, 18th Aug., 1866," and payment is to be made as "per the aforesaid charter party." A copy of this charter party was sent to the defendants with the original bill of lading. The bill of lading, then, must be construed in connection with the charter party, and the surrounding circumstances—perhaps as the bill of lading is negotiable, not all the surrounding circumstances that would be applicable as between charterer and owner—but one, at least, must be borne in mind, viz., that the defendants were consignees of the whole cargo. This being so, it seems to me that the best way to examine the matter is first to ascertain the meaning of the charter party. It was said by the plaintiff that the effect of it was, that on the loading of the cargo the responsibility of the charterer ceased, as well for all things future as those past; and that therefore a right must be taken to be given against the person entitled to receive the goods under the bill of lading to withhold them till satisfied for all claims which otherwise would have been enforced against the charterer. It is not strictly necessary to decide this, perhaps, because it may be that from the form of the bill of lading no right is given against the defendants, although all rights are lost against the charterer; and, on the other hand, it may be, that by the terms of the charter party rights remain against the charterer, while by those of the bill of lading they are given against the defendants. But the argument is so important, an answer one way to the question would be so cogent in favour of the plaintiff, that it is necessary to consider it minutely. It seems to me that the plaintiff is wrong in his contention on this point. I do not think that the parties intended, nor that they have expressed an intention, that the charterer's responsibilities for causes of actions then accrued should be extinguished on shipment. Agreements should be construed on the principle that parties, when making them, contemplate keeping, not breaking them. I do not think this charter contemplates that the charterer will break his contract. It is true, the words "dead freight" are used, which certainly are unmeaning in this case, except they provide for the case of a short cargo contrary to the charter. What meaning, if any, is to be given to them, I shall have to explain presently; but I think they are not sufficient to show that "responsibilities" mean "responsibilities for past breaches of agreement." Again the charterer's "responsibilities" are to "cease." It is a verbal criticism, but the right words would be, "be extinguished" as to accrued claims. Farther, they are "to cease on shipment

of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge." So that it must be of sufficient value to cover the freight and cargo. But why should the shipment of a cargo of sufficient value to cover freight and charges extinguish an already incurred claim for short loading, demurrage, and detention over the demurrage days? Again, it must be of that value "on arrival at port of discharge." So that if damaged on the voyage to a less value, the other responsibilities would exist. Further, they are to cease on shipment of the cargo, i.e., a full cargo. That is a good reason why the responsibility to ship a full cargo should cease, viz., because it has been done; but why is it a reason why responsibility for delay in loading should cease? Why should shipping a short cargo not only be a cause of action in itself, but also keep alive the cause of action for delay in shipping? It is also certain that all breaches of contract by the charterer are not provided for by a remedy against the person entitled under the bill of lading. For if there was no advance at the port of loading, no action would lie against the charterer; but clearly there is no lien on the goods for the damages thereby recoverable. Of course that is not decisive, it may have been overlooked; but it is an argument. I am of opinion on this part of the case, that the responsibilities which are to cease, are those which the shipowner without loss to himself may render unnecessary in the case supposed, viz., responsibilities for the freight and charges to cover which the cargo is of sufficient value on arrival at port of discharge. The clause should be read thus: "And on shipment of the cargo, provided it is of sufficient value to cover the freight and charges on arrival at port of discharge, the charterer's responsibilities to cease, for such freight and charges." It is said this opinion is inconsistent with the case of *Bannister v. Breslau* (sup.). If so, I respectfully intimate my doubt of that decision. But it is to be observed that every case such as this, where no general principle of law is involved, but only the meaning of careless and slovenly documents, must depend on its own particular words. I may observe that in one sense this question does not arise. For if the plaintiff is right "the cargo" has not been shipped, but something short of the cargo. However, to help the construction of the bill of lading, the question does arise; but, for the reasons I have given, it should, I think be answered unfavourably to the plaintiff. Putting this meaning on this part of the charter party, it is next convenient to examine what lien by the charter party would be reserved against the party entitled to the goods, whom I will call "the consignee." The owners are to have an absolute lien for all freight, dead freight, demurrage, and average. The doubts are as to dead freight and demurrage. First, does dead freight include short loading? In strictness, it does not. Dead freight apparently, in strictness, means some agreed sum fixed or capable of calculation, for short loading. Now, it is certain that general damages, which are all the plaintiff could recover here, are something very different from that. Here the plaintiff might recover more than a sum equal to the charter freight for goods carried; or less, if he filled up advantageously elsewhere. Why, then, are these words, which do not naturally signify

damages for short loading, to be held to do so in this case? The burthen of showing this is on the plaintiff. The argument he uses is, that unless so interpreted, the words "dead freight" have no application: that a meaning ought to be given to them if they are capable of it; that damages for short loading are often called "dead freight"; that words may be construed in a secondary sense when not applicable in their primary sense; that otherwise no lien is given for dead freight, though the parties intended to give very extensive liens. This argument is, I think, of great force; still its value must be tried and compared with arguments the other way. Those arguments seem to be these. That the parties might have said, "damages for short loading" in so many words if they had thought fit; that as they have not done so, those who have to decide on the charter ought not to say so, without almost a necessity for so doing; that no such necessity exists here; for that, although it is a rule that a meaning should be given to all words if they are capable of one, there is no rule that it must be done in all cases; and that when it is remembered that the forms of these documents are prepared in the same words in print, whatever particular stipulations may be introduced in each, it is more right and more natural to add the words "if any" to all such general words as those in question, as was done in the case of *Cross v. Pagliano* (L. Rep. 6 Ex. 9), than to give any such secondary meaning; for that where a secondary meaning is given to words incapable of their primary meaning, the words properly have that secondary meaning, as where "son" is held to mean "illegitimate son" where there is no legitimate son. Further, to suppose that a lien is given for damages for short loading, is to suppose that the parties contemplated that the agreement would be broken, and not kept, which is a wrong way of construing agreements, as, presumably, parties making them contemplate keeping them. Now, when dead freight is agreed to be paid, the charterer has the right to load a short cargo on paying the dead freight. Another argument against the plaintiff is that the construction he contends for is inconvenient; that it is not likely a merchant would charter a ship in such terms that he would not be entitled to a bill of lading without the goods in it being liable to a thing so uncertain and open to dispute as a claim for short freight; and that, though in this case there is but one bill of lading, there might have been several, and the goods in each subject to this claim. Which of these reasonings should prevail might be matter of much doubt but for the case of *McLean v. Fleming* (sup.), recently decided in the House of Lords, where a lien for "dead freight" under circumstances very similar to those of this case, was held to give a lien for damages for short loading. *Pearson v. Goachen* (sup.) is, no doubt, the other way, though certainly there the matter was rather assumed than determined. Anyhow, if it conflicts with *McLean v. Fleming*, of course the latter must prevail. It remains to consider, as to this point, whether the shipowner having a right to this lien, that right has been preserved in the bill of lading? But I will first examine what other liens are given by the charter party. Analogous considerations to the foregoing show, to my mind, that "demurrage" means demurrage strictly so called. In the first place, demurrage, though sometimes used to signify any undue delay

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in loading, is an expression in common use to signify an agreed time, and is so used in this charter party. Demurrage proper is contemplated by this charter and the word therefore is satisfied; so that, if the plaintiff is right, "demurrage" would have two meanings, viz., "demurrage proper," and "damages for detention," which may be at a greater or less rate than the agreed demurrage. In the next place, there is the argument that the parties are not to be taken to contemplate breaking their agreement. In the result, then, I think the charter party enables the owner to insist on a lien for demurrage, strictly so called, but not for delay in loading, *ultra* the demurrage days. If, then, these are the proper constructions of the charter party, what is that of the bill of lading? If the master has not reserved the liens he was entitled to, or has stipulated for those to which he was not entitled, why has he? Shortly, the meaning to be expected in the bill of lading is one in conformity with the charter party. Let us examine it. The goods "are to be delivered unto order, or to his or their assigns, be or they paying freight, and all other conditions, or demurrage, if any, should be incurred for the said goods, as per the aforesaid charter party." It is certainly impossible to speak with confidence as to the meaning to be put on this document. In the first place, the word is "or" demurrage; of course, this must be read "and." Then the words are "if any should be incurred." This means on the face of it, I suppose, "should thereafter be incurred." But when it is remembered that the charter, "per" which this is to be paid, makes no provision for demurrage at the port of discharge (and it certainly does not), while it does for demurrage at the port of loading, and when it is remembered how commonly the mistake is made of using the "should" or "shall be" for "shall have been" to comprehend possible past and future, must not this be read as a bit of bad grammar for "if any shall have been incurred?" It seems to me it must be so read, especially when read in conjunction with the words "be or they paying freight, and all other conditions." These words I now have to consider in reference to the remaining questions, viz., is there a lien under the bill of lading for the damages for short loading? But for the words "all other conditions" there clearly would not be. But those words must be read as "performing or satisfying all other conditions" for the said goods as per the aforesaid charter party: for "paying" conditions is insensible. But if I am right in my construction of the charter party, one of the conditions the consignee might be required per the charter party to satisfy in order to have the goods, is paying damages for short loading under the name of "dead freight," for it seems to me that the word "conditions" has no application, unless it is to secure the liens to which the shipowner is entitled by the charter party. It supposes the performance of some condition, precedent or concurrent, by the consignee. What is he to do by the charter party? Pay freight? That is expressly provided for. Unload as fast as the ship can put the cargo out? But that is not a condition precedent or concurrent, to or with his having the cargo. He may be bound so to unload, but not for "the goods;" for he must have them whether he unload at that rate or otherwise. Besides, that would be only one condition, and not conditions. The clause about

heated or damaged condition does not create any condition to be performed, but provides for a way in which, in a certain event, the freight is to be computed. It seems to me, then, that by the charter party there is a right to insert in the bill of lading a lien for the demurrage and dead freight or damage for short loading; that there is no reason to suppose that the captain intended to give up that right; that there are words sufficient to carry it; that those words have no application unless they have that effect; and that consequently they have that effect; and the plaintiff is entitled to his lien for those damages and demurrage. It is said that the words are "paying for the goods;" I think that the words must be read "paying and satisfying all the conditions for the goods;" for "paying conditions" for the goods is insensible. Even then it is argued that the paying and satisfying are to be "for the goods," which means "for the carriage of the goods." I do not think so. It means "to have the goods." Demurrage is not paid for the carriage of the goods, but for delaying in loading, nor is average; yet, by the bill of lading, demurrage and average may have to be paid for the goods, which may mean "to have them." *Smith v. Sierck* (*sup.*), is cited to show that those words "for the goods" are to be so understood; and certainly that case tends that way. But *Wegener v. Smith* (*sup.*) is an authority the other way. And it seems to me clear that each of those cases must depend on the very words used. Here, again, the argument is used, that if there were several consignees, and several bills of lading, it would be impossible to construe them in this way; that either there would be liens on small parcels for large damages, or other difficulties would arise. There is only one bill of lading. It may be if there were several it would be impossible so to construe them, though I do not think so. But, if so, the conclusion to be drawn is, that in that case the bills of lading would have been differently framed. In this particular case (if such a matter may be noticed) the fact is, that "all other conditions" are inserted in writing in an otherwise printed form obviously for some important purpose, while the clause about demurrage "if any should be incurred" is in print, and good enough, at the time of printing, to comprehend all demurrage, whether incurred before or after the signing of the bill of lading. Supposing that by the words "demurrage if any should be incurred," no lien for the demurrage anterior to the bill of lading would be given, I think it would be given by the words "all other conditions." I think those words, for the reason I have given, would suffice without express mention of demurrage, and I think that express mention does not lessen their effect. In conclusion, I think the plaintiff entitled to a lien for the demurrage, and the dead freight or damages for short loading; and that the judgment should be affirmed as to the former, and reversed as to the latter. But I speak with great doubt, seeing the state of the authorities, and knowing the different opinions entertained on the questions, and considering what they are—viz., what meaning is to be put on loose and careless expressions? But I cannot help thinking that if we decide against the plaintiff, he will lose a benefit he clearly means to have, and the charterers intended he should have. The questions ought to have no importance except to the parties interested, and except

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as a warning to others not to let them arise again.

WILLES, J.—I entirely concur with the judgment delivered by my brother Brett—a judgment written with such fresh and accurate acquaintance with the mercantile and maritime law applicable to the subject, that I will not attempt to add anything.

KELLY, C.B.—Three questions arise upon this appeal. One, and the most important, for it governs the entire case, is whether the words interlined in the bill of lading, so far incorporate into that instrument the conditions in the charter party as to entitle the plaintiff to a lien upon the cargo, of which the defendants have become the owners under the indorsement of the bill of lading. The first point is as to demurrage in respect of the ten days, from the 8th to the 18th Dec., amounting to 80*l*. Under the bill of lading the cargo was to be consigned "as per charter party," and the cargo is to be delivered "as per charter party unto order or assigns, he or they paying freight and all other conditions" [these words being interlined in writing in the printed bill of lading], "or demurrage, if any should be incurred for the said goods, as per the aforesaid charter party." This must be read as paying freight and demurrage, if any; and the question is, how much of the charter party is imported into the bill of lading by the words interlined in the bill of lading, "and all other conditions?" These words must be read "performing all other conditions" to make them intelligible and sensible.

When we look to the charter party we find, after the provision for the payment of the freight on unloading, and for fifty lay days from the 15th Oct. and ten days on demurrage at 8*l*. per day, the charter party proceeds thus: "The owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average, and the charterer's responsibility to cease upon shipment of the cargo, provided it be of sufficient value to cover the freight and the charges upon arrival at the port of discharge." And the question is, Whether this condition is binding upon the defendants under the words "and all other conditions" interlined as before mentioned? I think it is. First, because the words cannot be treated as words of form and superfluous, or as having no meaning or effect, seeing that they are introduced expressly and in writing by interlineation in the printed bill of lading, and must therefore point to something intended and distinctly agreed upon between the parties, and I see no other condition to which they can apply, but the very important one that the owner was to have a lien upon the cargo for all freight, dead freight, and demurrage. It has been contended that the words apply only to any condition touching these goods, the freight payable under the bill of lading being the freight only for this shipment; but I think the reasonable interpretation is, that any and every condition is imported which affects in any way the interests of the owner or of the defendants in relation to the cargo thus consigned. I do not say that notice of the contents of the charter party would have bound the defendants by this condition, but assuming the words to mean "performing all other conditions," I think the only reasonable effect to be given to them is to preserve to the owner the lien for which he had stipulated upon the cargo consigned to the defendants, which otherwise they would not have been liable to satisfy. It is un-

necessary to determine whether, upon the shipment of this cargo, the liability of the charterer and the lien of the owner altogether ceased, as well in respect of demurrage already incurred, as of any species of liability that might afterwards arise, for, whether such liability wholly or in part continued or ceased, the owner might claim the benefit of his lien against the consignee of the cargo, either as a substituted or an additional or collateral security for the freight and demurrage. No case has been decided in which the question has turned upon words like this. We must, therefore, decide this case according to what we believe to have been the intention of the parties, to be collected from the language of the two instruments taken together. It is true that, had the two constituted but one contract between the owner and the consignees, it is most unlikely that the consignees would have allowed their cargo to stand as a security for demurrage already incurred, and not by reason of any act or default of theirs; but we must remember that the charter party was entered into between the owner and the charterer before it could be known what compensation the owner would become entitled to, whether in respect of freight or demurrage or any other incident of the adventure. I think, therefore, that the verdict for the plaintiff for 80*l*. ought to stand, and the judgment of the Court of Queen's Bench upon this point should be affirmed. The next question is, whether the lien extends to the compensation claimed for the detention of the ship after the lapse of ten days on demurrage. Now the words are "freight, dead freight, demurrage, and average;" and it seems to me impossible that this claim should come within either of these words. I think, therefore, the judgment below must also be affirmed upon this point. It remains to be considered whether the claim to unliquidated damages for the not having shipped a complete cargo can be claimed as dead freight, and so brought within the lien to which the owner was entitled. Now, inasmuch as we have no means of ascertaining the amount of these damages, except by consent or by verdict of a jury, they cannot be brought within the strict legal meaning of the term "dead freight," which must be a sum ascertained or ascertainable by the charter party itself, as where a complete cargo is agreed to be 1000 tons at a specific sum as 20*l*. per ton, and therefore the term "dead freight" in this condition must mean the unliquidated damages for not shipping a full cargo, or it has no meaning at all with reference to the whole effect of this charter party. But we often find words in these printed instruments which are so framed and introduced as to be applicable to a great variety of different cases which have no application at all, and therefore no meaning and effect whatever in the particular case in which such a question as this arises. I am far from saying that a different construction is to be put upon words in print and words in writing, but it may be in an instrument of either character, but more especially where it is in a printed form, that a word or term of this description must be read with the implied addition of the words "if any." After all, we are in this case to draw our own inferences as to the meaning of the parties in the use of these words, and if they are doubtful, and there be no evidence on the one side or the other of their bearing a particular meaning among commercial men, we must put such a construction upon them as we think calculated to give effect to the rea-

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THE UNDERWRITER.

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intention of the parties; and if they are of a doubtful import they should have a reasonable interpretation; and it certainly does not seem reasonable that these parties should have agreed upon a lien like this, the effect of which would be that, whenever the cargo becomes deliverable upon the arrival of the ship it will be impossible for the consignee to satisfy the lien and to obtain possession of their property, unless by agreement between the parties, as to the amount of damages claimed by reason of the deficiency of the cargo, a matter upon which they are very unlikely to agree, or by means of the verdict of a jury or the award of an arbitrator, which might not be obtained for months, or even for years, after the arrival of the vessel. I may add, that if we are to put a strictly literal construction upon these words, a claim to damages by reason of the shipment of a deficient cargo cannot be brought within the true meaning of the word "freight," which imports a sum certain to be paid in respect of the conveyance of goods in a ship, and therefore the term "dead freight," as well observed by Lord Ellenborough, in the case of *Phillips v. Rodie* (sup.), cannot be properly used as designating the unliquidated damages recoverable by reason of the breach of contract to ship a full and complete cargo. And this view of the question last raised being supported by the case of *Pearson v. Goecken*, I think the plaintiff cannot be entitled to a lien for a short shipment, as in this case, under the term "dead freight." I have, indeed, great difficulty in understanding how a lien can exist for a sum of money not ascertained at the time when the goods upon which the lien is supposed to attach are deliverable according to the contract, nor capable of being ascertained but by the award of an arbitrator or the verdict of a jury. But since this case was argued we have been informed of the judgment delivered by the House of Lords in a case of *McLean v. Fleming* (sup.), in which it was held that damages by reason of the shipment of less than a full cargo might be recovered as dead freight, and we are no doubt bound by that decision. In that case, however, the amount of the damages was capable of being at once ascertained, inasmuch as the short shipment was of the specific quantity of 210 tons of bones, the stipulated freight being 35s. per ton. This is in the nature of dead freight, strictly so called, and is thus distinguishable from the case now before the court. Upon the whole, therefore, I am of opinion that the judgment of the Court of Queen's Bench should be affirmed.

Judgment affirmed.

Attorneys for the plaintiff, *Shewn and Crossman*.
Attorneys for the defendants, *Thomas and Hollams*.

COURT OF ADMIRALTY.

Reported by J. F. ARTHUR, Esq., Barrister-at-Law.

Friday, June 30, 1868.

THE UNDERWRITER. (a)

Necessaries—Right of ship's agent to sue—Co-partner.

The agents of a foreign ship in a British port, who have paid for necessaries supplied to her, or who

have rendered themselves liable to pay for such necessaries, may sue the ship for such advances as were made on the ship's account, but not for the balance of a general account against her owners. A co-partner in a ship may sue the ship for such advances made by him, but, semble, not if the co-partner is interested in the particular voyage for which the ship is supplied.

The West Friesland (See, 455) followed.

This was a suit instituted by Alexander and Joseph Taylor, merchants, of Liverpool, to recover certain sums of money expended by them for necessaries supplied to the ship *Underwriter* in the port of Liverpool. The *Underwriter* was an American ship, and put into the port of Liverpool, having encountered severe weather on her voyage from Liverpool. She was consigned to the plaintiffs, and they received the freight due upon her cargo, and so received a sum of money sufficient to pay the ordinary disbursements of the ship, but not sufficient to pay for the repairs actually executed. She was surveyed and repaired, the master, who was also part owner, not objecting to the repairs, but leaving the matter in the hands of the plaintiffs as the ship's agents.

The plaintiffs from time to time paid large sums on the ship's account, and made themselves liable to third parties for various supplies to be furnished to the ship. The whole of the ship's bills were from time to time certified, according to the usual course, by the master, as being correct, and the ship, in Feb. 1866, being fully repaired, sailed from Liverpool. The plaintiffs also had large transactions with the owners of the vessel in respect of other vessels, and on the 12th June 1866 there was due to the plaintiffs from the owners a large sum of money, exclusive of the claim in respect of the *Underwriter*. The plaintiffs also had large transactions with one Trask, of New York, and on the said 12th June 1866 owed him a considerable sum of money. On that date Joseph Taylor, one of the plaintiffs, being then in New York, acting on behalf of the plaintiffs, transferred by endorsement the said account against the owners of the *Underwriter* to the said Trask. Subsequently the owners paid to Trask the items in the account other than those of the *Underwriter*, expressly stating at the time that the payment was not on account of the *Underwriter*. Trask then instituted a suit against the *Underwriter* and her owners, in the United States District Court at New York, for the recovery of the amount remaining due on the account. On Jan. 7, 1867, the libel of Trask in the said suit was dismissed on the ground that it had been brought in violation of a rule of the Supreme Court, by joining ship and owner. No opinion was given upon the original debt, or the effect of the assignment. On the 20th April 1867, the ship having returned to England was arrested at Liverpool by the plaintiffs, who held the account returned to them by Trask, and claimed the balance due thereon. On the part of the defendants it was pleaded that the advances were not for procuring necessaries, but were paid for necessaries already supplied, and partly for procuring and paying for things that were not necessaries. One Joseph Stuart was, at the time of the advances made, and of the arrest of the ship, the registered owner of one-fourth part of the ship, and the defendants alleged that he held this share as trustee for the plaintiffs, and that they were the real bene-

(a) This case is considerably out of date, but not appearing in any of the reports, and being very much in demand among practitioners in the Admiralty Court, it has been thought advisable to publish it for convenience of reference.

ficial owners of such share, but this was denied by Joseph Taylor in his examination. The defendants further alleged that the advances were made, not on the credit of the ship but solely on the personal credit of the owners, and that there was no reasonable necessity to make such advances without first communicating with the owners; and the assignment of the debt to Trask vested in him the right to sue by the law of New York, and that he was still entitled to sue, and had instituted a suit. Trask had abandoned the suit *in rem*, and had obtained leave to proceed *in personam*, but had not done so. The master asserted that he had objected to the repairs as being too expensive, as he considered such an outlay unnecessary, but that he did not stop them because he understood that Messrs. Taylor were part owners. The other facts of the case are fully stated in the judgment.

The *Solicitor-General* (Sir W. B. Brett) and *Vernon Lushington*, for the plaintiffs, relied upon *The West Friesland* (Swa. 454).—This was an advance made and a liability incurred in order to procure necessities required:

The Sophie, 1 W. Rob. 368.
Arthur Cohen for the defendants.

The N. R. Gosfabrick, Swa. 344;

The Twentje, 14 Moo. P. C. C. 185; a. c. *The West Friesland*, Swa. 455;

The Compagnie de Frégerille, Lush. 329; 4 L. T. Rep. N. S. 713.

June 30, 1868.—Sir R. PHILLIMORE.—This is a suit instituted by Messrs. Taylor and Co., of Liverpool, against the ship *Underwriter*, belonging to Charles Carow and others, of New York, for the sum, I was informed by counsel for the plaintiffs, of 4830*l.* 2*s.* 4*d.*, as stated in the exhibit B annexed to the petition (not for the sum of 5833*l.* 10*s.* 6*d.* as set forth in the 18th article of the petition), being money expended for necessities supplied to this ship between the months of Sept. 1865 and Feb. 1866, at Liverpool. In the latter month the ship being fully repaired sailed from Liverpool, to New York, and was arrested on her return to Liverpool on the 20th April 1867, and the court is now prayed to pronounce the sum which I have mentioned to be due to the plaintiffs, and to condemn the ship in payment thereof with costs. The defendants in their answers alleged various reasons why the prayer should not be complied with, to which I will presently advert. But I must first consider the admitted and approved facts in the case. I must take it to be admitted that the ship arrived at Liverpool in Sept. 1865, "having encountered very severe weather in the course of her voyage, and being on her arrival at Liverpool almost in a sinking state" (see Article 3 in petition.); that she was consigned to the plaintiffs as agents for the owners, who received the freight, the balance of which after deducting the amount of the bill drawn upon it by the captain was about sufficient to pay the ship's ordinary disbursements at Liverpool; that the ship was properly surveyed and extensive repairs done to her; that large sums of money on the ship's account were paid by the plaintiffs, and liabilities to a considerable amount incurred by them for supplies furnished in the usual manner, tradesmen bringing their bills signed by the captain to the office of the plaintiffs, who thereupon discharged them; that the captain gave all the orders and certified according to the usual course all the bills to be correct; that the plaintiffs have not been repaid nor reimbursed by the owners for the

moneys which they have advanced, or the liabilities which they have incurred, and that the supplies so furnished to the ship were necessary to enable her to prosecute her voyage. The objections advanced on behalf of the owners, which are set out in their answer, or in the argument of their counsel, against the claim of the plaintiffs upon the ship, may be stated under the following heads:—First, that the plaintiffs did not pay the sums of money, nor incur the liabilities in the petition mentioned on the credit of the ship, but solely on the personal credit of the owners, or of the defendant, Charles Carow (the managing owner) alone; secondly, that the money was advanced as in an ordinary mercantile account, between correspondent and correspondent, that the advance of it did not constitute a maritime lien on the *res*, that in fact it was a demand for a balance of account between agent and principal, for which a common law action of *assumpsit*, was the proper remedy; thirdly, that under the law of New York, the debt of the plaintiffs being a *chose in action*, was assignable, so as to vest the legal right in the assignee, and had been duly assigned by the plaintiffs to a Mr. Trask, of New York, and that they have, consequently, no right to sue in this court; fourthly, that they are part owners, and, on that account, are incapacitated from bringing this suit. With respect to the first objection, I do not think it is sustained by the evidence as to the facts in this case, and, indeed, it was not much insisted upon by counsel, except in so far as it is connected with the second and next head of objection. This is by far the most serious objection, and deserves very careful consideration. The petition in this case was, according to the statement of the *Solicitor-General* originally intended to be a special statement, upon which an agreement was to be founded; the agreement was, however, broken off, but the special character of the petition, which contains, as it should seem, part of the defendant's case, remains. Mr. Joseph Taylor has been examined and cross-examined before me at considerable length, but with respect to the point under immediate consideration, it is enough to say that he appears to have been an agent for Messrs. Carow and Co. for many years. The accounts which have been put in show that the plaintiffs acted as brokers and agents in the matter of several ships, and that they forwarded debtor and creditor accounts, acting, in fact, as general agents. It appears to have been their habit to send in, not only particular accounts for each ship, but, at stated periods, general accounts for all the ships for which they were agents or brokers. In the case of *The West Friesland* (Swa. 455) my predecessor decided that "there is nothing in the Act to exclude agents from suing, and nothing in the relation itself apart from positive law, as is clearly illustrated by the continental law." This judgment was, it is true, reversed by the Privy Council, but upon a ground of fact which left this exposition of the law, as well as another to which I will hereafter advert, unaffected. If the evidence in this case had established that this suit was brought to recover the balance of an account, or in order to obtain a general balance of accounts, I should hold that I was bound by the decisions of the Privy Council in the *Twentje*, which was an appeal from the decision in the *West Friesland*, afterwards called *The Twentje* (13 Moo. P. C. C. 185; Swa. 454), and by the decision of my prede-

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cessor in *The Comtesse de Fréguville* (sup.), to hold that this court had no jurisdiction to entertain the suit. But I think that the present case is materially distinguished from these cases. This suit is instituted, not to recover any particular or selected item of a general account, but the whole of the sum expended upon this particular occasion in payment of the necessities required by the exigencies of the ship, and without which she could not have prosecuted her voyage. With regard to the third objection, I think the fair result of the admissions in court, and of the evidence, is that the plaintiffs, owing Trask a considerable sum of money, transferred by indorsement, under the law of New York, their account in respect of other vessels with Charles Carow, the managing owner; that Trask recovered sufficient payment for his purpose from Charles Carow, the latter expressly stating at the time "that the said payment was not on account of the *Underwriter*" (Art. 12); that Trask subsequently instituted a suit in the Court of New York against the *Underwriter* and her owners; that this suit was dismissed "on the ground that it had been brought in violation of the 17th Admiralty rule of the Supreme Court by joining the ship and owner. No opinion was given upon the original debt or the effect of the assignment" (Art. 14). It appears to be admitted and proved that the account with the endorsement has been delivered up by Mr. Trask to Mr. Joseph Taylor, and is now in the possession of the plaintiffs; and that, notwithstanding the formal language of the transfer, Mr. Trask has no longer any interest in the instrument. I am not embarrassed, therefore, by any consideration as to the plaintiffs having parted with their right to sue, or as to there being a *lis alibi pendens* in the matter now before me. Fourthly, it remains to consider the objection that the plaintiffs are part owners; and, first, as to the facts: the defendants themselves sledge in their answer that Joseph Stuart was and still is the registered owner of one-fourth part of the said ship, but he held and still holds the said one-fourth part as trustee for and to the use of the plaintiffs, who at the time of the said transactions were and still are the beneficial owners of such one-fourth part of the said ship" (Art. 3). The defendants now contend that Stuart is mortgagee; but they have given no evidence on this point. It is true that in the letters which they have put upon cross-examination into the hands of Mr. Taylor, it appeared that Trask, in the summer of 1866, wrote a letter to Joseph Taylor, the language of which assumed that Joseph Taylor still retained the fourth part in the ship; and that in his answers Taylor does not deny this assumption; but he has sworn in his evidence before the court that he had parted with all his interest in the said fourth share in the summer of 1865 to Mr. Stuart; and I do not think that I should be warranted on the evidence before me in holding him to be guilty of deliberate perjury. Secondly, as to the law. In *the West Friesland* (sup.) my predecessor said "that Mr. Bremer was himself a part owner, is only a technical objection. At common law partner cannot sue partner, but that is a rule which does not obtain in this court, and here the property is sued and not the co-partner." Perhaps the statement would have received some modification from the learned judge, in the case of a partner, who is concerned in the particular voyage for the pro-

secution of which the ship has been supplied with necessities, and for the payment of which necessities the ship is arrested, but Dr. Lushington's enunciation of the law and practice of the court certainly applies to the circumstances of this case. Upon the whole I am of opinion that I must grant the prayer of the plaintiffs, subject to any reference which may be necessary to the registrar, assisted by merchants.

Proctors for the plaintiffs, *Pritchard and Sons*.
Solicitors for the defendants, *Field and Co.*

June 27, July 26, and Aug. 2, 1871.

THE WILLEM III.

Salvage—Passenger's baggage—Salvor's lien—Rival salvors—Right to begin—Life salvage from a foreign ship—Jurisdiction—Admiralty Court Act 1861 (24 Viet. c. 10), s. 9.

A salvor's lien does not extend to personal baggage and effects (wearing apparel and other goods ejusdem generis) belonging to passengers on board the vessel, to which the services have been rendered, and the Court of Admiralty will order such effects to be released.

Where suits of rival salvors come on for hearing at the same time, the right to begin must depend upon the circumstances of each case.

The F. schooner, having taken on board part of the passengers and crew of a foreign vessel, which was on fire, afterwards transferred them to the S. steamer, in order that they might get ashore more quickly. The whole transaction took place outside British waters:

Held, that the services of the two vessels were not so continuous that they could be considered as one, and that therefore the F. was not entitled to life salvage from a foreign vessel as for services rendered either wholly or in part in British waters under the Admiralty Court Act 1861, s. 9.

Is this case there were originally five suits of salvage instituted against the *Willem III.*: two (Nos. 5771 and 5774), which were consolidated, were instituted on behalf of the General Steam Navigation Company, the owners of the *Scorpio* ss. and her master and crew, and on behalf of William Watkins the owner of the tug *Cambria* and her master and crew; two more Nos. 5773 and 5775, also consolidated, were instituted on behalf of John Cooto, licensed Trinity House pilot, and John Barnett, the master, and the owners and crew of the cutter *Mary* of Portsmouth, and on behalf of George Greenham, licensed Trinity House pilot, and the owners, master, and crew of the cutter *Alarm*; and the fifth (No. 5805), on behalf of the owners, master, and crew of the French schooner *Flora*. All these suits were for salvage services alleged to have been rendered to the *Willem III.* and her passengers and crew. On 20th May 1871 the pilot cutter *Mary* was on her station off the Owers Lightship in the Channel, when at about 9.45 p.m. she perceived signals of distress, and immediately bore down upon the place from whence they proceeded, and at 11.15 p.m. found a vessel which was the *Willem III.* on fire. Near the vessel they found a large boat containing some of the passengers and crew of the *Willem III.*, and these people, about fifty in number, were taken on board the *Mary*. This boat was sent back to

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the ship, and shortly after two more boats came up, and those in them, about forty persons, were taken on board the *Mary*, and the boats were ordered to save any other persons they were able, and to take them to the *Flora*, which was then lying on the port quarter of the *Willem III*. The *Flora* was a French schooner bound on a voyage from Nantes to Stockholm, with a cargo of molasses valued at 15,000. She received on board about 100 persons, from four boats belonging to the *Willem III*, and fastened these boats alongside. The *Flora* lay by the burning vessel until between three and four o'clock in the morning of May 20th. The *Mary* took on board a further boat load of thirty-four people, principally women and children, and at about 1 a.m. on May 21st, having ascertained that a steamer was waiting to pick up the rest of the passengers and crew, and being quite full she set sail for Portsmouth, where she arrived at 1 p.m. on the same day, with all on board safe. The *Scorpio* was a screw steamer of 661 tons, bound on a voyage from Sunderland to Charente, and with her cargo was valued at 20,000. On the night in question, on her watch making out the burning ship, she bore down to the place and picked up four boats belonging to the *Willem III*, and took on board those of the passengers and crew that were in them, including the master. The *Scorpio*, at the request of the master of the *Willem III*, then went in search of the *Flora*, and all those persons belonging to the *Willem III*. On board the *Flora* were transferred from her to the *Scorpio*, and the boats alongside the *Flora* were fetched away and were made fast to the *Scorpio*. The *Scorpio* had then on board of her about 150 persons. About this time the pilot cutter *Alarm* came up, with plaintiff George Greenham on board, and after searching for more boats and not finding any, George Greenham was engaged by the master of the *Scorpio* to pilot that steamer into Portsmouth, the master of the *Scorpio* saying that George Greenham agreed to do so for the sum of 3*l*. The *Flora* in the meantime proceeded on her voyage. The *Scorpio* then made fast her hawser to the *Willem III*. for the purpose of towing her in, and the *Scorpio's* boatswain and two seamen and some of the crew of the *Willem III* went on board the burning vessel to make fast. In the meantime the tug *Cambria* came up, and she, being a powerful paddlewheel steamer, working up to 400 horse power, after some negotiation it was arranged that she should tow the *Willem III* ashore instead of the *Scorpio*. The fire continued to burn fiercely. The *Scorpio* then proceeded to Portsmouth, where she landed those saved from the *Willem III*, and handed them over to the Dutch consul, who paid the plaintiff, George Greenham, the stipulated 3*l*. She also took in some of the boats of the *Willem III*, of the value of 400*l*. The *Scorpio* then went out in search of the *Cambria* and the *Willem III*. George Greenham still remaining on board. When they found the two vessels the *Scorpio* offered further assistance, but those on board the *Cambria* said it was unnecessary, but that they wanted the pilot, and thereupon George Greenham went on board the *Cambria*. The *Scorpio* then proceeded on her voyage. Whilst the *Scorpio* was away landing her passengers, the *Cambria* had made fast her hawser to the *Willem III*, and in doing so her crew incurred considerable risk, as they had to go on board the burning

vessel and had to cut away the foremast, which was of iron, and had gone by the board, and was hanging alongside by the wire rigging. At 7 a.m. they got all clear, and began towing, and about 3 p.m. the *Cambria* succeeded in placing the *Willem III* on the Hamilton bank outside Spithead, and they continued by her, pumping water into her. The *Willem III* was a new steamer, on her first voyage from New Dieppe to Batavia, and belonged to Dutch owners. She had on board a number of passengers, principally officers and soldiers in the service of the Dutch Government, and some ladies, and these persons had personal effects on board, including money, and these were left in the burning ship owing to the hurry of the escape. The plaintiffs contended that there must be gunpowder on board, and that the risk was thereby increased, but this the defendants denied.

The petition in the suit instituted on behalf of the *Flora* (No. 5806) contained, amongst others, the following paragraph: "The *Flora* herself was not, during any portion of the time when the persons from the *Willem III* were on board of her, within three miles of the shore of England or in British waters.

PASSENGERS' BAGGAGE AND PERSONAL EFFECTS.

JUNE 27.—The case was brought before the court on motion for its direction as to certain baggage and personal effects belonging to passengers on board the *Willem III*, at the time of the rendering of the salvage services in respect of which the above suits have been instituted. An affidavit by the master of the *Willem III* was read which, *inter alia*, stated that certain baggage was on board, and that it had been deteriorated by the fire and water, and that coins to the value of about 40*l*. had been found. The motion was to obtain an order of court releasing the baggage and personal effects from salvage claims.

W. G. F. Phillimore, for the passengers and owners.—The entire question is, whether the goods of passengers are liable to salvage or not. In 1 Beave's *Lex Mercatoria*, 6th edit., p. 242, it is laid down that the wearing apparel of the master and seamen are always excepted from the allowance of salvage, and this is cited in *Park on Insurance*, 7th edit. p. 225. In "Wreck and Salvage" (by W. Marvin, Judge of the Florida District Court, U.S.), p. 133, it is said that "bills of exchange or other papers, evidences of debt or title to property, are not liable to salvage (*The Emblem*, Daire's Adm. Rep., District of Maine, U.S., p. 61); nor is the clothing of the master and crew," and for this proposition *The Rising Sun* (Ware's Adm. Rep., District of Maine, U.S., p. 385) is cited. It is also said that, "In this district the wreckers have never demanded salvage upon the clothing or personal baggage of the master, crew, and passengers." In the *Rising Sun* (*sup.*), Ware, J., says: "A question was raised at the arguments whether the clothing on board, which appears to have been principally the wearing apparel of the crew, ought to be included in the mass of property on which salvage is allowed. I think not. On these melancholy occasions, those who escape from shipwreck usually find themselves in a strange land, without friends, and without resources, and if the wreck happens to be brought to the same shore by other hands, the common feelings of humanity require that their clothing should be restored to them forthwith, unburdened by salvage." This applies

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equally to passengers. Money found on the person of a passenger found on board of a salvaged vessel was ordered by the same judge to be restored to his legal representatives after deducting the expenses of his funeral: (*The Amethyst*, Darcis' Adm. Rep., District of Maine, U. S., pp 20 & 29.) In questions of general average it is well settled that passengers' effects do not contribute; and Lord Tenterden says: "Neither in this country do the wearing apparel, jewels, or other things belonging to the persons of passengers and crew, and taken on board for their private use, and not for traffic, contribute on these occasions: "

Abbott on Shipping, 11th edit., p. 549.

Dig. 14, 2, 2, 2.

Traité des Assurances et des Contrats à la Grosses d'Emigrés, par Boulay-Paty, t. 1, ch. xii., sect. xlii., §§ 7, 8.

Thus by analogy applies to salvage. Passengers' effects ought not to contribute.

The Admiralty Advocate (Dr. Deane, Q. C.) and *Clarkson* for the salvors.—This is the first time the point has arisen. Mr. Phillimore says that "baggage and personal effects" are exempt. These may differ very much; they may include objects of great value. In an emigrant ship the passengers carry out their entire fortune, and all their possessions would be personal effects, but it could not be said that they would be exempt from salvage. The broad rule is that the salvor has a lien on whatever is salvaged. In the case of *Hartford v. Jones* (1 Raym. Rep. 393), which was in trover for goods, the defendant pleaded that they were in a ship, and the ship took fire, and they hazarded their lives in trying to save them, and therefore they were ready to save them if the plaintiff would pay 4l. for salvage. The plaintiff demanded generally, and Holt, C. J., held that "they might retain the goods until payment as well as a tailor or a hatter or common carrier. And salvage is allowed by all nations, it being reasonable that a man should be rewarded who hazards his life in the service of another. But though the retainer be lawful it does not amount to a conversion, no more than a distress for rent." If the retaining of these goods be not a conversion we are entitled to salvage. The same case is reported in 2 Salk. 654, and there it appears that part of the goods salvaged were twenty small carpenter's tools, which were clearly personal effects. With respect to the master's and crew's effects being exempt, this is only by comity and from a feeling that the effects of persons engaged in so many perils ought to be regarded with favour. *Expressio unius est exclusio alterius*. In the *Rising Sun* (*sup.*) this was the ground of the judgment, as the clothing mostly belonged to the master and crew. The *Amethyst* (*sup.*) is distinguishable from the present; the money was paid to the personal representatives of the dead man, and the man was washed ashore. [W. G. F. Phillimore.—He was found dead on board the vessel.] No analogy can be drawn from general average, and this court is very chary of meddling with its doctrines. Personal effect for daily use would, perhaps, be considered privileged. *De minimis non curat lex*. Passenger's baggage is not usually of sufficient value to make it worth while for salvors to claim against it, but in this case there were about 200 passengers. The defendants contend for an absurdity; the cargo pays salvage reward to salvors of life as well as of property: (*The Fusilier*, 3 Moo.

P. C. C. 51; 12 L. T. Rep. N. S. 186.) Why should the property of those whose lives have been saved be exempt? Salvage is paid on the ground of public policy. Clothes actually worn at the time are perhaps exempt on the ground of decency. Salvage is awarded for the purpose of encouraging others to render such services, and not merely to reward services performed. In this case there being no information as to the articles on board, the court is in danger of going wrong as to what is exempt. Would household plate, which is strictly personal effects, be exempt? Or diamonds or brilliants? (*The Jonge Bastiaan*, 5 C. Rob. 322, 324.) This is argued as a principle, and the court has no guide as to what is claimed. In the case of *R. in his office of Admiralty v. Property Derelict* (1 Hng. 385) a moiety of the property found being coin, a trunk, gold watches, rings, &c., was decreed to the salvor. There is no distinction between property derelict and not derelict, and that case is a direct authority that private property is subject to salvage; and it militates against *The Amethyst* (*sup.*). If the property had been wreck, the receiver of wreck would have been entitled to salvage. [Sir R. Phillimore.—It is quite likely an emigrant might take out his entire capital with him. The practical difficulty is where to draw the line between personal effects and private property, as there would not be any difficulty in holding personal effects not liable, if a sufficient restrictive meaning could be given to these words. It is the custom of the Dutch to carry all their personal property about with them, even their stock-in-trade. General international law would justify me in deciding that actual wearing apparel and personal effects for daily use are privileged, but beyond this there is a very wide margin.]

W. G. F. Phillimore in reply.—I only claim for baggage and personal effects. Certainly the latter may bear a very wide meaning, but I mean by personal effects only what are included in the strict meaning of the words. Cases in the Railway Acts have decided that certain things are not personal baggage with them. [Sir R. Phillimore.—The Railway Acts are very special.] The principles of general average do not apply to jewels. [Sir R. Phillimore.—Would it not be a strong thing to say that a valuable jewel would be exempted from the lien.] If on the owner's person it would certainly be exempt. In the case of unpaid passage money, the passengers' luggage cannot be seized, though he himself may be detained. As to the argument that any amount of "personal effects" might be taken by a passenger, no such thing can occur, as he is only allowed a limited amount, and must pay freight for the remainder. It would be inconvenient to hold against the exemption, on account of the great number of passengers and the consequent number of bail bonds.

Sir R. Phillimore.—I hold wearing apparel and things *ejusdem generis* exempted from the salvor's lien. In my opinion, strict personal effects, such as wearing apparel, are not liable to salvage. It would be as well to point two arbitrators to determine what things should be exempted, doubtful points to be referred to the court. Costs to be costs in the cause, (a)

(a) The order drawn up in the registry on this ruling was as follows: "June 27.—The judge, having heard counsel on both sides, ordered that the defendants be at

RIGHT TO BEGIN.

July 26.—The consolidated causes came on for hearing together.

Butt, Q. C. for the *Scorpio* and the *Cambria* (Nos. 5771 and 5774), claimed the right to begin, and cited the *Morocco* (24 L. T. Rep. N. S. 598; ante, p. 46) in support of his contention, that the cause first entered ought to be first heard.

The *Admiralty Advocate* (Dr. Deane, Q. C.) and E. C. Clarkson for the *Mary* and the *Alarm* (Nos. 5773 and 5775).

Sir John Karslake, Q. C. and Phillimore for the defendants.

Sir R. PHILLIMORE.—It is difficult to lay down any rigid rule in such a case. Each case ought to depend on its own circumstances. I think it more convenient for counsel for the *Mary* and the *Alarm* to begin, as the *Mary* was first on the spot. (a)

SALVAGE OF LIFE FROM A FOREIGN VESSEL.

Aug. 2.—The cause (No. 5805) instituted on behalf of the *Flora* came on motion to reject the petition on the ground that the life salvage was rendered to foreigners outside British waters, and that the court had, therefore, no jurisdiction.

W. G. F. Phillimore for the defendants.—The Court of Admiralty had no original jurisdiction to award salvage for the saving of life only. No jurisdiction was given by the Merchant Shipping Act 1854, ss. 458, 459, 476, over salvage of life on the high seas, particularly from a foreign ship: (*The Johannes*, Lush. 182.) British legislation does not affect foreigners except when within its jurisdiction, unless it is so expressly enacted.

The Zollverein, Swa. 86;

Cope v. Doherty, 4 K. & J. 367.

In this statute there is no such enactment. The Admiralty Court Act 1861 (24 Vict. c. 10), s. 9, extends these provisions, and gives jurisdiction over salvage of life "from any foreign ship or boat, where the services had been rendered wholly or in part in British waters." (b) (Sir R. PHILLIMORE.—In the *Queen Mab* (3 Hag-

liberty, under the inspection of some person, to be agreed upon between the parties to this cause, to deliver to the passengers on board the vessel *Willem III.*, at the time of the services in question in this cause being rendered, the wearing apparel and other goods *quodcumque generis* belonging to him, and he made no order as to the costs of this motion.)

(a) The court, after hearing evidence in the two cases, awarded salvage as follows: In the cases, Nos. 5771 and 5774, the sum of 350*l.*, which was thus divided between the two vessels—to the *Scorpio*, 180*l.*; to the *Cambria*, 250*l.*. In the cases, Nos. 5773 and 5775, the sum of 625*l.*, which was thus divided: to the *Mary*, 600*l.*; to the plaintiff George Greenham, 20*l.*, and 5*l.* *nomine expensarum*. The tender in the first set of causes was 250*l.*, and in the second 400*l.* to the *Mary*, and 10*l.* to Greenham. The claim of the owners, master, and crew of the *Alarm* was abandoned at the hearing.

(b) The sections of the Merchant Shipping Act cited are as follows:—

Sect. 458.—In the following cases (that is to say, whenever any ship or boat is stranded or otherwise in distress, on the shore of any sea or tidal water, situate within the limits of the United Kingdom, and services are rendered by any person, (1) in assisting such ship or boat, (2) in saving the lives of the persons belonging to such ship or boat, (3) in saving the cargo or apparel of such ship or boat or any portion thereof; and whenever any wreck is saved by any person other than a rescuer within the United Kingdom, there shall be payable, &c. . . a reasonable amount of salvage, &c.

Sect. 459.—Salvage in respect of the preservation of the life or lives of any persons belonging to any such

ship or boat as aforesaid, shall be payable . . . in priority to all other claims for salvage, &c.

Sect. 476.—Subject to the provisions of this Act the High Court of Admiralty shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect to which salvage is claimed were performed upon the high seas, or within the body of a county, or partly in one place and partly in the other, and whether the wreck is found at sea or cast upon the land, or partly in the sea or partly on land.

The Admiralty Court Act 1861 (24 Vict. c. 10, s. 9).—All the provisions of The Merchant Shipping Act 1854, in regard to salvage of life from any ship or boat within the limits of the United Kingdom, shall be extended to the salvage of life from any British ship or boat, where-soever the services may have been rendered, and from any foreign ship or boat, where the services have been rendered either wholly or in part in British waters.

(a) Sect. 59.—Whenever it shall appear to Her Majesty that the Government of any foreign country is willing that salvage shall be awarded by British courts for services rendered in saving life from any ship belonging to such country when such ship is beyond the limits of British jurisdiction, Her Majesty may, by Order in Council, direct that the provisions of the principal Act (Merchant Shipping Act 1854), and this Act with respect to salvage for services rendered in saving life from British ships, shall in all British courts be held to apply to services rendered in saving life from the ships of such foreign country, whether such services are rendered within British jurisdiction or not.

The Atlas, Lush. 518; 6 L. T. Rep. N. S. 737.

The Jonge Bastiaan, 5 C. Rob. 322.

A first set of salvors are entitled to reward where they cannot perform all the salvage: (*The Samuel*, 15 Jur. 407.) Abandonment after great exertions to save a ship will not disentitle to salvage if the ship is brought in by another set of salvors.

The E. U., 1 Spinks, 63.

W. G. F. Phillimore in reply.—To hold the ship liable would be contrary to the principles of international law.—The statutes cited are modern enactments, and must be construed strictly.

Sir R. PHILLIMORE.—The question has been very

ship or boat as aforesaid, shall be payable . . . in priority to all other claims for salvage, &c.

Sect. 476.—Subject to the provisions of this Act the High Court of Admiralty shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect to which salvage is claimed were performed upon the high seas, or within the body of a county, or partly in one place and partly in the other, and whether the wreck is found at sea or cast upon the land, or partly in the sea or partly on land.

The Admiralty Court Act 1861 (24 Vict. c. 10, s. 9).—All the provisions of The Merchant Shipping Act 1854, in regard to salvage of life from any ship or boat within the limits of the United Kingdom, shall be extended to the salvage of life from any British ship or boat, where-soever the services may have been rendered, and from any foreign ship or boat, where the services have been rendered either wholly or in part in British waters.

(a) Sect. 59.—Whenever it shall appear to Her Majesty that the Government of any foreign country is willing that salvage shall be awarded by British courts for services rendered in saving life from any ship belonging to such country when such ship is beyond the limits of British jurisdiction, Her Majesty may, by Order in Council, direct that the provisions of the principal Act (Merchant Shipping Act 1854), and this Act with respect to salvage for services rendered in saving life from British ships, shall in all British courts be held to apply to services rendered in saving life from the ships of such foreign country, whether such services are rendered within British jurisdiction or not.

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well argued, and involves a point of difficulty and nicety. The claim is made under 24 Vict. c. 10, s. 9, and it appears that a vessel not belonging to the salvors now claiming brought the lives saved within British waters. I must hold it to be the rule of law that life salvage could not be awarded *jura gentium*. No case can be found of life salvage having been awarded where no property was at the same time saved before the Merchant Shipping Acts, and I must therefore hold that life salvage was first made recoverable by those Acts. I must also hold it to have been decided by *The Johannes* (sup) that the Merchant Shipping Acts must be construed as confined to salvage of life within British waters. The next statute on the subject is the 24 Vic. c. 10, which is intended, no doubt, to carry the provisions further. I think that to give a right to claim for life salvage from a foreign ship under this statute services must be shown to have been rendered within British waters. Mr. Webster, in his able argument, has put his case on the ground that the salvage was partly rendered in British waters. The services commenced when beyond the limits of these waters, but he contends that they were completed within them. It is admitted that no treaty exists to enable the salvors to invoke the powers of the 59th section of 25 & 26 Vict. c. 63. The question is reduced to the point, Do the circumstances show that the services rendered by the *Flora* and the *Scorpio* were so continuous, that those of the *Flora* may be considered as wholly or in part rendered in British waters? The vessel did not herself proceed within British waters with the lives saved on board, but it was argued that, as the *Scorpio* took them within the jurisdiction, the service of the two vessels must be considered as continuous and therefore one. Upon consideration I am of opinion that this position cannot be maintained. I must construe this statute strictly, having regard to the fact that it is an alteration of the existing law of nations. The services must have been rendered to these persons either wholly or in part within British waters, and I am of opinion that they were not. I pronounce that the *Flora* is not entitled to salvage, but make no order as to costs, as this is the first case that has arisen.

Solicitors for the *Mary* and the *Alarm*, Lowless, Nelson and Jones.

Solicitors for the *Cambria* and the *Scorpio*, Cattara, Jehu, and Cattara.

Solicitors for the *Flora*, Ingledew and Ince.

Solicitors for the defendants, Pritchard and Sons.

Aug. 14, Oct. 13, and Nov. 7, 1871.

THE PANTHEA.

Priority of Lien—Master—Ship's agent—Ship-builder—Wages—Disbursements—Repairs—Merchantile account.

The master of a ship has a maritime lien on her for his wages and disbursements, and his claim takes priority over all other claims, save claims for salvage and damage by collision.

A ship's agent was appointed by the master on his arrival at B. He had no previous knowledge of either master or owner, but made no inquiries as to how he was to be repaid his advances for necessities. He allowed the vessel to be placed in the

hands of a shipwright to be repaired, and when her value was by this means increased, caused her to be arrested:

Held, that he was not entitled to be paid his claim in priority to the shipwright.

Where there are several claimants against the proceeds of a vessel in the registry, and she has been sold at the suit of one, the costs of such sale will be paid before all claims, as such sale was for the benefit of all.

THIS ship was arrested and sold at the suit of Henry Randall James, of Bristol, in a cause (No. 5720) instituted on his behalf for necessities alleged by him to have been supplied to the said ship, and against the proceeds of the sale of the said ship. Three more causes were afterwards instituted; the first (No. 5749) by John Batchelor, of Cardiff, shipbuilder, for necessities supplied and repairs done to the said ship; secondly (No. 5761) by Hopkins Williams, master mariner, for wages earned and disbursements made by him as master of the said ship; thirdly (No. 5785) by Daniel Philip Messervy, master mariner, for disbursements made by him, as master of the said ship, by a decree of the Judge of the Court of Admiralty of the 2nd Ang. All these claims were referred to the registrar of the said court to report as to the order in which they should be paid, the proceeds being insufficient to satisfy them all in full. These claims came before the registrar on Aug. 14, and the accounts and vouchers were produced before him, and the question of priority was fully argued. Thereupon the registrar reported that the claims were to be paid in the order annexed to the end of his report, and gave his reasons for so reporting. The order and his reasons are given below. On Nov. 7th the judge ordered the several payments to be made in accordance with the report. The facts of the case, and the arguments used, are fully set out in the report.

Cohen appeared for plaintiffs in Causes Nos. 5720 and 5761.

Clarkson for plaintiffs in causes Nos. 5749 and 5785.

THE REGISTRAR'S report was as follows: These cases were fully argued before me on the 16th Ang. last by Mr. Cohen on the one side, and by Mr. Clarkson on the other, and it is hardly necessary to observe that everything that could be said on the subject was said by those two learned advocates. Owing, however, to the confusion in which the whole question of the priority of liens is involved, I fear the conclusion at which I have arrived will hardly be so satisfactory as I could have wished. This is the more to be regretted as I understand that the parties intend to accept my award as final, and that they have no intention of appealing. The question appears to me to be sufficiently important to be formally argued before the court, and I could even wish now that that course may be taken. Assuming, however, that it is not intended to carry the case any further, it only renders it the more incumbent upon me carefully to consider the conclusions to which I may come, lest by want of due care and attention I should be doing an injustice which would not be remedied on appeal. The facts of the case are as follows: It seems that the *Panthea* was purchased in June 1870 by a Mr. Norton, of Gnersey, and as I understood was registered at that port. On the 27th June Mr. Norton appointed Daniel Philip Messervy, the plaintiff in cause No. 5785 to the

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command, at wages of 20*l.* a month. Captain Messervy thereupon, by the owner's directions, shipped a crew, and on the 30th of the same month set sail in her for Sunderland, thence he proceeded to Boston and to Beverley, in the United States, after that to St. John's, New Brunswick, and ultimately returned to Bristol, where she arrived on the 6th Jan. 1871, and discharged her cargo. The crew were soon afterwards discharged, but Captain Messervy remained in charge of her until the 20th March following. During the time that he was in the service of the ship, Captain Messervy received various sums of money and made various disbursements on account of the vessel, and on a balance of account between himself and his owner he claims a sum of 41*l.* 2*s.* 1*d.* Captain Messervy was succeeded in the command of the ship by Hopkins Williams, the plaintiff in cause No. 5761. He claims to have been appointed her master on the 17th March, 1871, three days before the termination of Captain Messervy's service, and was to receive wages at the rate of 14*l.* a month. He seems to have remained in charge of the vessel until the 24th June, 1871, when he was dispossessed by the sale of the vessel under the authority of this court. He claims not only his wages during the above period, but also for certain disbursements made by him and amongst them for a sum of 10*l.* lent by him to the owner, as it is said, for ship's disbursements, and for board and lodging during the whole period of his service at the rate of 3*s.* per day, he having been unable to live on board owing to the repairs that were going on. His claim amounts to the sum of 73*l.* 16*s.* 4*d.* Another case (No. 5720) is that of Mr. Henry Randall James, a shipbroker, of Bristol, who says that he was appointed by Capt. Messervy to take the management of the ship's business upon her arrival at Bristol in Jan. 1871. He says that she lay at Bristol up to some time in March, when she was removed to Cardiff, and that during January, February, March, and April, he made, as ship's agent, various disbursements for wages, dock dues, and other necessities, amounting altogether to 38*l.* 13*s.* 5*d.*, no part of which has ever been paid to him. The last claim is that of Mr. John Batchelor, the plaintiff in cause No. 5459. He is a shipbuilder, residing at Cardiff, and states that in the month of March 1871 he executed certain repairs to the vessel, as I understand, by the direction of Mr. Norton, the owner. By the account which has been brought in the repairs seem to have extended from the 21st to the 28th March, and to have been mainly for docking and re-metalling the ship. His account amounts altogether to the sum of 262*l.* 8*s.* 11*d.* It may be as well to state here that the first suit instituted was that of Mr. James, the shipbroker; then that of Mr. Batchelor, the shipbuilder; after him that of Capt. Williams; and last of all the suit of Capt. Messervy, the first master in point of date. Besides the above claims, two other bills for wire rigging and for setting it up have been sent to the registry; but as the parties have not, although duly warned, thought proper to bring their causes properly before the court by entering actions, I am prevented from taking them into my consideration; and the only cases with which we shall have to deal are the four for which suits have been instituted. In the cases of the two masters and of the shipwright, no question was

raised, when they were before the court, as to the amounts, and accordingly the learned judge pronounced for them as claimed. As these decisions however, passed without discussion it will not preclude me from reporting to the court any items of the claims which appear to me to be inadmissible, leaving it to the learned judge to strike them out or not, as he may think proper. In the remaining case, that of Mr. James, the shipbroker, the whole question has been left open, and I am to report whether any and what part of the claim shall be allowed. I have also to any in what order the claimants are entitled to be paid. And first as to the claims of the two masters for the balances due to them on account of wages and disbursements. By the 191st section of the Merchant Shipping Act 1854, a master has the same "rights, liens, and remedies for the recovery of his wages" as a common seaman. And in the case of the *Mary Ann* (1 R. 1 A. & E. 8; 13 L. T. Rep. Rep. N. S. 354) Dr. Lushington decided that a master's claim for his disbursement stands upon precisely the same footing as the claim for his wages; for both he has a "maritime lien" on the ship. On the authority, too, of other decisions, a lien of this nature takes precedence of all other claims against the ship, except a claim for salvage, and possibly one for damage by collision, of which, however, there is no question in the present case. Counsel, therefore, did not dispute the claim of the two master mariners to priority over the other two claimants for their wages and disbursements. To the amounts also of these claims no question was raised, except as to a sum of 10*l.* appearing in Captain Williams' accounts, and described as having been advanced to Mr. Norton, the owner, for the purpose of making disbursements. No information is given me as to how this money was expended by Mr. Norton, and whether it really was expended for the ship's use; and as it can hardly be said to be a duty incident to a master's position to lend money to his owner, and then to claim the amount thereof out of the proceeds of the vessel, in priority to other valid claims against the same property, I am of opinion that this sum of 10*l.* should be struck out of Captain Williams' claim. No other item was objected to in either of the claims. I must, therefore, report that Captain Messervy is entitled in respect of a sum of 41*l.* 2*s.* 1*d.*, and Captain Williams in respect of a sum of 63*l.* 16*s.* 4*d.*, to priority over the other claimants, together with their costs. The question as to which of the two masters is entitled to priority over the other, does not arise in the present case, the fund in court being amply sufficient to pay them both, as well as costs. But even if it had, I am not sure, looking to previous decisions of the court, that I could have given either of them precedence over the other. At the same time I cannot but think that, if the question were to be fully argued, a master like Captain Messervy, who has been employed on board the ship, sailing her to different ports, and earning a considerable amount of freight thereby, would be entitled to be preferred before that of Captain Williams, who seems to have done little, if anything, beyond what an ordinary shipkeeper might have done, and who claims to be paid for such services at the rate of 14*l.* a month, besides 3*s.* a day for board and lodging during the whole period. But, as I have already said, the question does not arise in the present case. There remain the claims of the shipbroker and ship-

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wright; and, first, as to that of Mr. Batchelor, the shipwright. When that gentleman instituted his suit, the vessel was already under the arrest of the court, and as the claim is for repairs, there can be no question as to his right to sue under the 4th section of the Admiralty Court Act 1861. Mr. Clarkson contended, and with some reason, that it was a claim which was peculiarly entitled to consideration. The vessel had been placed in Mr. Batchelor's hands by the owner, Mr. Norton, for the purpose of repairing and retreating; the work had gone on from the 21st to the 28th March; on the latter day Mr. James, the shipbroker, institutes this suit, she is arrested, and is subsequently sold by order of the court in her improved condition. The repairs, then, that had been done to her by Mr. Batchelor, may be said to have been sold with her, and to have materially increased the proceeds in court. His claim, therefore, appears to me to be especially deserving of the consideration of the court. Mr. Batchelor's account amounts to the sum of 262l. 8s. 11d., he admitted, however, when he before me, that if his bill had been paid at once, he should have had no objection to allow the usual discount of 10 per cent. Seeing, however, that six months have now elapsed since the work was done, and that perhaps even now the money will not be immediately paid, I think that a deduction of 5 per cent. might properly be made from his account, which would leave a sum of 249l. 6s. 6d. to be due to him. The question, however, remains as to whether he or Mr. James is entitled to priority, or whether they ought to stand upon the same footing, and divide the balance that may remain, rateably between them, and for this purpose it will be necessary to see of what Mr. James's claim consists. According to this gentleman's statement the vessel was put into his hands by Capt. Messervy, the master, immediately upon her arrival at Bristol in January last, and it is said that he thereupon advanced sums of money to the master, amounting in all to 180l. to enable him to pay the crew; that he paid the usual port charges, including pilotage, towage, lights, dock dues, and the expenses of disbursements incurred at Queenstown; his own commissions, and sums advanced at various times to Mr. Norton, amounting to 26l., make up in all a sum of 382l. 13s. 6d., which he claims to be paid to him out of the proceeds. Mr. Clarkson contended that Mr. James's claim was not for "necessaries" within the meaning of the Act, and he referred to the cases of the *N. R. Gosfabrick* (Swab. 344), to the *Onni* (action of *Seymour, Pascock, and Co.*, Lush. 157; 3 L. T. Rep. N. S. 447), and to the *Comtesse de Fregeville* (Lush. 329; 4 L. T. Rep. N. S. 71), to show that the money advanced to discharge a debt incurred for necessaries, and ordinary mercantile accounts between a shipowner and agent, which he contended this was, were not necessaries within the meaning of the Act, and could not be recovered against the proceeds of the vessel, and certainly not in priority to a claim for repairs. Mr. Cohen, on the other hand, although he admitted that some of the items of the account as, for instance, the 32l. odd advanced by Mr. James in satisfaction of an account for disbursements at Queenstown, and 26l. advanced to Mr. Norton, the owner, were not necessaries within the meaning of the statute, contended that the moneys advanced to pay for the wages at all events, and even for the pilotage, dock due, and

other port charges, were necessaries within the meaning of the Act, and as such were entitled to be paid out of the proceeds. And he referred to the case of the *W. F. Safford* (Lush. 69; 2 L. T. Rep. N. S. 301), where the learned judge held that money advanced to pay the wages of the crew was entitled to rank as wages in priority to other claims upon the proceeds. The cases of the *W. F. Safford* and the *N. R. Gosfabrick* are, it must be admitted, not very easy to reconcile; in the former case it was held that money advanced to pay for wages was not only necessaries within the meaning of the Act, but was entitled, like wages, to priority over the claims for necessaries; in the latter case it was held that money advanced to discharge a debt incurred for necessaries, was not necessaries within the meaning of the Act. It is not very easy to understand why a claim, which is good in the hands of the first creditor should be bad in the hands of the transferee of the claim, or why, when a number of creditors have each separately a good right of action against the proceeds of a vessel, a person taking an assignment of those debts should be unable to sue in one action for the total amount of the debts. Such, however, would seem to be the case. Whether, if the transferee were to institute a suit for the money advanced for the wages alone, he would be entitled, as the case of the *W. F. Safford*, to priority as for a claim of wages, as if he entered another suit for the money advanced to pay the pilotage, he would be entitled to priority as for a claim of pilotage, and so on through all the items of the account, it is not easy to say. I think, however, that enough has been said to show that the question of the relative priorities of these several claims is in an extremely unsatisfactory state, and will demand the most careful consideration from the court when the question comes before it. It appears to me, however, that, apart from these very difficult questions there are other considerations which seem to militate against Mr. James's claim to be preferred to Mr. Batchelor, or even to rank equally with him. Mr. James, as I have already said, was appointed by the master to be the broker for the ships immediately upon his arrival at Bristol. He stated, when he was before me, that he had no previous knowledge either of the master or of the owner, and that he took it up as an ordinary matter of business. Now, the usual practice of a ship's broker, if I am well informed on the subject, when he advances moneys, as in this case, to nearly 400l., for the disbursements of a ship, of whose owner and master he had previously no knowledge, is to inquire what prospect there is of his being repaid. Ordinarily he collects the freights, repays himself out of it his advances, and hands over the balance either to the master or to the owner of the vessel. And it is quite clear the vessel brought a cargo home, for there is a charge in Mr. James's account for discharging the cargo. I required to know what has become of the freight, and to whom it has been paid? In reply, I was informed that the sum of 475l. 17s. 2d., the balance due for freight, had been paid to Mr. Norton, the owner, by the shippers of the cargo at St. John's, New Brunswick, previous to the sailing of the vessel, and that no part of it had been paid, either to the master, Messervy, or to Mr. James. Assuming this to be so, a question arises whether Mr. James did not, when asked to make these advances by people of whom he knew nothing, inquire, in the first place,

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whether there was any freight to be received out of which he could be repaid; and, when he had ascertained that it had all been received by the owner at St. John's whether he did not take measures to ascertain in what way his advances were to be repaid to him. That would seem to be the natural course which a prudent man would have adopted; but, instead of that, what, according to his own statement, does he do? He allows the vessel to be placed in Mr. Batchelor's hands for repairs, and when that gentleman has completed the repairs, and has re-metalled her, and thus materially increased her value, he institutes his suit in this Court of Admiralty, and causes the vessel to be arrested; and he now applies to the court to be paid the amount of his account out of the proceeds, in priority to the claim of Mr. Batchelor; in other words, he seeks to be paid his claim, in part at least, out of the goods which, with his cognizance, Mr. Batchelor had put into the ship. It seems to me that this is hardly equitable; if when Mr. James made his advances he took no pains to ascertain the true position of affairs, but made them on the faith of his being repaid by the owner, it is to the owner that he must look for reimbursements. It would be hard indeed that he should be paid in priority to a gentleman whose claim is for repairs, which have tended materially to increase the proceeds in court. I am of opinion that the claim preferred by Mr. James is for an ordinary mercantile account between himself as ship's agent or ship's broker, and the owner as master of the vessel, and that, as such, on the authority of the cases cited, it is not entitled to rank in priority to the claim of Mr. Batchelor, the shipwright. If Mr. James has been deceived by Mr. Norton, he must take the consequences; it would not behove to visit them upon those who have not been equally incautions, *Vigilantibus, non dormientibus, succurritur*. I will add, however, that inasmuch as Mr. Norton, the owner, has not thought proper to come forward and defend these suits if there should be any balance remaining after payment of the claims of the two masters, and Mr. Batchelor, and the costs incurred by them, I see no objection to its being paid to Mr. James, in part satisfaction of his claim, that course having been adopted by the learned judge in a recent case. The expenses, also, incurred by Mr. James in obtaining the order of the court for the sale of the vessel, being for the benefit of all parties, will have to be paid in priority to all of them.

I am, therefore, of opinion that the order in which the several claims ought to be satisfied out of the proceeds remaining in court is as follows:—(1) The costs incurred in the suit of Mr. James No. (5720) in regard to the sale of the vessel, (2) the claims of Captain Messervy (No. 5785) to the amount of 411. 2s. 1d. and costs, (3) the claim of Captain Williams (No. 5761) to the amount of 63l. 16s. 4d. and costs, (4) the claim of Mr. Batchelor (No. 5749) to the extent of 249l. 6s. 6d. and costs, (5) the balance (if any) may be paid to Mr. James in part satisfaction of his claim and costs.

Tuesday, Nov. 7.—Sir R. PHILLIMORE ordered the payments to be made out of the registry in accordance with the above report, and in the order therein set out.

Solicitors: Field and Sumner; Clarkson and Co.; Stocken and Jupp.

Nos. 7 and 10.

THE FREEDOM.

Costs—Bail—Proscipe—Re-arrest of ship where the amount due for damages and costs exceed bail—Admiralty Court Act 1861, ss. 15, 22.

Where a suit has been instituted against a vessel, and bail has been given for an estimated amount to cover damages and costs, and the damages recovered and the costs taxed are a larger sum than the bail given, and there has been no carelessness on the part of the plaintiffs, the court will not amend the proscipe, but will issue a writ under the Admiralty Court Act 1861, ss. 15 and 22, for the re-arrest of the ship to satisfy the costs, and will direct such writ to the marshal for execution. (a)

The practice by which the amount, in which a suit is instituted, is laid to cover probable damages and costs is simply a matter of convenience.

This suit was brought on behalf of Messrs. Simmonds, Hunt and Co., against the ship *Freedom*, an American vessel, of which the owners were domiciled in America. The petition set out that the plaintiffs were indorsees of bills of lading of parcels of oilcake, and that they had instituted a cause against the ship to recover damages for injury to the cargo, and that at the time of the institution of the suit, they had taken bail for the vessel in the sum of 500l., having estimated their damages and probable costs in that amount; that they had recovered the sum of 453l. 2s. 8d. in the High Court of Admiralty, and that on appeal to the Privy Council the above award was con-

(a) The writ issued in pursuance of the judgment in this case was as follows:

In the High Court of Admiralty of England.

No. 4791.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the Marshal of the High Court of our Admiralty of England, and to all and singular his substitutes, greeting. Whereas a cause instituted in our said court on behalf of Simmonds, Hunt, and Company, of No. 37, Mark-lane, London, the indorsees of the bills of lading of certain parcels of oil cake, now or lately laden on board the ship or vessel *Freedom*, against the said vessel, her tackle, apparel, and furniture, and against the owners thereof intervening, the judge of our said court did on the 4th March 1870, pronounce for the damage proceeded for, condemn the defendants and their bail therein, and in costs, and refer the said damage to the register of our said court, assisted by merchants, to report the amount thereof. And whereas the said damage has been assessed at the sum of 452l. 2s. 8d. with interest thereon until paid, and the said costs have been taxed at the sum of 432l. 10s. 3d., making together a sum of 884l. 12s. 11d. And whereas it hath been alleged that the sum of 500l. being the amount for which the sureties in the said cause have bound themselves on behalf of the owners of the said vessel *Freedom*, has been paid to, and accepted by, the plaintiffs in satisfaction of the said damage and interest, and in part satisfaction of the costs, and that there is now due to the plaintiffs a sum of 394l. 12s. 11d. for costs, in addition to such further costs as have been incurred subsequent to the taxation. We do, therefore, hereby command you, inasmuch as requiring, to arrest the said vessel *Freedom*, her tackle, apparel, and furniture, and to keep the same under safe arrest until the defendants shall have paid what may be due from them to the plaintiffs in this cause, or until you shall receive further orders from us.

Given at London, under the seal of our said court, the day of _____, in the year of Our Lord 1871.

(Signed) H. C. ROTHERY, Registrar.

Warrant 800l., taken out by Thomas and Hollams, 40, Commercial Sale Rooms, Mincing-lane.

[ADM.]

THE FREEDOM.

[ADM.]

firmed (a); that the costs when taxed amounted to 432l. 10s. 3d., and that the two sums together exceeded the amount of the bail by 384l. 12s. 11d., and the plaintiffs prayed the court "to allow the plaintiffs to increase the amount in which the suit was instituted and to direct that a writ of *fi. fa.* do issue to enable the plaintiffs to obtain execution and satisfaction of the said judgment for damages and cost." The defendants answered, submitting that the court had no power to do so.

Nor 7.—Cohen for the Plaintiffs.—We are entitled to a judgment for the damages and costs. The bail is for 500l. only, and therefore we have only 47l. for costs. It has been decided, no doubt, that if bail has been put in the ship cannot be re-arrested to answer for damages: (*The Wild Ranger*, Bro. & Lush, 84). [Sir R. PHILLIMORE.—The principle of the cases which decide that point seems to be that after judgment has been given the sum in which the action has been entered cannot be altered.] Sects. 15 and 22 (b) of the Admiralty Court Act 1861 give the court power to re-arrest the ship for payment of costs, in spite of the former decisions. The sections presuppose the ship not under arrest. This court must have power to enforce a judgment. It can obtain possession of the goods of the judgment debtor, or may seize his ship. We ask the court to issue execution. It is not necessary to increase the original amount of action. We have a good judgment, and although before the Admiralty Court Act 1861 the court may have had no power to re-arrest the ship, it now has power to issue a writ of *fi. fa.*, and we ask for it.

Butt, Q.C. and Clarkson for the defendants.—It is necessary for the plaintiffs to have the *præcipe* amended before they can recover more than 500l., the amount of the bail. The amount in which an action in the court is entered is always such as to cover damages and costs, and according to the practice no more can be asked for costs than the sum entered, which is supposed to include the estimated amount of plaintiff's costs. The cause has come to an end, and all has been done that can be done. We have a decree, and have gone to a reference. It was not an interlocutory decree. The figures are ascertained, which, with costs, are more than the amount of action, and the court has no power to make any order increasing the amount of action save on the payment of costs by the plaintiff. If the plaintiff had come to the court before the interlocutory judgment, he might have had an alteration of the *præcipe*; but it is now

too late: (*Tebbs v. Barron*, 4 M. & G. 844.) In this court the amount of action includes costs. [Sir R. PHILLIMORE.—There is no rule of court which compels a plaintiff to institute his suit in a sum which will cover both damages and costs. You contend that if he does, he cannot get costs. It is done only as a matter of precaution.] No alteration can be made after judgment at common law; but the courts will grant a new trial by virtue of their equitable jurisdiction by rescinding the judgment. But even then they require the payment of costs by the plaintiff. The form of the bail bond in this court is that "we," &c., "consent that if the said ——— shall not pay what may be adjudged against him in the said cause with costs, execution," &c., and this shows that the bond is intended to cover both damages and costs. [Sir R. PHILLIMORE.—It shows that the plaintiff is content to take it; but has it been decided that where the sum awarded has been more than that named in the bond, more could not be given, and the ship could not be re-arrested? I have great doubt as to that point. A court of common law can enforce payment of a sum beyond the damages for costs, and cannot I do the same under sect. 15 of the Admiralty Court Act? If you can make it out to be a rule that the suit must be instituted in a sum to cover everything, you are unanswerable; but it seems doubtful that where a case afterwards becomes very expensive such a rule can obtain.] The answer to that is that the plaintiff may apply at any time before decree. A judge giving his reasons only gives an interlocutory decree, and an application may be always made. [Sir R. PHILLIMORE.—Supposing I were to make an order for the issue of a *fi. fa.* under sect. 22.] The real question is whether the amount of action entered is conclusive? [Sir R. PHILLIMORE.—That question is grounded not on a rule, but on the practice of the court. If the judgment recovered were in the exact sum in which the action was instituted with costs, could not the court order payment of the costs? Not without amending the *præcipe*, and it is now too late to amend. The plaintiff cannot have his *præcipe* amended without payment of costs, and since the Common Law Procedure Act it has been decided that a judgment at common law cannot be set aside except on such payment: (*Cannan v. Reynolds*, 26 L. J. 62 Q. B.; 5 E. & B. 301.) In this court it is necessary to be even more particular than at common law, as it is the practice to give sufficient bail. There is a distinction between this court and the common law courts; in the latter a pleader puts into his declaration what sum he chooses, and the amount is immaterial, whilst here the property is arrested, and two things are concurrent, the suit is instituted in an amount to cover costs and damages, and bail is issued to cover this amount. It is material here that the amount should be accurate, and it has been the practice to allow the plaintiffs to estimate the sum. [Sir R. PHILLIMORE.—The case of the *Temiscouata* (2 Spinks 208) is conclusive against the contention that practice of the court is to require bail to be entered to cover both damages and costs.] Since that case (decided in 1855) the court has become a court of record, and there, there were peculiar circumstances. [Sir R. PHILLIMORE: In the *Volant* (1 W. Rob. 383, 390), Dr. Lushington says: "Suppose no bail given, may not the owner abandon the ship? and can the court do more than sell the ship for the benefit of the plaintiffs

(a) See 22 L. T. Rep. N. S. 175; 3 Mar. Law Cases, O. S. 350, and on appeal 24 L. T. Rep. N. S. 452; *ante*, p. 6.

(b) By the Admiralty Court Act 1861 (24 & 25 Vict., c. 10), sect. 15, "All decrees and orders of the High Court of Admiralty whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, shall have the same effect as judgments in the Superior Courts of common law, and the persons to whom such moneys or costs, &c., shall be payable shall be deemed judgment creditors, and all powers of enforcing judgments possessed by the Superior Courts of common law, or any judge thereof, with respect to matters depending in the same courts, as well as against the ships and goods arrested as against the person of the judgment debtor, shall be possessed by the said Court of Admiralty with respect to matters therein depending," &c. Sect. 22: "Any writ or other process necessary or expedient for giving effect to any of the provisions of this Act may be issued from the High Court of Admiralty, in such form as the judge of the said court shall from time to time direct."

ADM.]

THE BECHERDASS AMBAIDASS.

[AMERICAN REFS.]

in the action? No further liability can be imposed on the owner, save as to costs." That cannot be good law. Dr. Lushington seems to say that a liability is created beyond the value of the ship. The plaintiffs were bound to require bail to the full value. Their neglect to do so disentitles them to recover more than the amount of the bail: (*Nuestra Señora del Carmine*, 1 Spinks, 303.) It would be impolitic to order a re-arrest of the vessel.

Cohen, in reply. We originally arrested for a small amount, and this the court approves, and we ought not now to suffer. In salvage cases there is no jurisdiction where the property saved is not up to a certain sum, and yet the court may give costs. In cases of limitation of liability costs may be given. Costs are not part of the judgment, but its legal consequences and ancillary to it. Admitting that we have made a mistake, we are entitled to a remedy by the equitable jurisdiction of the court. The common law courts will give relief on a mistake being made: (*Cannan v. Reynolds* (sup.).

Nov. 10.—Sir R. PHILLIMORE.—In this case the plaintiffs, who were English subjects, instituted a suit against the American ship *Freedom*, of which the defendants were owners domiciled in America, for damages to cargo. I gave judgment in favour of the plaintiffs, and this judgment was affirmed by the court of appeal. The usual reference was made to the registrar, who reported that there was due to the plaintiffs 452l. 2s. 8d., with interest; and the costs were taxed at the sum of 432l. 10s. 3d. The suit had been instituted in the amount of 500l., and bail had been taken for that amount and the ship released. The defendants have now paid to the plaintiffs the sum of 500l., leaving the sum of 384l. 12s. 11d., due for costs, still unpaid. It appears that the ship is still within the jurisdiction of the court. The plaintiffs pray the court, for Mr. Cohen confined himself to this part of the prayer, to issue such process against the ship as may enable the plaintiff to obtain execution and satisfaction of the judgment, for damages and costs. The defendants contend that the application is too late; that before judgment the court might have increased the amount in which the suit was instituted on proper application being made to it, but that it has no power to do so after judgment has been given; and that the ship, having been released on bail given for the full amount in which the suit was instituted, cannot be re-arrested. Cases were cited by the defendants from the courts of common law; the one principally relied upon was *Cannan v. Reynolds* (sup.), for the proposition, that where a mistake has been made in the amount claimed and recovered, the judgment may be set aside, at the instance of the plaintiff, upon payment of all costs incurred after declaration, and a new action entered; and it was contended that this was the only mode of redress to which the plaintiffs could have recourse. It was not denied that these cases, whither their authority may be for the practice of this court, related only to an increase of the amount of damages for which the action was laid, nor that the court, as a matter of course, issued a proper writ to enforce the payment of costs quite independently of the question of the amount of damages; but it was urged that it was according to the invariable practice of this court that the proceeds for the institution of this suit should lay the amount at a sum which would

cover costs as well as damages, and therefore I find a difficulty in following the argument that the common law cases were applicable. I am clear that this is an erroneous view of the practice of the court. It did not require the authority of the *Temiscouata* (2 Spinks, 210), to prove that this court can always issue a monition in *personam* for the payment of costs which have exceeded the amount in which the suit was instituted. Moreover, if the vessel had not been bailed, and were still under arrest, there can be no doubt that she would not be released without payment of costs, and the fact of bail having been given in no way affects the liability of the owner of the ship for costs as well as damages, and I think that, even under the old law, if necessary, the court would have ordered the re-arrest of the ship for the payment of costs. I say nothing about the subject of damages. The fact that generally the amount in which the suit is instituted is laid to cover probable costs and damages is simply a matter of convenience; and the court has always discouraged the institution of a suit for an excessive amount. In this case the defendants are foreigners domiciled abroad, and no monition in *personam* can be enforced against them; though if they had succeeded in the suit they could have obtained a monition in *personam* against the plaintiff. It is, therefore, manifestly in furtherance of justice that the plaintiffs should have the remedy for which they pray. Such a remedy might, I think, have been furnished by the old law and practice of the court; but, however this may be, I am satisfied that the 15th section of the Admiralty Court Act 1861, enables the court to cause execution of the sentence by the seizure of the goods, which in this case is the ship of the defendants, and under the 22nd section I have the power to frame a writ for that purpose; and I shall execute that power by directing, under a proper instrument, the marshal to seize the ship of the defendants for the payment of the balance of costs due to the plaintiffs, in which will be included the costs of the application.

Solicitors for the plaintiffs, Thomas and Hollams.
Solicitor for the defendants, Thomas Cooper.

UNITED STATES DISTRICT COURT OF MASSACHUSETTS.

Collected by F. O. CARR, Esq., Barrister-at-Law.

THE BECHERDASS AMBAIDASS (a).

British vessel in United States Court—Wages—Protest of British Consul—Voyage not ended—Absence of special circumstances—Jurisdiction.
A crew shipped in a British vessel for a voyage "from Liverpool to Bombay and any ports and places in the Indian, Pacific, and Atlantic Oceans, and China and Eastern seas, thence to a port for orders, and to the Continent, if required, and back to a port of final discharge in the United Kingdom, term not to exceed three years." On arriving at Boston on the return voyage, the crew claimed their wages as per schedule, and brought a suit in the United States Court. The British acting consul protested against the jurisdiction, on the ground that the voyage was not ended, and that by English

(a) The materials for this report are furnished by the American Law Review for Nov. 1871.

law British seamen are not permitted to sue in foreign ports unless discharged there, or so ill-treated as to be put in fear of their lives.

Held, that although the court might doubt the validity of the ship's articles, it could not, in the absence of special circumstances, entertain the suit against the protest of the British consul. (a)

LIBEL by the crew of the British ship *Becherdass* Ambassadors, alleging that they shipped at Liverpool in Nov. 1869 for a voyage to the East Indies, and thence to Boston; that the ship arrived in safety at this port in Feb. 1871, where the libellants' services terminated, and they became entitled to their wages as fully stated in their schedule. H. B. M. acting consul at Boston protested against the court taking jurisdiction of this cause, for the reasons that the libellants signed shipping articles in a usual form approved and used in the Government shipping offices, and for a voyage not yet ended; that by the Merchant Shipping Act of Great Britain (17 & 18 Vict. c. 104, ss. 190, 207), seamen are not permitted to sue in foreign ports unless duly discharged there, or so ill-treated as to be put in fear of their lives; that neither alternative applies to these libellants, and that it will be for the advantage of both parties to remit them to their home tribunals. The master, by his answer, reiterates the same grounds of objection, and adds a description of the voyage from the articles as follows: "From Liverpool to Bombay, and any ports and places in the Indian, Pacific, and Atlantic Oceans, and China and Eastern seas, thence to a port for orders, and to the Continent if required, and back to a port of final discharge in the United Kingdom, term not to exceed three years." The shipping articles on inspection agreed with the masters answer, and the libellants admitted that their description of the voyage in the libel was not the true one, and prayed leave to amend by alleging that they were brought to Boston against their will. No objection was made to allowing such an amendment; but none such was made and sworn to.

O. O. Shattuck, and O. W. Holmes, jun., for the claimant.

C. G. Thomas for the libellants.

LOWELL, J.—The law is well settled in England and America, that courts of admiralty have jurisdiction of suits by foreign seamen for their wages against a foreign ship, or her master or owners who are found within the territorial limits of the jurisdiction of the court. As early as 1795, *Peters, J.*, thus stated his practice: "I have avoided taking cognizance, as much as possible, of disputes in which foreign ships and seamen are concerned. I have in general left them to settle their differences between their own tribunals. On several occasions I have seen it a part of the contract that the mariners should not sue in any other than their own courts; and I consider such a contract lawful," &c. He adds that where the voyage is ended or broken up here, and no treaty or compact prescribes the mode of proceeding, he had permitted such suits to be brought: *The Catharina*

(1 Pet. Adm. 194). He makes a very similar statement in *The Forsöket* (1b. 197). And there is no substantial change since that time. See *The Jerusalem* (2 Gal. 191), *Taylor v. Caryl* (20 How. 611, per Taney, C. J.), *The Maggie Hammond* (9 Wall. 452, per Clifford J.). These three cases do not decide the very point, but they contain dicta of great weight, and the decisions are in conformity with them: *Patch v. Marshall* (1 Curtis C. C. 452), *The Gazette* (1 Sprague 378), *The Havana* (1b. 402), *Davis v. Leslie* (Abbott Adm. 123), *Gonzales v. Minor* (2 Wall. Jr. 348), and there are many similar cases in which the rule is shown to be that the Admiralty Court has jurisdiction, but has a discretion whether to exercise it or not. It is not possible, of course to lay down a precise rule to govern even the sound and judicial discretion of a court in future cases. Those in which actions have been maintained, against objection by the defendants or claimants (leaving out of view for the present the protest of the consul or minister), are where the voyage ends here by its own terms, and the wages are due here; where it has been wholly broken up by a sale of the ship, whether voluntarily or under legal process; where the ship is unseaworthy that the crew are not bound to go in her; where they have been forced to leave her by the cruelty of the master. It has been doubted whether a seaman discharged here by his own consent should be permitted to sue, and whether a deviation by the master would be good ground for taking jurisdiction. On this last point see *Moran v. Baudin* (2 Pet. Adm. 415), *The St. Oloff* (1b. 428), for, and *Davis v. Leslie* (Abbott Adm. 134), and *Bucker v. Klorkgeyer* (1b. 409), against, suits being sustained, the latter being dicta by *Betts, J.*, in which he expresses the opinion that the cases in *Peters* are not well decided. His ground is, that the very question of deviation may present all the difficulties of ascertaining the foreign law and applying it to the contract that induce the courts to decline the jurisdiction of questions arising during the course of a still unfinished voyage. My own opinion is, that a plain departure from an admitted voyage absolves the crew from their engagement by the general maritime law, and authorises them to leave the vessel at any port where the only inconvenience to the master will arise from the necessity of hiring a new crew, even at higher wages; and that the decision in the former of the two cases cited from 2 *Peters*, where it is shown that the crew had been taken on voyages they had never agreed for, was clearly right. Such seems to be the opinion of *Mr. Parsons* (2 *Parsons on Shipping*, 227), and *Judge Betts's* dicta must be taken, not as announcing any general rule, but rather as suggesting important exceptions to a sound rule. There are such exceptions, no doubt, to any rule that may be attempted to be made. A seaman discharged here may yet have bound himself by a valid contract not to sue here; or we may be bound by treaty not to entertain the suit; or an offer may be made to return destitute seamen to their home, which the court may think they ought to accept, &c. Subject to such exceptions, I consider deviation may be a ground for discharging the crew and ordering their wages to be paid to them, and this upon plain grounds of justice and universal authority. This is not a case of deviation, strictly so-called. The crew in their sworn libel say they were to come to Boston, and that the voyage

(a) The practice of the High Court of Admiralty, which will be found in *Williams and Bruce's Admiralty Practice*, pp. 173, 174, is the same as that held to be the rule in the American Admiralty Courts. See *Admiralty Rules 1859, r. 10*.—Ed.

was to end here. It is admitted now that the voyage was not to end here, and it is said, though not verified by oath, that they were brought here against their will. If this were so, the men must certainly have known it when they filed their libel, and should have alleged it, so as to put it in issue. As the case stands, I cannot take this fact for granted. The voyage described in the articles is broad enough to include Boston within its terms, and the contract seems to have been fully read and explained to the crew, and I understand the real objection relied on by the libellants is, that the articles are void for uncertainty. That is a point which has often arisen in this court; and, so far as our own statute is concerned, it is settled that such a description is too vague. This is not denied by the claimant, nor does he hesitate to admit that the decisions of the High Court of Admiralty, so far as any such have been reported, seem to agree very nearly with the American case; still he insists that I cannot know the English law, and that he ought to have the right to take evidence in England concerning the present law and practice there, if I take jurisdiction at all. Besides these considerations, there is the protest of H. B. M. acting consul, which affirms the validity of the articles, and protests that the court ought not to take jurisdiction. Several of the authorities above cited refer to the consent or dissent of the representative of the foreign government as being an important fact, but precisely what weight should be given to it is not defined. Sprague, J., in *The Bloomer* (cited 2 Parsons on Shipping, 229, note 2), says: "The usual course in the case of a libel by a foreign seaman against his vessel is to direct the clerk to inform the consul of the government of the dependency of the suit, that he may take such notice of it as he thinks proper; and unless there were strong circumstances in the case, the court would not proceed *in rem* against a foreign vessel without the assent of the commercial representative here of the foreign government of the country where she belonged." What circumstances would be strong enough to induce action, notwithstanding such a protest is not stated. Peters, J., opens to have found such circumstances in *The St. Oloff* (2 Pet. Adm. 428), where there had been both cruelty and deviation. So did Mr. Justice Curtis, in *Patch v. Marshall* (1 Curtis, C. C. 452), where the defendant appeared domiciled in Massachusetts, and the voyage was ended there. In a late case in England, it has been decided in conformity with the practice in both countries, that the protest of the foreign consul could not bar the jurisdiction; but that it ought to be respectfully considered and weighed together with the other facts and circumstances upon which the sound discretion of the court must be exercised. *The Nina* (L. Rep. 2 P. C. 38; 17 L. T. Rep. N. S. 391; *Id.* 585); see, too, *The Golubchick* (1 W. Rob. 143); *The Milford* (Swabey, 362); *The Herosin Marie* (1 Lush. 292). The practice pointed out by Sprague, J., which agrees entirely with the English practice as shown by these cases was not followed in this case, and the consul was not notified before the warrant issued; and for the sufficient reason that the libel says nothing about the vessel being foreign, but states simply the case of a voyage ending here, the ship earning freight, and the seamen entitled to their wages; and not only so, but it invokes the imme-

diate action of the court on the ground that the ship was about to proceed to sea within ten days, an allegation made under the statute of 1790, 1 Stats. 134, which is wholly inapplicable to the case of a British crew shipped in England, as these men are now admitted to have been. A libel so framed in total disregard of the truth of the case is an abuse of the process of the court, and the costs which have resulted from it will justly fall on the libellants if it turns out that no warrant ought to have been granted. And my opinion is, that justice does not require me to take jurisdiction against the protest of the consul. That objection has weight as showing the opinion of the person who is intrusted with the care of British seamen, that there is no such hardship in this case as required the libellants to be paid here rather than at home. His opinion of the law, too, must have some weight, because he is in a position to know and act upon it often. Nor can I find in the case any of the strong circumstances such as Judge Sprague refers to, as requiring the protest to be disregarded. The libellants do not appear to have been brought here against their will, and the master professes himself ready to carry them home. The time for which they shipped has not run out, and no reason is given, excepting what under the circumstances of this case may fairly be called the technical one, that their contract is null. It is the policy of all maritime countries to discourage the discharge of their seamen in foreign ports, and if the master undertook to discharge these men here against their will, he would be guilty of a misdemeanor by the terms of the Merchant Shipping Act (17 & 18 Vict. c. 104, ss. 206, 207). They say it is in their election to be discharged. If this be so, yet there is no reason given excepting the strict right, and that is precisely what a court of admiralty does not feel bound to enforce without further reasons. Reserving, therefore, an opinion upon any state of facts not now before me, I must say that I do not find here any good cause for taking jurisdiction. One of the difficulties in the operation of the well-established course of practice is, that we are obliged to try the case before we can ascertain whether it ought to be tried or not, and I find that difficulty somewhat embarrassing here, for the facts may not have been fully developed in the short hearing already had. I shall retain the libel until the sincerity of the master's professed readiness to take back the men has been ascertained; but if the facts turn out to be as they now appear, I shall not exercise jurisdiction further. Whether I shall do so in any event, unless one or more of the crew shall appear to have been discharged with the master's consent, I do not decide. But in such a case as I have sometimes seen, of a master inducing a crew to desert, and then setting up the act in bar of their wages, perhaps his consent to discharge them might be presumed.

Q. B.] IONIDES AND ANOTHER v. THE PACIFIC FIRE AND MARINE INSURANCE COMPANY. [Q. B.]

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT, M. W. MCKELLAR, and J. P. ASPINALL,
Esqrs., Barristers-at-Law.

May 30, June 9 and 24, 1871.

IONIDES AND ANOTHER v. THE PACIFIC FIRE AND
MARINE INSURANCE COMPANY.

Marine Insurance.—Policy on goods on ship or ships to be declared—Mistake in ship's name—Innocent misrepresentation—Underwriter's slip—Evidence
—30 Vict. c. 23, ss. 7, 9.

The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared is, that he will insure any goods of the description specified, which may be shipped on any vessel answering the description, if any there be, in the policy, on the voyages specified in the policy, to which the assured elects to apply the policy; the object of the declaration (and it need do no more) is to identify the particular adventure to which the assured elects to apply the policy.

If the description in a policy on a particular ship designates the subject with sufficient certainty, or suggests the means of doing it, a mistake in the name of the ship or in other particulars, will not defeat the contract, and where it can be proved that it was a clear mistake, and the underwriter cannot be prejudiced, it is of no consequence.

If a representation is made to an underwriter, however honestly and innocently, that a ship is a new ship, when, in fact she is an old ship, and the underwriter subscribes a policy on goods on board of her in favour of a person making such representation, the policy is thereby vitiated, for the age of the vessel is material in considering the premium.

An underwriter's slip is a contract for marine insurance, and is not a policy, but by 30 Vict. c. 23, ss. 7, 9, it is not valid, that is, not enforceable at law or in equity; it may, however, be given in evidence, wherever it is, though not valid, material.

The plaintiffs, in pursuance of instructions from Messrs. G., of Hamburg, had entered into a policy to cover hides on ship or ships to be declared. This policy was subscribed by the Progress Insurance Company, which had failed and was being wound-up. Interests had been declared on this policy, so that there only remained open the sum of 121l. The plaintiffs received instructions from Messrs. G., to declare on this policy to cover hides shipped on the Socrates, Captain Jean Card, from a port in the Brazils to Hamburg. L., plaintiffs' clerk, went to the defendants' office, and asked D., the defendants' manager, if he would re-insure the portion of the risk covered by the policy of the Progress Insurance Company, viz., 121l. L. had not the letter of instructions with him, but D. looked at the Veritas register, and saw there the Socrate, Captain Jean Card, an old French vessel, and next to it the Socrates, Captain C. J. Albertson, and asked L. if the Socrates was the ship; L. replied that he thought so. D. thereupon initialed a slip and a policy was issued for 121l., and at the same premium. The goods were really shipped on board the Socrate, and were totally lost.

Held, that as the defendants were in no way bound to accept this policy, the mistake and misrepresentation as to the name of the ship was such that the policy was thereby vitiated, and that the defendants were not liable in respect of the policy.

After the policy for 121l. had been subscribed by the

defendants, they, in pursuance of instructions from Messrs. K., of Hamburg, opened a further policy on hides, on ship or ships to be declared for 5000l.; the slip was signed, but the policy had not yet been prepared. The plaintiff then ordered by Messrs. K. to declare on hides to the value of 2700l. coming by the Socrates from Brazil to Hamburg and others by other ships, one of the plaintiffs went to the defendants' office and took the slip for 5000l., and wrote out a slip for a policy on 2455l. on hides per Socrates, and another slip for 2500l. for hides on another vessel, saying to the defendants' clerk, that instead of drawing-up an open policy for 5000l., and then declaring on it for 1955l., which would leave so small a balance as 45l., it would be more convenient for all parties to have two ship policies. The clerk assented and initialed the two slips, and policies were duly issued in accordance with the slips. The hides were really on board the Socrate, and were afterwards totally lost.

Held, that as the defendants were bound in accordance with the slip for 5000l. to issue a policy on any ship selected by the plaintiffs, and as knowledge of facts as to the risk under that policy is issued, would not have been material to them, and as the policy for 2455l. was a policy substituted for the other, the mistake in the ship's name was immaterial, and the defendants were liable.

DECLARATION.—First count, that a contract was made by and between the plaintiffs and the defendants by a certain policy of insurance, purporting thereby, and containing therein, that the defendants held insured the plaintiffs, as well in their own as that of the name or names of those to whomsoever they might appertain, and whether lost or not lost, in the sum of 3000l., in hides as might be declared valued at invoice cost, and 12l. 10s. per cent. additional, free from particular average, unless the ship should be stranded, sunk, or burnt, under 5 per cent. on the whole interest part of 6000l., from any ports or places in the Brazils, to any port of call and for discharge in the United Kingdom (and—or) the continent of Europe between Havre and Hamburg, both inclusive, and continuing the risk from the United Kingdom or Havre, by steamer, to Hamburg, on board the good ship or ships, whereof, &c. . . . And the plaintiffs say that afterwards interests on hides were declared to the defendants, and accepted by them as interests to be covered by the said policy, which interests were, by the said declarations, valued for the purposes of the said policy, and their aggregate said values amount to 6000l., and amongst them the following interest valued as aforesaid at 245l. was declared—that is to say, 2600 dry salted hides, part of the value of which was declared to be covered by the said policy, such part being the said sum of 245l., though the said hides were by the said declaration collectively valued for the purposes of the said policy at 2700l., the said sum of 245l. being by the said declaration declared to be part of the 6000l. to be covered by the said policy, and it was declared that the said hides were insured by a certain vessel called, to wit, the Socrates, on one of the said voyages covered by the said policy as in the declaration described, and the said declaration was indorsed on the said policy, and assented to by the defendants, and all things were done and happened, and all times elapsed, &c. . . . and the plaintiffs say

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that the said ship with the said hides on board thereof, started and proceeded on the said voyage, and during the said voyage, and during the continuance of the risk covered by the said policy, the hides were wholly lost by the perils insured against, and the plaintiffs say that certain persons, called Messrs. Kalkman, at the time of the said loss were interested in the said hides in respect, &c., and all things were done and happened to entitle the plaintiffs to have the defendants pay them the said sum of 245*l*., yet the defendants did not pay the same, nor did they otherwise indemnify the plaintiffs against the said loss to the extent of 245*l*. or any part thereof.

Second Count: That a contract was made by and between the plaintiffs and defendants by a certain policy of insurance, purporting thereby, and containing therein, that the defendants held insured the plaintiffs, as well in their own, as that of the name or names of those to whomsoever the same might appertain, and whether lost or not lost in the sum of 2455*l*., on hides valued at 2700*l*. . . . from Ceuza to Hamburg on board the good ship *Socrates*, whereof was master, or whoever else should be master, beginning the adventure, &c., and the plaintiffs say that all things were done, &c., and that the said ship with the said hides on board thereof started and proceeded on the said voyage, and during the said voyage, and during the continuance of the risk covered by the said policy, the said hides were wholly lost by the perils insured against, and the plaintiffs say that certain persons called Messrs. Kalkman before and at the time of the said loss were interested in the said hides to the full value, &c. . . . and all things happened, &c. . . . Yet the defendants did not pay the same, nor did they otherwise indemnify the plaintiffs against the said loss to the extent of the said sum of 2455*l*. or any part thereof.

Third Count: That a contract was made by and between the plaintiffs and the defendants by a certain policy of insurance, purporting thereby, and containing therein, that the defendants held insured the plaintiffs as well in their own as that of the name or names of those to whomsoever the same might appertain, and whether lost or not lost, in the sum of 2354*l*., on hides valued at invoice charges, and 12*l*. 10*s*. per cent. additional, in conjunction with policies for 3500*l*., dated 14th Oct. 1868, warranted to sail after 1st July, 1869, from any ports and places in the Brazils to a port or ports of call, and for discharge in the United Kingdom, or on the continent of Europe between Havre and Hamburg, both inclusive, on board the good ship *U*, whereof was master, or whoever else should or might be master, beginning the adventure, &c., and the plaintiffs say that afterwards interests on hides to the value and amount of 5250*l*. were declared to the defendants, and accepted by them as interests to be covered by the said last recited policy, and by the said policies for 3500*l*., dated 14th Oct. 1868, and amongst them the following, that is to say: 1400 dry salted hides, and it was by the said declaration declared that the said hides were insured by a certain vessel called, to wit, the *Socrates*, on one of the said voyages covered by the said last mentioned policy, which voyage was in the said declaration described, and the said declaration was indorsed on the said policy, and assented to by the defendants, and all things were done and happened, &c., and the plaintiffs say that the said ship with

the said hides on board thereof, started on the said voyage, and during the said voyage, and during the continuance of the risk covered by the said policy, the said hides were wholly lost by the perils insured against, and the plaintiffs say that one John Tecker Gayen, was interested in the said hides, in respect of which the said sum of 1450*l*. was insured to the full value of all the moneys by them or him ever insured thereon, and the said insurance was made for the use and benefit, and on account of, the said John Tecker Gayen, and all things were done and happened to entitle the plaintiffs to have the defendants pay them the said sum of 725*l*., under the said last recited policy, yet the defendants did not pay the same, nor did they otherwise indemnify the plaintiffs against the said loss, to the extent of the said 725*l*. or any part thereof.

Fourth count: That a contract was made by and between the plaintiffs and the defendants by a certain policy of insurance, purporting thereby, and containing therein that the defendants held insured the plaintiffs as well in their own as that of the name or names of those to whomsoever the same might appertain, and whether lost or not lost in the sum of 12*l*. on 1400 hides, valued at 1450*l*., being a re-insurance on part of policy issued by the Progress Insurance Company, subject to some clauses and conditions as said insurance, and to pay as might be paid thereon from Ceuza to Hamburg on board the good ship *Socrates*, whereof was master, or whoever else might or should be master, beginning the adventure, &c., and the plaintiffs say that all things were done and happened, &c., and that the said ship, with the said hides on board thereof, started and proceeded on the said voyage, and during the said voyage and during the continuance of the risk covered by the said policy the said hides were wholly lost by the perils insured against by the defendants, and the plaintiffs say that one John Tecker Gayen was interested in the hides, &c.; and the said insurance was made for the use and benefit, and on account of the person so interested, and all things were done, &c.; yet the defendants did not pay the same, nor did they otherwise indemnify the plaintiffs against the loss to the extent of the said sum of 12*l*., or any part thereof.

Fifth count: For money payable, &c.

Pleas:—First, as to first and third counts, payment into court of 134*l*. 9*s*. 8*d*.; secondly, as to the second and fourth counts, denial of contract; thirdly, as to second and fourth counts, denial of interest in the hides; fourthly, as to the second and fourth counts, that the said policies were not made for the use and benefit of Kalkman and Gayen respectively, as alleged; fifthly, as to second and fourth counts, denial of shipment on board the *Socrates*; sixthly, as to the second and fourth counts, that the defendants were induced to subscribe the said policies in those counts mentioned, and to become insurers to the plaintiffs on the terms of the said policies respectively, by the misrepresentation of the plaintiffs of a fact material to be known by the defendants, and material to the risks by the said policies respectively covered, that is to say, that the hides were shipped by the ship *Socrates*, whereas, in fact, they were shipped by another ship, that is to say, the ship *Socrate*; seventhly, as to the second and fourth counts, denial of the loss of the hides; and eighthly to the fifth count, never indebted.

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The plaintiffs took out of court the sum of 134*l.* 9*s.* 8*d.* paid in, replied damages *ultra*, and joined issue on the second, third, fourth, fifth, sixth, seventh, eighth pleas. The defendants amended their pleadings, and added a plea to the second and fourth counts that "at the time of the defendants subscribing the said policies and becoming insurers, as therein mentioned, the plaintiffs and their agents wrongfully concealed from the defendants a fact then known to them and unknown to the defendants, material to the risk caused by the policies, that is to say, that the plaintiffs had received a letter from the consignee of the goods in the said policies respectively mentioned, and which ought to have been communicated to the defendants, whereby it appeared that the said goods were shipped on board of a foreign vessel, the name of whose master was Jean Card;" and they farther paid into court on the first and third counts the sum of 131*l.* 18*s.* 2*d.*, and this sum the plaintiffs took out in satisfaction of their claim under those counts, and entered a *nolle prosequi* thereon, and joined issue on the amended plea above set out.

The case came on for trial at Guildhall, before Hannen, J. and a special jury, at the sittings after Michaelmas Term 1870, and a verdict was found for the plaintiffs on the second and fourth counts, the learned judge asking the jury, first, whether the parties, when the name of the vessel was declared, had in contemplation, and contracted about, the same identical vessel; secondly, whether there was a misrepresentation as to the ship on which the goods were; thirdly, whether there was a concealment of the captain's name (a). Leave was reserved to the defendants to move to enter a verdict for them, on the ground that no insurance was effected on goods on board the *Socrates*, and no loss was proved within the meaning of the several policies declared on; the defendants also moved for a new trial, on the ground that the learned judge misdirected the jury, in patting to them as material, whether they thought the parties intended to insure the hides by whatever ship they might be carried, or that there was any evidence proper to be admitted to them that the parties insured, or meant to insure, hides carried by any other ship than the *Socrates*, and that they might properly find for the plaintiffs, on the pleas of concealment and misrepresentation upon the evidence of the captain's name, under the circumstances proved, and also that the verdict was against the evidence. The facts are fully set out in the judgment.

May 30 and June 9.—Cohen and Lanyon for the plaintiffs showed cause.—The defendants have paid money into court on the first and third counts, and have thereby admitted their liability under the others. The policies on which they have paid are

similar to the others. The policy set out in the second count was entered into for convenience. The defendants had already initiated a slip for 5000*l.*, and were bound to issue a policy in accordance with that slip. Before the issue of that policy, and in order to avoid the necessity of declaring upon it the plaintiffs got a slip signed for goods on board a ship they called the *Socrates*. It is exactly the same thing as if they had declared on the policy for 5000*l.* for the amount insured as per *Socrates*. A policy on goods on board a ship to be afterwards declared, imports an insurance on any ship in the absence of fraud. The ship alluded to and intended by the parties in both policies (for 2455*l.* and 121*l.*) was the ship on which the hides actually were. The real question is, what was in the contemplation of the parties? The jury found for the plaintiffs, and that finding really was that the defendants were willing to insure the hides on any ship declared by the plaintiffs as long as there was no fraud, and that they did not contemplate any particular ship. A mere mistake in the name of the ship will not vitiate the policy. Casaregis says (*De Commercio*, disc. 1, § 159), "Error tamen nominis alienius navis non attenditur, quando ex aliis conjecturis constat de navis identitate." In this case the identity was of no consequence, and, therefore, the mistake cannot affect the right to recover. See also Emerigon, par Bonlay-Paty, Ch. 6, sect. 2. In 1 Arnold on Marine Insurance (3rd edit. p. 327), it is said that, where the name of the ship is by mistake declared wrong it may be corrected. Both these policies were in the nature of declarations, the one for 121*l.* being only a re-insurance:

Robinson v. Touray, 1 Man. & Sel. 217; 3 Camp. 158;

Phillips on Insurance, c. 5, s. 1, 430;

Le Mesurier v. Vaughan, 6 East, 332.

In a policy on "ship or ships," the assured has a right to apply any of the policies to a loss on board any ship he pleases that comes within the terms of such policy (1 Arnold on Insurance, 3rd edit., p. 329), and these policies were really on "ship or ships." There was never any positive statement that the *Socrates* was the ship on which the hides were. It was only said that the plaintiff thought so. The *Socrates* was not shown to be unseaworthy, and on such policies the insurers are bound to take any ship. They cannot now set up that they would have required a higher premium if they had known it was the *Socrates*. The defendants could not have repudiated their engagement to issue a policy in accordance with the slip for 5000*l.*, and if they had issued that policy it would not have been material to them whether certain facts were known to the plaintiffs, and not known to them which would have made the risk greater. They were under that policy bound to take her, good or bad, at a premium fixed in the slip. Even should the policy for 121*l.* be considered an insurance *de novo*, there was no misrepresentation. The plaintiffs honestly believed that they were naming the right ship. The clerk said he "thought so," as no doubt he did think so. That was a true representation, and cannot vitiate the policy. There was no fraud or wilful intention to deceive:

1 Arnold on Marine Insurance, 3rd edit., p. 496.

Milward, Q.C., and *Murphy* in support of the rule.—The policy for 121*l.* was on goods on the ship *Socrates*, not on the *Socrate*. As far as the defendants were concerned it was an entirely new policy, and upon a particular ship. The ship was material to them, as the risk on the *Socrate*, being

(a) With respect to this question, Hannen, J., in his summing up, said: "A concealment of a material matter, though made in forgetfulness, though made unintentionally and without any fraud, but through forgetfulness, will vitiate the policy. But then we must consider what it must be forgetfulness of. A man may hear something casually, from some source wholly unconnected with the business which he is about to enter upon, and if that is the only knowledge he has, so casually obtained, and that does not occur to his mind at the time, that is not a concealment of the fact. It must be a concealment (and I am supposing, mind, through forgetfulness), of a fact which the majority of the community, as represented by twelve men chosen by chance, and sitting in a jury box, think that a man ought, in the ordinary course of things, to have had present to his mind."

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an old ship, was greater than on the *Socrates*, a new ship. The plaintiffs' clerk clearly represented that the ship was the *Socrates*, and it was on the faith of that representation that the defendants undertook the risk. They were under no obligation to do so. Misrepresentation, however innocent, vitiates the policy, and here the plaintiffs gave the name of the wrong ship:

1 *Arnould on Marine Ins.* 491, 3rd edit.;

Anderson v. Thornton, 8 Ex. 425.

In fact, there was no contract at all between the parties; the defendants undertaking to insure one ship, and the plaintiffs asking them to insure another. They were not *ad idem*. No distinction can be drawn between the two policies. The policy for 2455*l.* was equally a new policy, and entered into between the same parties. It has been contended by the plaintiffs that as the defendants initiated the slip for 5000*l.* they were bound to issue a policy, and that the policy actually issued was in accordance with their undertaking; the policy actually issued, however, was in a particular ship, the *Socrates*. The plaintiffs are not entitled to go beyond the written terms of the policy. What passed between the plaintiffs and defendants as to the policy for 121*l.* binds the plaintiffs as to the policy for 2455*l.*, and it must be taken that the representation as to the name of the ship was repeated. The plaintiffs are not entitled to use the slip as evidence of the intention of the parties. A slip is not admissible in evidence by 30 Vict. c. 23, ss. 7, 9, and the court are not at liberty even to look at that slip as evidence of a contract: [*Blackburn v. Coulson*, L. Rep. 8 Eq. 368, 374.] (*BLACKBURN, J.*—“A slip is not a policy, and the Act only forbids policies being given in evidence when not duly stamped. A slip is not valid as a contract, but may be given in evidence where material.” It has been otherwise decided:

Marsden v. Reid, 3 East, 573;

1 *Arnould on Marine Insurance*, 253.

The defendants were not in any way bound to enter into this new insurance. The plaintiffs waived the issue of the first policy, and asked the defendants to enter into a fresh policy on a different footing, and any representations made at that time are binding on the parties. The second policy cannot be taken as a substituted policy, as there never was a policy in existence for which to substitute it. In *Le Mesurier v. Vaughan* (*sup.*), the judgment went mainly on the ground that the policy contained the words “or by whatever other name or names the said ship should be called.” These words are not inserted in either of these policies.

June 24*th*.—The judgment of the COURT (Cockburn, C.J., Blackburn, and Hannen, JJ.) was delivered by

BLACKBURN, J.—This was an action on four different policies of marine insurance made by the defendants with the plaintiffs. The plaintiffs are brokers, who, as is common, enter into policies in their own names, but on behalf of and to protect the interests of different constituents. No notice was given to the defendants for whom the different policies subscribed by them were made, but from the ordinary course of business they must have known that the plaintiffs probably had principals, and nothing was done by the plaintiffs to justify the defendants in concluding that the principals in the different policies were the same person. In fact, the policies which come in question in the

present action were made by two different firms, Messrs. Kalkman and Messrs. Gayen, both of Hamburg. In order to make the points raised at the trial and discussed in court intelligible, it is necessary to state what was the position of the plaintiffs with regard to both of these firms in the latter part of Jan. 1870, when the transactions took place which gave rise to the present dispute. The plaintiffs, in pursuance of instructions received from Messrs. Gayen, had entered into policies in conjunction with each other to cover hides to a considerable value on ship or ships to be declared. The defendants had subscribed one of these policies for the amount of 2354*l.* Another of the policies was subscribed by another company, the Progress, which had failed, and was being wound-up. So many interests had been declared on these policies that there remained so little open on them to declare that the proportion on the defendants' policy left open would be 725*l.*, and that on the policy in the Progress, 121*l.* In this state of things the plaintiffs received from Messrs. Gayen a letter dated the 23rd Jan., written from Hamburg, directing them to declare on each of these policies to cover hides shipped on the *Socrates*, Capt. Jean Card, from a port in the Brazils to Hamburg. The plaintiff Chapeauvieux, having received this letter on the 24th of Jan. directed one of his clerks, Lambert, to go to the office of the defendants, and there declare on the *Socrates* for 725*l.*, so as to fill up the defendants' ship or ships' policy, and at the same time to see if the defendants would at the same premium re-insure the portion of the risk covered by the policy in the insolvent company, the Progress, viz., 121*l.* The letter of instructions was not by him, but the Veritas was lying on the table, and on looking into it the plaintiff and his clerk saw in the register, which is in alphabetical order, the *Socrates*, Capt. C. J. Albertsoo, a new Norwegian vessel, and next to the *Socrate*, Captain Jean Card, an old French vessel. Had the plaintiff recollected that the letter described the vessel as the *Socrates*, Captain Jean Card, he would probably have conjectured that the inaccuracy was in the name of the vessel, and that, as the fact turned out to be, the hides were shipped on board the *Socrate*; but not recollecting this, he observed to his clerk that a Norwegian ship of that character was very likely to be engaged in that trade, or words to that effect. The clerk went down to the office, and there was the defendants' principal manager, Drummond. He then indorsed on the policy a declaration of interest by the *Socrates*, which he handed to Drummond to initial, and at the same time requested him to insure on the same ship 121*l.*, by way of re-insurance of what had been insured in the Progress Company. Drummond, turning to the Veritas, and there seeing the *Socrates*, asked if that was the ship? Lambert replied that “he thought so,” and Drummond then initialled the declaration. At the same time a slip was prepared for a policy on hides, per *Socrates*, to cover 121*l.* at 66*rs.* per cent., being the same premium. No discussion took place about the premium, probably because the transaction was so small, and was entered into rather to oblige a good customer than with any view of making a profit; but there can be no doubt that the premium on an old vessel such as the *Socrate*, would have been higher than that on a new one, such as the *Socrates*, though the difference on such a sum as 121*l.*

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would not have been more than a few shillings, and was probably neglected by both parties. The policy for 121L was afterwards made out and executed. This finished the transactions so far as the plaintiffs were acting for Messrs. Gayen. The third count was on the declaration on the ship or ship's policy to recover the 725L. The fourth count was on the policy for 121L, and in both these counts the interest was averred to be in Messrs. Gayen, and the policies to be made on their behalf. The plaintiffs had also opened with the defendants a policy on hides, by ship or ships to be declared, for 3000L. This had been done on behalf of Messrs. Kalkman. The plaintiffs had also received instructions from the same parties to open a further policy of the same nature to the extent of 5000L, and had agreed with the defendants for it. The slip was signed, but the policy had not yet been prepared. On the 3rd Feb. there had been so many interests declared on the 3000L policy that there remained open on it only 245L. This being the state of things, the plaintiffs received a letter from Messrs. Kalkman, informing them they had hides to the value of 2700L coming by the *Socrates* from Brazil to Hamburg, and also hides to the value of 3600L coming by the *Sophie*, and desiring them to insure 1100L, and to declare on their open policies for the residue. It will be observed that the interest open on the policy for 3000L, viz., 245L, the 5000L for which the slip was signed, though the policy was not executed, and 1100L, would together make 6345L, being 45L more than the amount coming by the two vessels as announced by the letter of the 3rd Feb. The plaintiffs procured a policy for 1100L on the hides per *Sophie*, and then, on the 4th Feb. the plaintiff Chapeanrouge went in person to the defendants' office; he there saw a different clerk of the defendants, one Lark, and there was no controversy of testimony between them as to what took place. The plaintiff indorsed on the back of the 3000L policy a declaration of interest on hides per *Socrates* to the extent still open on the policy, viz., 245L. He at the same time took the slip for the 5000L policy on hides by ship or ships, and taking up two pieces of paper wrote out a slip for a policy for 2455L on hides per *Socrates*, and another slip for a policy for 2500L on hides per *Sophie*, and laid those four documents before Lark. Lark asked what this meant, and Chapeanrouge said that, instead of drawing up an open policy for 5000L, and then declaring on it for 4955L, which would leave so small a balance as 45L, it would be more convenient for all parties to have two ship policies. Lark assented, and initialed the declaration and the two slips. The plaintiff Chapeanrouge went away, and soon after two policies on hides by the *Socrates* and on hides by the *Sophie* were duly executed on behalf of the defendants. The first count was on the declaration of interest on the open policy of 3000L to recover the 245L. The second count was on the policy on the *Socrates* to recover the 2455L. In both these counts the interest was averred to be in Messrs. Kalkman, and the policies to be made on their behalf. The defendants ultimately paid money into court on the first and third counts, being those on the ship or ships' policies, which the plaintiffs accepted, so that no question arose on the trial as to those two counts, though it has been necessary to mention them in order to render the defence as to the others intelligible. As to the second and fourth counts, they

pleaded several pleas. Those that were material are, the second, non-assumpsit; the fifth, that the hides were not shipped by the *Socrates*; the sixth, that the defendants were induced to subscribe the policy by a misrepresentation of a material fact, viz., that the hides were shipped by the *Socrates*, whereas they were shipped by the *Socrate*; the seventh, a denial of the loss, as alleged; and, lastly, an additional plea, that the letter in which the name of the captain was given was not communicated. On all these pleas issues were joined, which came on to be tried before my brother Hannen, and a special jury, at the sittings at Guildhall. Evidence to the effect above stated was given. It was not disputed that hides to the value insured were in fact shipped on the *Socrates* on behalf of the parties interested, and that they had no hides whatever on board the *Socrates*, and that the *Socrate* was totally lost, with the hides on board. My brother Hannen reserved leave to the defendants to enter a verdict for them on all or any of the issues, subject to the finding of the jury on the question which he left to them, which was, whether the parties, in entering into the contracts, both meant to insure the hides by the vessel on which they were actually shipped, whatever her name might be, though they supposed it to be the *Socrates*, or whether the defendants meant to insure hides on board the *Socrates*. The jury answered this question in favour of the plaintiffs. Mr. Milward obtained a rule nisi to enter the verdict according to the leave reserved. He also obtained it for a new trial, on the ground of misdirection; but that latter ground was merely *pro majors cautela*, in case the point was not properly raised. We have come to the conclusion that the plaintiffs are entitled to retain their verdict on all the issues on the pleas to the second count, that on the policy for 2455L; but that the defendants are entitled to have a verdict entered for them on the second and sixth pleas, so far as those pleas relate to the fourth count, namely, that on the policy for 121L. Our reasons for this distinction are as follows: The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared is, that he will insure any goods of the description specified which may be shipped on any vessel answering the description, if any there be, in the policy, to which the assured elects to apply the policy. The object of the declaration is to earmark and identify the particular adventure to which the assured elects to apply the policy. The assent of the insurer is not required to this, for he has no option to reject any vessel which the assured may select; nor is it necessary that the declaration should do more than identify the adventure, and so prevent the possible dishonesty of a party insured, who might intend to apply the policy to particular goods, so that they should be at the risk of the insurers, and he could come on them if they were a loss; and then, when those goods had arrived safely, to pretend that he intended to apply the policy to another set of goods still subject to risks: (*Harman v. Kingston*, 3 Camp. 150; *Robinson v. Touray* (sup.)) It seems plain, therefore, that the declaration of the *Socrates* on the ship or ships' policies was, under the circumstances, amply sufficient to show that the assured had elected to attach those policies to the goods actually shipped on board the *Socrate*; and, consequently, that the

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defendants were well-advised when they withdrew their defence to the 1st and 3rd counts. But on the 24th Jan., when the policy for 1211. was agreed upon, the defendants were under no obligation to subscribe any policy for that 1211. They had an absolute right to decline to enter into a contract except on their own terms as to premiums, or indeed, into any contract at all unless they liked. And though we see no reason to doubt that the jury were quite right in finding that both parties were intending to insure the goods by the ships on which they were actually shipped, yet, when we find it not disputed that the one party expressly asked the question whether the ship was the Norwegian ship *Socrates*, and was told by the other party that he thought it was, we cannot think that there was any evidence on which the jury could properly find that the defendants entered into a contract to insure by any other ship than the *Socrates*. The most that could be legitimately found was that there was no contract, the parties not being *ad idem*. And we think also that, if the representation was made, however honestly and innocently, that the ship was a new ship when in fact, she was an old one, the policy was vitiated thereby, for the age of the ship must be material in considering the premium. It was argued that a representation, if only as to expectation or belief, is substantially complied with if the assured really had honestly entertained that expectation on sufficient grounds, and that the representation that "he thought" the ship was the Norwegian ship was literally true. We think this expression tantamount to an assertion that she was the Norwegian, but even were it otherwise, the letter of advice would, but for the carelessness of those who read it, have made them aware that the ship was that, of which the captain was Jean Card, and therefore the plaintiffs had not reasonable grounds for believing that she was the Norwegian ship. But, though we come to this conclusion as to the smaller policy of insurance for 1211., we think the case is quite different as to the other policy for 24551. Mr. Milward argued that there could be no difference, for the plaintiffs were the persons who made both contracts, and made them both with the defendants; and, therefore, he argued, all that passed on the 24th Jan. between Lambert, representing the plaintiffs, and Drummond, representing the defendants, must be considered as present to the minds of the plaintiff Chapeaurouge in person, and Lark representing the defendants, on the 4th Feb., and as if then virtually repeated. But the transaction on the 24th Jan. was respecting one contract, in fact made for one principal, and the transaction of the 4th Feb. was respecting another contract, in fact made for another principal, and the defendants knew that they were almost certainly made for undisclosed principals, and had no reason to suppose that the principals in the two contracts were the same. We think, therefore, that, even if the defendants had, in fact, on the 4th Feb., recollected all that took place on the 24th Jan., they would not have been justified in coming to the conclusion, without further inquiry, that the real parties were the same, and meant to make a similar contract. The identity of the name of the ship, and of the voyage described, would no doubt raise a reasonable suspicion that both parties meant to describe the same ship; but that was all. And, in fact, there can be no doubt that the plaintiff and Lark, if they ever knew

what took place between Lambert and Drummond, did not, on the 4th Feb., think of it. We think, therefore, that it is clear that the transaction of the 4th Feb. must be looked at as if that of the 24th Jan. had happened subsequently, or had never happened at all. And in looking at it in this way, the fact that a slip for a policy for 50001. on hides by ship or ships to be declared had been prepared, and was in existence, is of great importance. The slip is, in practice, and according to the understanding of those engaged in marine insurance, the complete and final contract between the parties, fixing the terms of the insurance and premium, and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of faith, for which he would suffer severely in his credit and future business. The Legislature, for the purpose of protecting the revenue, had by the very strongest enactments provided that no such instrument should be given in evidence for any purpose; but all those enactments are repealed by the 30 Vict. c. 23, and the law is now governed by the 7th and 9th sections of that Act. By sect. 7 no contract or agreement for reinsurance shall be valid unless expressed in a policy. And by sect. 9 no policy shall be pleaded or given in evidence in any court unless duly stamped. As the slip is clearly a contract for marine insurance, and is equally clearly not a policy, it is, by virtue of these enactments, not valid, that is, not enforceable at law or in equity; but it may be given in evidence wherever it is, though not valid, material; and in the present case it is material.^(a) The defendants could not, without a breach of faith, repudiate that engagement, and they never proposed to do so. And whilst they adhered to that engagement it was not material to them whether they were or were not facts known to the insured, and not known to them, which might make the vessel a less eligible risk, for they were going to take her, whatever she was, at a premium, the amount of which was already finally fixed. Mr. Milward's argument was, that they were not legally bound to do so; and that, therefore, when they entered into a substituted policy on a ship they were entitled to hold it avoided for want of a disclosure which, in fact, would have made no difference. This would be to make the rule, that contracts of marine insurance are considered as *uberrima fidei*, a means in this case of working fraud. In fact, the case is exactly as if the underwriter had said, "I have finally made up my mind to take the policy on unalterable terms; nothing you can disclose to me will make the slightest difference, and therefore

(a) It may be as well to point out here that sect. 4 of this Act says, "And the word 'policy' means any instrument whereby a contract or agreement for sea insurance is made or entered into." Blackburn, J., in his judgment, says that a slip is a contract for sea insurance, but that it is not a policy, whereas the Act says that a policy means any such contract. If a slip is a policy within the meaning of the Act, it could not be received in evidence, and could not be taken as showing the existence of the contract for an open policy of 50001., and therefore the parties could not travel out of the terms of the policy for 24551. Sect. 4 of the Act is an interpretation clause, but where such a clause exactly defines the meaning of a word, the rule that interpretation clauses do not restrict the ordinary meaning of words but extend them, can scarcely apply. If this view is right, the defendants here were entitled to judgment on both policies.

See *Morrison v. The Universal Marine Insurance Company*, ante, p. 109.—Ed.

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you need disclose nothing." It is true the last words were not expressed, but they were evidently implied. The only remaining point arises, therefore, on the misnomer of the vessel, which was called in the policy the *Socrates*, when, in fact, she was the *Socrate*. But the rule of law, both in England and America, is stated in Phillips on Insurance (sect. 430), that if the description of the policy designates the subject with sufficient certainty, or suggests the means of doing it, a mistake of the name of the ship or of other particulars will not defeat the contract. In *Le Mesurier v. Vaughan* (6 East, 382), where the broker had received instructions to insure goods by an American ship called the *President*, and by mistake insured as on a ship called the *American President*, it was held that, it being clearly proved by the invoice and letter of instructions that the goods were on the *President*, and that the name was a mistake, the plaintiffs might recover. It is true that in the judgment some weight seems to have been given to the expression contained in the ordinary Lombard-street policy, "or by whatever other name or names the said ship should be called," and that those words are omitted in the form of the policy used by the defendants in the present case. But we think this far too narrow a ground, and that the real ground of the decision is that which is expressed by Lord Ellenborough, that where it can be proved that it is a clear mistake, and the underwriter cannot be prejudiced by the mistake, it is of no consequence. The jury here have found and were justified in finding, that neither party cared what the name of the ship was, as they meant to insure the goods by the ship on which they were really shipped. When the other policy for the 121st was made, it appears plainly that the underwriter really believed that the ship was the Norwegian ship, and that was a matter very material to the risk, and the underwriter was free to accept or refuse that risk, and therefore the mistake in the name was of importance. We think, therefore, that the rule should be made absolute to enter a verdict for the defendants on the second and sixth pleas, as far as they relate to the fourth count, and discharged as to the rest.

Rule accordingly.

Attorneys for the plaintiff, Stibbard and Beck.

Attorneys for the defendants, Holmer, Robinson, and Co.

Tuesday Nov. 21, 1871.

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*Mutine insurance—Material concealment—
Liability of underwriter.*

Where a policy on ship or ships to be declared is subscribed by an underwriter after a material fact relating to a particular ship, which the assured afterwards intends, if necessary, to declare on that policy, has been posted at Lloyd's and so become known to the assured, and may or may not have so become known to the underwriter, without the name of the ship and the material fact having been communicated by the assured to the underwriter, so that he might know the risk proposed, the policy is vitiated.

Lynch v. Dunnisford, 14 East, 494, followed.

Plaintiff was accustomed to insure at Lloyd's upon floating policies quantities of cochineal shipped

for him from the Canaries; he declared the name of the ship upon receipt of each bill of lading.

He received information that a large quantity would be shipped in the *Candida*, and by the same mail an anonymous letter reached Lloyd's, containing a statement that the owners intended to lose that ship on her next voyage, in order to make the underwriters pay. A notice of this letter was openly affixed to a board at Lloyd's; and the plaintiff was aware of the contents of the letter, but considered them unworthy of credit. At this time the plaintiff reasonably expected that the bills of lading by the *Candida* would be the next to be declared by him, and in that case they would be covered by policies previously made.

He entered into the policy now sued upon without communicating to the underwriter his intelligence of a cargo to be shipped by the *Candida*, or the contents of the anonymous letter. By accident the bills of lading of the *Candida* came to the plaintiff after those of later shipments, and the *Candida* was declared upon:

Held, in an action to recover for a total loss of part of the cochineal which had been jettisoned from the *Candida*, that plaintiff had been guilty of a concealment which invalidated the policy.

SPECIAL CASE.

1. The plaintiff is a merchant carrying on his business in London, under the firm of J. Staddy, Leigh, and Co., and the defendant is an underwriter at Lloyd's.

2. The action is brought to recover 46l. 18s. 1d., and interest on 37l. 10s. 6d., part thereof at the rate of 5l. per cent. per annum from 1st April, 1869, the proportionate amount of defendant's subscription as underwriter to a certain policy of insurance, in respect of a total loss of certain cochineal (in which it is to be taken for the purposes of this case that the plaintiff was interested), which loss occurred during the voyage of a vessel called the *Candida*, from the Canaries to London.

3. This policy was underwritten by other underwriters at Lloyd's besides the defendant, of whom some are also defending the claims upon this policy, and the actions against them are consolidated with the present.

4. Before and at the date of the shipments of the cochineal in question, the plaintiff had been and was engaged in trade between London and the Canaries, which was carried on in the following manner:

5. He sent quantities of goods of different kinds to correspondents on those islands, in execution of certain orders received from them, for which almost invariably credit was given. He also made advances in money to cochineal growers in those islands; and the arrangement was, that in payment of these goods, and those advances, the plaintiff should receive cochineal both from his correspondents and the growers, which should be shipped to him by degrees as the former could purchase, and as the latter could collect it.

6. In order that these shipments of cochineal might be properly insured, it was necessary, as the plaintiff was nearly always in ignorance of the names of the vessels by which specific shipments would be made, to have floating policies open, similar in form to the policy sued upon in this action, on which to declare the shipment, and the value of the produce shipped as the bills of lading for the same were received.

7. In pursuance of this course of business,

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the plaintiff had opened the following policies in Lloyd's room from the commencement of the cochineal crop of 1862, viz. :—

1862. Aug. 15.....	23000
1862. Oct. 21.....	3000
1862. Dec. 22.....	5000
1863. June 24.....	5000
	416,000

on all of which declarations were made to the full amount, and the cochineal so insured arrived in safety, some by steamers, and some by sailing vessels.

8. In each of these policies it was expressed that it followed and succeeded the preceding one effected, and it sometimes happened that a shipment of cochineal was declared partly on one policy and partly on its successor.

9. On the 30th Sept. 1863, as the plaintiff was then doing a greatly increased business with the Canaries, he opened a fresh policy for 10,000*l.* to follow and succeed the said policy for 5000*l.*, insured at Lloyd's on the 24th June 1863.

10. On the 3rd and 10th Nov. 1863, by which time declarations to the full amount had been made on the said policy for 5000*l.*, shipments were declared upon the last-mentioned policy for 10,000*l.*, to the extent of 2450*l.*, thus leaving 7550*l.* open on the said policy for subsequent declarations. On the 16th Nov. 1863, in consequence of advices from a firm of Escofet, Diaz, and Co., carrying on business at Las Palmas, that they intended to ship a large parcel of cochineal to the plaintiff by their vessel, the *Candida*, a further policy of 5000*l.* to follow the last-mentioned policy for 10,000*l.* was opened at Lloyd's by the plaintiff; a total of 12,550*l.* was thus left open for subsequent declarations.

11. On the 9th Dec. 1863, the plaintiff received a bill of lading of a shipment of cochineal by the ship *Asorian*, to the value of 1591*l.* This shipment was declared on the plaintiff's policy for 10,000*l.* of the 30th Sept., thus leaving a total of 10,959*l.* undeclared, viz., 5859*l.*, upon the said policy for 10,000*l.*, and the whole amount of the policy for 5000*l.* of the 16th Nov. 1863.

12. On the same 9th Dec. 1863, the plaintiff received advices that further shipments of cochineal to a large amount were intended to be made to him by the said vessel, the *Candida* and that there was in addition other cochineal ready to be shipped to him. The plaintiff, however, had no means of knowing what the amount of the cochineal to be shipped by the *Candida* would be, except that it would be large, amounting in probable value to more than 800*l.*, or what the amount of the additional cochineal so ready to be shipped would be.

13. By the same mail which arrived on the 9th Dec. the following anonymous letter was received at Lloyd's :

Messrs. Lloyds.—The house of Escofet, Diaz, and Co., intend shipping to the consignment of Messrs. J. R. Yglesias and Co., 600 sacks of cochineal, and sends them in the *Candida* belonging to the aforesaid house of Escofet, Diaz, and Co. It is not cochineal, but barley; and the intention is to lose the vessel in order that the underwriters pay. They are ruined, and desire to save themselves in this manner. The houses of J. R. Yglesias is innocent. A FRIEND.

14. A notice of the fact that a letter had been received which would affect all persons insuring by or interested in the *Candida*, and that such letter

could be seen at the secretary's room, was openly affixed to a board at Lloyd's; but, in point of fact the defendant never observed such notice, or saw such letter.

15. The contents of this letter, and the fact that it had been received at Lloyd's, were made known to the plaintiff on the next day, the 10th Dec.

16. From the time when the letter was received it would have been impossible to effect an insurance at Lloyd's on goods intended to be shipped by the *Candida*, except at an advanced premium.

17. On the 11th Dec. 1863, the plaintiff gave instructions to his brokers to open a policy at Lloyd's for 10,000*l.* to follow and succeed the policy for 5000*l.* A policy was accordingly opened in pursuance of such instructions, which is the policy the subject of the present action.

18. The defendant accepted the risk at the ordinary rate of premium, and subscribed the policy (which is the policy sued upon) for 100*l.*

19. At the time when the plaintiff gave instructions to have this policy opened, and when this risk was shown to the defendant, and when the defendant subscribed the policy, the plaintiff had not received any bills of lading of the shipments by the *Candida*, and was still ignorant of the amount of cochineal which would be shipped by her. But he was then expecting that further large shipments of cochineal would shortly be consigned to him, besides the shipments by the *Candida*, and he opened the said policy in the ordinary course of business, and he was in no way induced to open the said policy by the fact of the receipt of the said anonymous letter having been made known to him. At this time also the plaintiff reasonably expected that the bills of lading of the cochineal by the *Candida* would be the next bills of lading that would be received by him, so that the value of the cochineal in such bills of lading would be the next that would be declared; and as there were 19,959*l.* still undeclared on the former policies as before mentioned, and as he did not expect that cochineal to a greater amount than to the value of 10,959*l.* would come by the *Candida*, he expected that all the cochineal that would come by the *Candida* would be declared on such former policies. But whether all the cochineal that was shipped by the *Candida* would be declared on such former policies depended on what would be the value of the cochineal that would come by the *Candida*, and on whether any other bills of lading for cochineal to be shipped to the plaintiff would arrive before the bills of lading of the cochineal shipped by the *Candida*; and the plaintiff knew it so depended, and when he opened the said policy he knew that either by reason of the amount of the cochineal shipped by the *Candida* being larger than he expected, or by reason of bills of lading of shipments by other vessels being received before the bills of lading by the *Candida* it might reasonably happen that the whole of the cochineal shipped by the *Candida* could not be declared on the former policies, and intended in that case that the portion not declared on the former policies should be declared on the said last mentioned policy, the subject of the present action.

20. The plaintiff did not communicate to the defendant or to the other underwriters of the said policy, the fact that the plaintiff had received advices that shipments of cochineal were about to be made to him by the *Candida*; nor the fact that in the contingency mentioned in the last para-

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graph, part of the shipments by the *Candida* might and would be declared on the said policy. If the defendant had known of these facts he would not have accepted the risk or subscribed the policy on the terms on which he did subscribe it.

21. On the 24th Dec. 1863, a mail came in from the Canaries, and by that mail, in spite of many promises contained in previous letters, that bills of lading of larger shipments per *Candida* would be forwarded by that mail, bills of lading were only received of the following shipments per *Candida* to the extent of 2485*l.*, that is to say:

Quevedo Romero	8 bags cochineal	£225
Morera Hermanos	66 " "	1855
Lois Inglott	15 " "	406

22. On the 28th Dec. 1863, the plaintiff received bills of lading from the different correspondents of a shipment per the steamer *Amazon*, value at 636*l.*

23. Owing to the Christmas holidays the bills of lading which arrived on the 25th Dec. as before mentioned, were not declared until the 28th Dec. 1863; on which day the bills of lading mentioned had arrived. Declarations were made in respect of both these sets of bills of lading at the same time, and in the following order—A declaration was first made as to the 636*l.* on the bills of lading which arrived on the 28th Dec. by declaring as to 556*l.* part of the said amount of 636*l.*, on the policy for 10,000*l.* on the 30th Sept. 1863, which was thereby and by a declaration for 390*l.* on produce shipped by a steamer from Teneriffe filled up; and by declaring as to 79*l.* residue of the said sum of 636*l.* on the said policy for 5000*l.* of the 16th Nov. 1863. A declaration was then made as to the said bills of lading to the amount of 2485*l.* per *Candida*, on the said policy of the 16th Nov., leaving still undeclared on the same policy 1718*l.*

24. On the 9th Jan. 1864, another mail arrived bringing bills of lading of other shipments per *Candida*, viz:

From T. M. Bethencourt,	7 bags cochineal	£195
" Escofet Diaz and Co.	185 " "	5200
" M. G. Castellanos	11 " "	310
		£5705

Of this sum of 5705*l.* 1718*l.* was declared on the 11th Jan. on the policy of 5000*l.* of the 16th Nov. 1863, leaving 3987*l.*, which was declared on the same day on the policy for 10,000*l.* of the 11th Dec. 1863, now sued upon. The defendant initiated by his clerk the declaration so made, but at the time the defendant's clerk so initiated it, neither the defendant or his clerk in fact knew of the receipt of the said anonymous letter at Lloyd's, or the fact that the plaintiff knew of the receipt of the letter at the time of the opening of the said policy, and had not communicated such letter to the defendant and the other underwriters.

25. The whole of the remainder of the said policy for 10,000*l.* of 11th Dec. 1863, that is to say 6013*l.* was filled up by subsequent declarations on shipments by other vessels, and since that time, viz: on the 11th Jan. 1864, a subsequent policy was, in pursuance of the above mentioned course of business, effected for 5000*l.*, the whole of which amount has been declared upon.

26. It is to be taken for the purpose of the argument of the special case that cochineal, to the amount declared upon the policy in question, was shipped on board the *Candida*, and that in conse-

quence of disasters sustained by the ship on her voyage, a large portion of the cochineal was lost.

It is agreed that the court shall have power to draw all inferences of fact which a jury ought to have drawn.

The question for the opinion of the court is whether, under the circumstances above stated, the plaintiff is entitled to recover on the said policy.

If the court should be of opinion that he is so entitled, then judgment is to be entered for him for the said sum of 46*l.* 18*s.* 1*d.* and interest on 37*l.* 10*s.* 6*d.*, part thereof, at the rate of 5*l.* per cent. from the 1st April 1863 until judgment and cost of suit. If the court should be of a contrary opinion then judgment is to be entered for the defendant with costs of suit.

Pollock, Q.C. (with him *F. M. White*) for plaintiff:

—The case finds in effect that there was *bona fides* on the plaintiff's part throughout his transactions, and it must be taken that he believed not only that the statement in the anonymous letter in no way affected his goods, but further that the statement was a mere idle rumour unworthy of consideration. The letter too, and its contents, were equally within the knowledge of the defendant and plaintiff, and the presumption of the underwriter's knowledge is sufficient in this case to preclude the defence of a concealment: 2 Doer on Marine Insurance, 555. It is stated in *Arnold on Marine Insurance* (3rd ed.) p. 535, that "loose rumours indeed which have gathered together, no one knows how, need not be communicated; and intelligence may be so general, and its application to the subject insured so doubtful and remote, that the assured need not communicate it, though it may possibly turn out to have related to the subject insured." At the time this insurance was effected the plaintiff did not know that the subject of it would be on board the ship concerning which this loose rumour was promulgated. It was held by Burroughs, J., in *Friers v. Woodhouse* (1 Holt's N.P. 572), that "what the underwriter by fair inquiry and due diligence may learn from the ordinary sources of information, need not be disclosed." In *Elton v. Larkins* (8 Bing. 198), it was decided that the non-communication of facts which were as accessible to the underwriter as to the assured, did not vitiate a policy. [Lush, J.—Is not *Lynch v. Durnsford* (14 East, 494), exactly in point against you?] No, in that case the assured knew that one of the ships upon which his goods were laden was reported to be deep and leaky; here the plaintiff had no knowledge that he should declare the goods insured by this policy upon the *Candida*. Indeed it seems to have been only by accident that they were so declared. This would be carrying the law concerning concealment further than any of the cases yet decided. See the judgment of Shee, J., in *Bates v. Hewitt* (L. Rep. 2 Q.B. 610). *Sir Geo. Honyman Q.C.* (with him *J. C. Mathew*) for the defendant, was not heard.

COCKBURN, C.J.—I think our judgment must be for the defendant. We need not decide the larger of the two questions raised in this case, viz., how far this notice on the board at Lloyd's was intelligence to the underwriters of the contents of the letter to which it referred; or whether a party insuring is compelled to communicate expressly knowledge which he obtains from such a

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source, or whether he is justified in assuming that such a matter ought to be and is known to all underwriters in the course of their business. It has been laid down that the lists at Lloyd's are within the knowledge which every underwriter is presumed to possess, but how far the same presumption relates to a notice of this extraordinary and exceptional nature, we are not justified from the findings of this case in concluding. I think it would be necessary, before we expressed an opinion upon the point, to know whether this is the ordinary business of an underwriter. In my view it is not necessary to consider that question, for according to the facts it was on the day after the notice was exhibited at Lloyd's, and the day after he knew that a cargo was to be shipped for him on board the *Candida*, the plaintiff instructed his agent to make this insurance. He did not at that time know that this policy would apply to, or that he should be able to declare the policy upon, the cargo of the *Candida*; but he knew that it might possibly so turn out. The concealment was that he did not communicate the fact that the policy was intended, if it might happen to be necessary, to cover the shipment in the *Candida*. There were two facts within the plaintiff's knowledge which he did not communicate to the defendant; one was that he knew a cargo would be forwarded for him by the *Candida*; the other was that there existed an anonymous letter which impeached that ship's reputation. We may assume for the purposes of this case that the second of these facts was known equally by the plaintiff and defendant; but without information from the plaintiff, the defendant could not know anything about the first. The case finds that if the defendant knew both these matters he would not have entered into this insurance, but would have required a higher premium. Now, unless he knew the first, it would have been useless to him to know the second. The fact then that plaintiff had received intelligence of a cargo by the *Candida* was known to one and not to the other of the parties to this contract; and in my opinion this constitutes a good and valid defence to the action. I am of this opinion not only on principle, but also on authority. In *Lynch v. Durnford* (14 East, 494), the facts are almost exactly like these; and Lord Ellenborough concluded his judgment in these words: "If the underwriters had had the knowledge possessed by the assured, it might have been a question with them whether they would have insured at all; or, if they did, whether they would not have required an enhanced premium." That is the case here, and the defendant is entitled to judgment.

MELOR, J.—I am entirely of the same opinion. Whether or not the assured was justified in supposing the underwriter to be aware of the subject of the notice, I am perfectly satisfied that the parties did not contract upon equal terms; for the plaintiff knew, and the defendant did not know, of circumstances which rendered it probable that the notice might apply to this particular insurance. I think on principle and on authority the defendant is entitled to succeed.

LOSH and HANSEN, JJ., concurred.

Judgment for defendant.

Attorneys for plaintiff, *Hillyer and Fenwick*.

Attorneys for defendant, *Waltons, Bubb, and Walton*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY AND THE VICE-ADMIRALTY COURTS.

Reported by J. P. ASHALL, Esq., Barrister-at-Law.

Monday, Nov. 13, 1871.

(Present: The Right Hon. Sir JAMES W. COLVILLE, Sir JOSEPH NAPIER, and Sir MONTAGUE SMITH.)

THE EARL OF ELGIN AND THE JESMOND.

Collision—Regulations for preventing collisions at sea—Articles 13 & 16—Risk of collision.

Article 16 of the "Regulations for preventing collisions at sea" only applies when there is a continuous approaching of two ships.

When two vessels are meeting end on, or nearly end on, within the meaning of Article 13, and one of them, at a proper distance, ports her helm sufficiently to put her on a course which will carry her clear of the other, she thereby determines the risk, and is not "approaching another ship so as to involve risk of collision" within the meaning of Article 16, and is not bound to slacken speed or stop.

This was an appeal from a decree made on the 25th July 1870 by the judge of the Court of Admiralty in cross causes of damages, instituted on behalf of the owners of the steamship *Jesmond*, and the owners of the steamship *Earl of Elgin*.

The cause arose out of a collision between those vessels, which occurred about half-past ten p.m. on the 7th May 1870, off Staithes, on the coast of Yorkshire. The *Jesmond* was a screw steamship of 589 tons register, and 100-horse power, and was on a voyage from London to the Tyne in ballast. The *Earl of Elgin* was also a screw steamship of about 608 tons, and was on a voyage from Sunderland to Bordeaux, laden with coals. The weather was fine and clear, and the wind light.

The *Jesmond* was under steam only, steering N.N.W., and making between seven and eight knots an hour, with the Admiralty regulation lights exhibited, and a good look-out being kept on board of her. The masthead and then the side lights of the *Earl of Elgin* were made out at the distance of a mile and a half ahead. According to the evidence of the second mate of the *Jesmond*, who was in charge, the helm of the *Jesmond* was ported, and the vessel went off about a point and a half, and was then brought back to within half a point of her course. When the vessels were about 300 yds. apart the green lights of the *Earl of Elgin* opened into view, and the second mate immediately gave the order "hard-a-port," and placed the dial of the engine room telegraph at stop, but did not know which way he turned it, or whether his signal was heard in the engine room. About a minute after the two vessels came into collision the stem of the *Jesmond* striking the *Earl of Elgin* close by the fore rigging on the starboard side, and the *Earl of Elgin* shortly afterwards sank.

The case set up by the *Earl of Elgin* was that she was under steam, and proceeding at the rate of from seven to eight knots an hour, that the masthead and green light of the *Jesmond* were seen on the starboard bow of the *Earl of Elgin*; that the *Earl of Elgin* was kept on her course with a view to pass on the starboard side of the *Jesmond* until the *Jesmond*, by porting her helm, opened her red lights to the *Earl of Elgin*, causing danger of an immediate collision, where-

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upon the helm of the *Earl of Elgin* was starboarded. But from the evidence of the man on the look-out on board the *Earl of Elgin*, it appeared that he first saw the red light of the *Jesmond* about half a mile off, and thereupon the order was given by the mate in charge of the deck to put the helm hard a starboard.

And it further appeared from the evidence of both sides that nobody at any time apprehended any risk of collision until the *Earl of Elgin* starboarded her helm. The owners of the *Earl of Elgin* pleaded in their answer in the court below that the *Jesmond* improperly neglected to comply with the provisions of Article 16 of the Regulations for preventing Collisions at Sea, by not easing or stopping her engines at a time when risk of a collision was involved.

The learned judge of the Admiralty Court pronounced both vessels to blame; the *Earl of Elgin* on the ground that she improperly starboarded her helm, and the *Jesmond* on the ground that she did not stop or ease her engines under the provisions of Article 16.

His judgment (not reported), after a statement of facts, was as follows: "The first question upon which the court must come to a clear conclusion is, were these vessels meeting end on, so as to bring them within what is called the port-helm rule, the 13th Article of the Regulations for Preventing Collisions at Sea? That article is as follows: 'If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.' Each vessel saw the other at a distance of about a mile and a half off; and the evidence appears to me, and also to the Elder Brethren of the Trinity House—although it is more, perhaps, my province to decide upon this question, and the responsibility of this part of the decision must rest entirely upon me—the evidence seems to me to establish that these vessels were meeting end on in the sense of the rule which I have read. I believe the evidence given by those on behalf of the *Jesmond*, to the effect that they first saw the bright light of the other vessel, then the three lights, then they ported, then they saw the green light of the *Earl of Elgin*, and then they ported, and the collision took place. I might even go into the evidence to show that the testimony on the part of the *Jesmond* is in some sense corroborated by the witnesses on board the *Earl of Elgin*. The man Aikin, who gave his evidence extremely honestly, did not deny that he had expressed a regret for the starboarding; and the captain of the *Earl of Elgin*, when he was asked as to a conversation that ensued when he came on board the *Jesmond*, after the collision, did not deny that he had said so, but he said that he could not recollect what the conversation was, and it was distinctly sworn to by the captain of the *Jesmond*. I, therefore, on the evidence given by the crew of *Jesmond*, corroborated in these particulars by the evidence of the witnesses to whom I have referred on behalf of the *Earl of Elgin*, come to the conclusion that these vessels were meeting end on, so that it was incumbent upon them to put their helms to port, and, we have no doubt that, if they had done so, this collision would have been avoided. But there remains another very important question to be decided—I may say, two questions—which were put by the Admiralty

Advocate; one is, whether the *Jesmond* ought not to have stopped her engines and the *Earl of Elgin* to have stopped hers. We think that the *Jesmond* did err in porting as slightly as she did. The evidence came to this—she ported and then steadied, and did not port again till the collision became nearly inevitable, but it is not upon this ground that I should come to the conclusion that such blame attaches to the *Jesmond* as to disentitle her to recover, if she succeeded on other points; but I mention it as a fault on the part of the *Jesmond*. The real blame that attaches to the *Jesmond* and the *Earl of Elgin* is their not easing and stopping their engines before this collision took place. The more it is examined the less defensible it appears, that two steamers should be going at the joint speed of eighteen or nineteen miles an hour, nearly on opposite courses, seeing each other a mile and a half off, and not take the common precaution of stopping or easing their engines under such circumstances. At all events, we have arrived at the conclusion that the order of the 16th article—'Every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse'—has not been obeyed in this case, and I have no alternative but to pronounce that both parties are to blame for this collision."

From this judgment the owners of the *Jesmond* appealed.

Butt, Q.C. (*R. E. Webster* with him) for the owners of the *Jesmond*. When two steamers show their red light to each other no collision can happen without one steamer starboarding. It is clear from the evidence that the steamers were red light to red light, soon after they sighted each other. Neither side apprehended a collision, nor had they any right to do so when red light to red light. The case for the *Earl of Elgin* was that the steamers were green light to green light, but the look-out said that he saw the *Jesmond's* red light when she was half a mile off. This corroborates the story on the part of the *Jesmond*, that she ported, and so got on the port bow of the *Earl of Elgin*. In his judgment the learned judge said that the *Jesmond* "was approaching another ship so as to involve risk of collision." There was no such risk at the distance of a mile and a half. If there is no reason to believe that the mate ought to have anticipated a collision, he cannot be held to blame for making a mistake. Stopping at 300yds. would not have prevented a collision.

The Admiralty Advocate (*Dr. Deane*, Q.C.) for the owners of the *Earl of Elgin*.—If the *Jesmond* had been prudently navigated, her engines would have been eased or stopped at some intermediate point between a mile and a half and 300 yards from the *Earl of Elgin*. Article 16 of the "Regulations for preventing Collisions at Sea," must be taken in combination with Art. 13, and as supplementary to it. If the master had reasonable cause to apprehend a collision he was bound to apply the supplementary rule, and to ease the engines. If there was risk, not certainty, but probability or chance of a collision, he was bound to stop. How was the officer commanding the *Jesmond* to know that the *Earl of Elgin* would obey the 13th rule? If she did not do so there would have been risk. If the *Earl of Elgin* had been accidentally disabled, she would have been unable to obey the rule, and this is a contingency

against which the *Jesmond* was bound to provide. It was not sufficient for her to port only.

E. C. Clarkson, on the same side.—If the master of a vessel considers he comes under the port helm rule, it is his duty to carry out that rule so that there may be no mistake as to what he is doing. The *Jesmond*, if she ported when her witnesses said, did not port enough. The Regulations are carefully worded, and it must be noticed that article 16 refers not to collision, but to risk of collision, and to the manner in which steamers must act under such risk, and not when in actual danger of collision. The *Jesmond* was bound to slow on sighting the *Earl of Elgin*.

Bunt, Q.C., in reply. The real question is what is meant by risk of collision? In the Regulations for preventing Collisions at Sea (published by the authority of the Board of Trade, by Thomas Gray, 5th edit., and made positive and binding by Order in Council of July 30th, 1865), sect. 1 § 6, it is said, "Every one is unanimous in agreeing that no two ships can come into collision so long as they show each other the same coloured light, green to green, or red to red." These vessels were red light to red light. Both saw the other's red light, and in the same book it is said, § 7, "The rule cannot therefore apply; (a) when a green light is seen anywhere on the starboard side; (b) when a red light is seen anywhere on the port side, &c." The rule here referred to is Art. 13, set out in the judgment. It is further said, § 8, "There is not the remotest chance of collision in either of the cases above put . . ." If my friends are right, whenever a master ports or starboards his helm to get out of the way under Art. 13, he is at the same time bound to slow his engines. This is an absurdity. No collision could have happened here but for the starboarding of the helm of the *Earl of Elgin*.

Sir JAMES COLVILLE delivered the judgment of the court. In this case their Lordships must hold that it has been conclusively found that the two colliding vessels were meeting each other end on, or nearly end on, within the meaning of the 13th sailing rule; that the *Jesmond*, in obedience to that rule, ported her helm—whether enough or not is a question which will be afterwards considered; that the *Earl of Elgin* violated that rule by starboarding instead of porting, and thereby put herself clearly in the wrong, and became *prima facie* responsible for the collision which took place. But the learned judge of the court below, having found these facts, said: "We think that the *Jesmond* did err in porting as slightly as she did. The evidence came to this: She ported and then steadied, and did not port again till the collision became nearly inevitable; but it is not upon this ground that I should come to the conclusion that such blame attaches to the *Jesmond* as to disentitle her to recover, if she succeeded on other points, but I mention it as a fault on the part of the *Jesmond*. The real blame that attaches to the *Jesmond* and the *Earl of Elgin*, is their not easing and stopping their engines before this collision took place. The more it is examined, the less defensible it appears, that two steamers should be going at the joint speed of eighteen or nineteen miles an hour, nearly in opposite courses, seeing each other a mile and a half off, and not take the common precaution of stopping or easing their engines, under such circumstances." That part of the judgment, there-

fore, raises two propositions; first, that the *Jesmond* did not port sufficiently, but, at the same time, qualifies that finding by saying that, of itself, that circumstance would not disentitle the *Jesmond* to recover. The learned judge, however, as their Lordships understand his judgment, would couple the insufficiency of porting with an assumed obligation to slacken speed, under the 16th article, and finds that, under the whole circumstances of the case, the *Jesmond* ought to have slackened speed as well as the *Earl of Elgin*, and that by reason of that fault on the part of the *Jesmond* the damage, according to the rule of the Court of Admiralty, is divisible between the two vessels. Their Lordships think that it will be desirable, in dealing with these two propositions, to deal with them, in the first instance at least, separately, as has been done in the argument. Their Lordships see no reason to doubt the truth of the evidence of the second mate of the *Jesmond*. They believe, upon his evidence, and the learned judge of the Admiralty Court has certainly not found that that evidence was to be disbelieved, that, when the three lights of the *Earl of Elgin* were first seen, the order to port was given. They believe that she payed off under her port helm a point and a half, but that before she had gone so far the mate gave the order to steady the helm, which ultimately brought back the vessel to within half a point of her original course. Their Lordships were urged by Dr. Deane to consult their nautical assessors upon this point, and they have done so; and these gentlemen, so far from finding, as Dr. Deane anticipated, that the evidence must be inaccurate in stating that the vessel went so far under the port helm as to pay-off a point and a half, think that there is nothing inconsistent or unreasonable in that statement; on the contrary, that upon principles of navigation, the fact is credible and what might be expected. Their Lordships, therefore, accept the evidence as given. Again, the nautical assessors also concur in thinking that the *Jesmond*, having paid-off as far as a point and a half, was, though brought back to within half a point of her original course when her helm was steadied, placed upon a line on which, if the other vessel had even kept her course, she would have gone clear, and that she had brought the two vessels into the position of red light to red light, and that the danger of collision was at an end. *A fortiori*, had the *Earl of Elgin* ported her helm and obeyed the rule, as she was bound to have done, the distance between the two vessels would have been increased, and the collision would have become still more improbable. That being the state of the case, their Lordships can hardly concur with the learned judge in thinking that the alleged insufficiency of porting on the part of the *Jesmond* in any degree contributed to the accident. They next proceed to consider whether they ought to hold that those on board the *Jesmond*, in omitting to slacken the speed of their vessel, were guilty of a default which justifies the judgment under appeal. Now the 16th Article says: "Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed." It is not necessary to read further, because nobody contends that the *Jesmond* was bound to stop and reverse her engines except at the moment when a reversal of the engines had almost become impossible, namely,

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when the other vessel was nearly run into. The article imposes this obligation only upon a ship which is "approaching another ship so as to involve risk of collision." It may be said that there was a moment at which the two vessels were in that condition, for if they had not been in that condition they would have been within Article 13. But it seems to their Lordships, taking the two articles together, that Article 16 only applies when there is a continuous approaching of the two ships, and, indeed, it was admitted candidly by Dr. Deane that there was not an obligation to slacken the speed the moment the two vessels sighted each other, and when the first porting took place. If their Lordships are right in their view of what was then done, the original risk of collision was determined when the vessels were brought port light to port light. Nor can it be said that after that porting the *Jeomond* was approaching the *Earl of Elgin* so as to involve a risk of collision, unless the true construction of the term "risk of collision" be that for which in one part of his argument Dr. Deane contended. As their Lordships understood his argument, he was prepared to insist that the term must be taken to include either a default on the part of the other vessel to do what the 13th Rule required of it, or the disabling of that vessel by some accidental cause of which the *Jeomond* was not, and probably could not be aware. It does not appear to their Lordships that the first of those elements can be reasonably imported into the risk of collision; there is no foundation in fact for supposing that the *Earl of Elgin* was prevented by any accident from doing what she ought to have done; nor are their Lordships aware that in obeying these rules it is necessary for persons navigating vessels to foresee and to provide against every possible accident. Their Lordships would be extremely sorry, by any decision of theirs, to diminish the stringency of any rule tending to prevent the great loss of property and destruction of life which are but too common in our narrow seas; but they do not feel at liberty to extend the application of the 16th Article beyond what seems to them to be its proper construction, and therefore they must respectfully differ from the learned judge in what he has found in respect to the obligation which lay upon the master and crew of the *Jeomond*. The result therefore will be that their Lordships will humbly advise Her Majesty to allow the present appeal; and to declare and order that the *Earl of Elgin* was solely responsible for the collision, and must be condemned in damages accordingly, and of course the costs in the court below and the costs here will, according to the ordinary rule, follow the result.

Appeal allowed.

Solicitor for the appellants, *Thomas Cooper*.

Solicitors for the respondents, *Lowless, Nelson, and Jones*.

Nov. 14 and 15, 1871.

(Present: The Right Hon. Sir JAMES COLVILLE.
Sir JOSEPH NAPIER and Sir MONTAGUE SMITH.)

THE MAGNA CHARTA.

Collision—Fog—Duty and powers of Trinity Masters as assessors in the Admiralty Court—Evidence—Conflict of opinion between judge and Trinity Masters.

Four to five knots an hour is not a moderate speed for a steamer in a thick fog in the Baltic, twenty-five miles east of Gotland.

The duty of Trinity Masters, sitting as assessors in the Admiralty court, is to assist the judge in questions of nautical skill. In case of a difference of opinion between the judge and the assessors, the judge is not at liberty to act upon any influences which they may draw from the evidence, except they accord with his own. It is the duty of the judge to decide the case on his own responsibility.

THIS was an appeal from a decree of the Judge of the High Court of Admiralty in a cause of damage instituted by the owners, master and crew of the steamship *Scotia*, against the steamship *Magna Charta*. The vessels came into collision at about four o'clock in the afternoon of Aug. 3rd, 1870, about twenty-five miles east of the Island of Gotland. The *Magna Charta* was a steamship of 788 tons register, propelled by engines of 90-horse power, with a crew of twenty-three hands all told, laden with a cargo of oats, on a voyage from Riga to Havre. The *Scotia* was a steamship of 535 tons, and 160-horse power, and was navigated by her master and a crew of twenty-three hands, and was proceeding from Sunderland to Cronstadt, with a cargo of coals. The *Magna Charta* struck the *Scotia* on her starboard side a little abaft the beam, and cut into her engine-room through her coal bunkers, and the *Scotia* sank in a few minutes. It was admitted on both sides that at the time of the collision the weather was very foggy. The remaining facts of the case are sufficiently set out in the following judgment (not reported) delivered by Sir R. Phillimore on Feb. 28th, 1871:

"It appears that the *Scotia* was navigated with the greatest care, both with respect to vigilance and speed; with respect to vigilance, because all the men whose especial duty it was to be on the look-out, and, indeed, all the watch, more or less, were on the look-out. And with respect to speed, because the rate of it had been reduced to one and a half knots an hour, 'just enough to steer,' the master of the *Scotia* said, that is to a minimum consistent with keeping her under command. The two vessels became mutually visible at a distance of 70 yds., when the *Magna Charta* was observed four points on the starboard bow of the *Scotia*, and then the *Scotia* starboarded her helm and put on full steam as the only chance of avoiding the collision, which manoeuvre was in the circumstances not improper, and the best means of attempting to get out of the way of the *Magna Charta*. The steam whistle had been kept perpetually going. It appears that the *Magna Charta* had been all the morning steaming in a calm, and in comparatively clear weather; that a haze came on between one and two p.m., which greatly increased in thickness towards three p.m. A little before three she was going full speed, and then the master went below to his cabin, leaving the deck in charge of the second mate. Her full speed was alleged to be from seven to eight knots. At about a quarter-past three, while the master was below, he heard the signal for putting her at slow half-speed. He came on deck for a short time, and seems to have thought the order unnecessary. From that time to the collision the fog seems to have been dense, and she continued at the same speed, making, as the engineer in charge says, from twenty-eight to thirty revolutions, her full speed being sixty-five. This so-

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called engineer represents himself as the third engineer. He had no certificate, and was, I suppose little more than a leading stoker. No other order was given till just before the collision. The watch on deck consisted of the second mate and four hands. There was no look out forward, the mate was on the bridge, the men were shifting the coal, and the man who would otherwise have been on the look out was so employed. At this time the fog was so thick that a vessel could not be seen more than a ship's length. The whistle appears to have been sounded from the time that the vessel was put at slow half-speed. The *Scotia* was seen nearly right ahead, at a distance of 70 yards, by the mate from the bridge, who almost immediately stopped and reversed. The collision, as I have already said, was violent, the *Magna Charta* cutting 11 feet into the *Scotia*, according to the evidence of her captain. In this state of circumstances, it appeared to me that the *Magna Charta* was alone to blame for the collision, partly on the ground of her careless navigation, but more especially on the ground of her speed. The Trinity Masters, by whom I was assisted, were of opinion that the accident was inevitable, and were disinclined to believe the evidence as to the reduced speed of the *Scotia*. It was then suggested to me to adopt a course, occasionally adopted by my predecessor, namely, to refer the case and evidence to the Trinity House, with a request that the opinion of other Trinity Masters might be taken thereon. The result was a conflict of opinion among those to whom it was referred, two holding that the accident was inevitable, and two that the *Magna Charta* was alone to blame. I have thought it right to state these circumstances, and I have thereupon determined to follow the opinion I originally formed upon the evidence, and still retain; and I therefore pronounce the *Magna Charta* alone to blame for this collision."

From this judgment the owners of the *Magna Charta* appealed, on the grounds that the evidence proved that the *Magna Charta* was not going at an improper speed, and that the course taken by the judge—referring the case and evidence to the Trinity House—was irregular and inexpedient; and even if that course were justified by the practice of the court, the preponderance of professional opinion in favour of the appellants (including the opinion of the two elder brethren who heard the case) was so great that the judgment should have been given in favour of the appellants.

Butt, Q.C., and F. M. White, for the appellants. It has been said that it is hopeless to appeal on a matter of fact. This does not apply here. The learned judge and the assessors differed in opinion, the assessors thinking the *Magna Charta* not to blame. The opinions of the Elder Brethren of the Trinity House, if they are to be taken into consideration, and those of the assessors, who heard the case, gives the appellants the voices of four as against two. This system of reference is not expedient, as it is better that the evidence should be heard if possible. The opinion of the assessors who did hear it is in favour of the appellants, and must be taken in preference to that of the others. [Sir J. NAPIER.—Have the assessors the right to decide questions of fact? They may make up their minds and record their dissent if necessary. Whatever weight should be given to the opinions

of ordinary assessors, in the Admiralty Court there are reasons why their opinions should receive great weight. That court will not receive evidence of experts, as the assessors are the proper advisers of the court. The Trinity Masters did not believe the story of the *Scotia*, as they thought that if she was only going at the speed proved she could not have been well in hand for steering purposes. It is found in the judgment that the *Magna Charta* was not going at an immoderate speed.

Milward, Q.C., and Clarkson, for the respondents. —The full speed of the *Magna Charta* was about nine knots, and half speed must have been about four and a half knots. This is too high a rate. The depth of the blow shows that she must have been going at a great rate of speed. It is hard upon the parties to send the case down to the Trinity House, and it is a dangerous course. The rate of speed was not a question for the Trinity Masters, but for the court. [Sir MONTAGUE SMITH. —It was a question of fact for the court whether the speed was more than the witnesses for the *Magna Charta* said.] It is the duty of the Trinity Masters to give assistance to the court in determining the possibility of facts given in evidence by witnesses, but not to decide whether the evidence is true or false.

Butt, Q.C., in reply.

SIR JOSEPH NAPIER delivered the judgment of the court, and (after commenting on the evidence, and finding that the rate of speed of the *Magna Charta* was from four to five knots an hour) said:—Their Lordships are satisfied, looking at the nature of the blow, and the evidence as to the speed of the *Magna Charta*, that she was not going at a moderate speed, and that from the want of a sufficient look-out, as well as to the *Magna Charta* not having reduced her speed, the collision is to be attributed. The learned judge of the court below as a matter of fact, came to the same conclusion. It has been said that there was a difference of opinion between those gentlemen by whom the learned judge of the Admiralty Court was assisted, that they took a different view of the case, and that, when the case was referred to the Elder Brethren of the Trinity House, a difference of opinion existed there. It was, however, the duty of the learned judge to decide the case upon his own responsibility. The learned judge has got the responsibility cast upon him of arriving at a judicial conclusion; he is advised and assisted by persons experienced in nautical matters, but that is only for the purpose of giving him the information he desires upon questions of professional skill, and having got that information from those who advise him, he is bound in duty to exercise his own judgment, and it would be an abandonment of his duty if he delegated that duty to the persons who assisted him. The assessors merely furnish the materials for the court to act upon, and, for convenience sake, they are allowed to hear all the evidence. If the learned judge is unable to see what are the grounds upon which they give their opinion and draw their inferences, or assume facts, and if they are other than those to which he gives his assent, he is not at liberty to act upon any inferences which they draw from the evidence, except they accord with those of which he himself approves. The deductions to be drawn from the evidence must be his own, and all the assessors can do is merely to give him their aid and advice

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in those matters in which they are supposed to be skilled. Their Lordships are of opinion, upon the whole of the evidence, that there was a want of a sufficient look-out on board the *Magna Charta*, and that the inference to be drawn from the evidence is that her speed was not a moderate speed. There Lordships have come to the conclusion that the view taken upon the whole case by the learned judge of the Admiralty Court was the right view, and therefore they will humbly recommend Her Majesty to affirm the judgment of the court below, and, of course, with costs.

Appeal dismissed.

Solicitors for the appellants, *Hilger and Fenwick.*

Solicitor for the respondents, *Thomas Cooper.*

Thursday, Nov. 16, 1871.

(Present: Sir JAMES W. COLVILLE, Sir ROBERT PHILLIMORE, Sir JOSEPH NAPIER, and Sir MONTAGUE SMITH.)

THE EUXINE.

Practice—Proxies—Duty of proctors with respect to—Vice-Admiralty Rules and Regulations. r. 40. The usual practice in the High Court of Admiralty as to proxies is for proctors to proceed without the exhibition of any proxy until called upon to produce it, and when they are called upon they satisfy the law by stating the names of the parties for whom they appear.

In the vice-admiralty courts proctors are not bound to do more than this under rule 40 of the Vice-Admiralty Rules and Regulations, unless upon a strict order of the court.

The production of a proxy, purporting to be duly signed and sealed, but without proof of the handwriting of those who appear to have subscribed the instrument, is a prima facie compliance with an order to produce a proxy, and throws the onus of disproving its authenticity on the opponents.

An objection to a suit on the ground of the non-production of a proxy is a preliminary objection, to be raised on motion, and not on protest, and the utmost a court can do where such proxies as above are produced is to stay proceedings until further information can be obtained.

THIS was an appeal from a decree of the Judge of the Vice-Admiralty Court of Malta, delivered on the 4th Oct. 1870, upon the protest of Roche Marins Fabre, master of the steamship *Euxine*, who had appeared under protest to a suit instituted on behalf of the appellants against the steamship *Euxine*, in the Vice Admiralty Court of Malta. The appellants were John Harvey and William Benjamin Harvey, of Littlehampton, in the County of Sussex, the owners of the late English brig *Clymping*; Emin Schemell and Biobara Schemell, merchants at Liverpool, trading under the name of Schemell, Brothers, and Co., the owners of the cargo of cotton-seed laden on board the said brig at the time of the loss, and George Hedgecock, the master and others the crew of the said brig. The respondents were owners of the French steamship *Euxine*, belonging to Marseilles, and carrying on business at that city as the firm of Fraissinet, Péro et Fils. The suit arose out of a collision between the *Euxine* and the *Clymping*, which occurred in the Mediterranean about 120 miles west of Alexandria, on 2nd July 1870, and occasioned the total

loss of the *Clymping* and her cargo, and of the private effects of her master and crew. On the 16th July 1870, William John Stevens, a proctor practising in the Vice-Admiralty Court at Malta, filed a *proscipe* to arrest the *Euxine*, and to cite all persons interested "to answer to John Harvey and another, of Littlehampton, in the county of Sussex, the owners of the English brig *Clymping*, George Hedgecock, master, Emin and Biobara Schemell, of Liverpool, in the county of Lancashire, the owners of the cargo of cotton seed, &c. . . . and George Hedgecock aforesaid, the master and others, the crew of the said brig, as owners of private effects also on board at the time, and J. W. Harper, on behalf of the salvage committee at Lloyd's of which he is secretary, other parties interested, the plaintiff represented at Malta by William Leonard, a partner in the firm of Robinson, Duckworth, and Co., bankers, merchants and agents for Lloyd's, of the city of La Valetta aforesaid, in a cause of damage civil and maritime." The affidavit to lead warrant, sworn and filed the same day, set out the following telegram:

To Robinson, Duckworth and Co., Malta.

Seize for committee, through Admiralty Court, French steamer *Euxine*, owners Fraissinet, Péro et Fils, of Marseilles, Captain Fabre, which will call at Malta about 15th inst., for running down English brig *Clymping*, George Hedgecock master, on June 2nd last, near Alexandria, at the suit of John Harvey and another, of Littlehampton, Sussex, owners of the brig, and Emin and Biobara Schemell, of Liverpool, Lancashire, owners of cargo of cotton seed, and Hedgecock, master, and others, crew of brig, for private effects, damages, 10,000*l*. When seized, give every facility for release on proper security; not promptly.

Harper, secretary, Salvage Committee,
Lloyd's, July 12, 1870.

The vessel was thereupon arrested. On the 19th July, an appearance under protest to the said suit was entered on behalf of Roche Marins Fabre, the master of the *Euxine*, by George Domenico Page, a proctor of the court, and the sum of 10,000*l*., the amount for which the warrant of arrest was issued, was paid into court and the release of the vessel thereby procured, and this sum was afterwards withdrawn on bail being given.

On the 1st Aug. 1870, the proctor for the *Euxine* filed his petition on protest, which alleged three grounds of objection to the jurisdiction.

1. That this Court of Vice-Admiralty has no jurisdiction in the trial of this cause brought by the said William Leonard (the plaintiff's agent), because Her Majesty's Court of Commerce in Malta possesses powers and authorities for the exercise of admiralty jurisdiction, and therefore this court of vice-admiralty cannot have concurrent jurisdiction with the said Court of Commerce.

2. That should it be held that this court of vice-admiralty has concurrent jurisdiction with Her Majesty's Court of Commerce of Malta, the title and authority of the said William Leonard in this cause is insufficient and illegal, it being merely in virtue of a telegraphic despatch produced in the registry of this court, without containing the names and descriptions of all the parties claiming damage, and without documentary proof of the authenticity of such telegram.

The third ground of objection to the jurisdiction was, that the grounds of the suit, the damage alleged to have been done to the *Clymping* by the *Euxine*, had already been made the subject of a suit before the French Imperial Consular Court at Alexandria, which had dismissed the claim on behalf of the *Clymping*, in consequence of the non-presentation of a protest in that court within twenty-four hours after arrival in Alexandria, as required by the rules of the court, so that the

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cause was, in fact, *res judicata*, and could not be tried again in the vice-admiralty court.

To this petition on protest an answer was filed by Stevens, as proctor holding a special proxy for the owners, &c. of the *Olymping* and her cargo on the 12th Aug. 1870, affirming the jurisdiction of the court under the Vice-Admiralty Court Act 1863, and alleging:

3. That the title and authority of the said William Leonard for entering this cause is sufficient and legal, it being not merely in virtue of the telegraphic despatch produced, but in virtue of written and duly signed confirmations thereof, and subsequent formal proxies or powers of attorney to Stevens the proctor, containing names and descriptions of the parties claiming damage.

The answer further pleaded *res judicata* was no defence, as the only point contested in the French consular court was of a purely technical nature, and concerning the rules of that court.

On Aug. 17th a reply under protest was filed by the proctor for the *Euxine* containing (*inter alia*) the following paragraphs:

3. That without motion or leave of the worshipful the judge of this court, the said William John Stevens, for the said William Leonard, as aforesaid, has not taken part in these proceedings by replying to the said act on protest as asserted, specially by John Harvey, &c. . . . the plaintiffs, represented by William Leonard, a partner in the firm of Robinson, Duckworth and Co., bankers, merchants and agents for Lloyd's at Malta, all parties abroad, asserted plaintiffs, who were previously represented by the said William Leonard without authority, which appearance of the said William John Stevens in the reply to the act on protest for persons not residing in this island of Malta, without having entered an action on their behalf, without leave of this court, and without any justification of his assumed title and authority, is irregular and illegal.

4. That the present appearance of the said William John Stevens as special proxy proves that the said William Leonard had not legal power to institute the action taken in this cause of damage, civil and maritime; and whereas very serious loss has been occasioned to the master and owners of the steamship *Euxine* by her arrest and consequent detention in this port of Malta, it is of the greatest importance to the said Roobe Marion Fabre, master of the said vessel *Euxine* that the title and authority of the said William Leonard, comprising the titles, names, and descriptions of his constituents abroad at the time of issuing the warrant of arrest from this court, should be legally furnished and fully authenticated in the registry of this court, in order that the owners and master of the said ship *Euxine* should know the proper parties against whom they may act for all losses and damages arising from the arrest and detention of the said ship *Euxine*.

On the 23rd Aug. a rejoinder was filed on behalf of the owners, &c. of the *Olymping*, taking issue on the points set out in the reply, and saying that Stevens, the proctor, "will in due time produce his authority." The pleadings were then concluded.

In an affidavit sworn on Aug. 29th, 1870, William Leonard and Stevens, the proctor, exhibited two proxies, as having been received by the former in a letter from Harper, the secretary of the salvage committee at Lloyd's. The proxies were identical, save as to the signatures, and the material parts are as follow:

Whereas there is now depending in the Vice-Admiralty Court at Malta a certain cause of damage on behalf of John Harvey, &c. . . . and whereas we, the undersigned John Harvey, &c., are desirous of nominating and appointing a proctor, &c. . . .

Now know all men by these presents that we, the said John Harvey, &c., do hereby nominate, and in and by these presents constitute and appoint William John Stevens, of La Valetta, in the Island of Malta, proctor, &c., or in his absence, any other proctor of the said

Vice-Admiralty Court of Malta, to be our true and lawful proctor for us, and in our names to appear before the said court and exhibit this, our special proxy, and in virtue thereof to prosecute the said cause so instituted, &c., . . . until the final conclusion thereof, &c. . . .

Giving and granting unto the said W. J. Stevens full power and authority to appoint one or more substitutes, &c. . . . And whatsoever our said proctor shall lawfully do or cause to be done in and about the premises we do hereby respectively promise to ratify, confirm, and allow for valid.

In witness whereof we have hereunto respectively set our hands and seals this 22nd of July, 1870.

(Signed) { JOHN HARVEY (L.S.)
WILLIAM B. HARVEY (L.S.)

Signed, sealed and delivered by the within-named John Harvey and William Benjamin Harvey in the presence of
(Signed) ROBERT FRENCH,
Solicitor, Littlehampton.

The proxy for the owners of the cargo parported to be signed by them, and to be witnessed in a similar manner by an underwriter and an accountant of Liverpool, and was also dated the 22nd of July. The affidavit above mentioned also contained an allegation by Stevens, that he was retained on the 13th July by William Leonard to act for him in the cause.

On the 26th of Sept. a further affidavit was filed, exhibiting a similar proxy from the master and crew of the *Olymping*, dated the 14th Sept. 1870.

It was further proved that William Leonard had received, besides the telegram annexed to the affidavit exhibited to lead the warrant of arrest, certain other telegrams delivered by the messengers of the Mediterranean Telegraphic Extension Company, one of which, dated London, 16th July 1870, contained a request from the said John Harvey to "take proceedings against the *Euxine* as instructed by the salvage committee at Lloyd's;" and the other, dated Liverpool, 15th July, from Sobemell Brothers and Co., authorised "proceedings against *Euxine*, as London Salvage Committee instruct," and the transcripts of these telegrams were verified by affidavit and brought into court. On 9th Sept. 1870 Stephens brought into court the following letter:

Association for the Protection of Commercial Interests as respects Wrecked and Damaged Property. Incorporated by Royal Charter.

Royal Exchange, London, 15th July, 1870.

Messrs. Robinson, Duckworth, and Co.
Olymping and *Euxine*.

Dear Sirs,—I enclose copies of the telegrams which have passed between us. The powers of attorney shall come forward by next steamer; they could not be prepared for this mail. I feel sure you will do what is necessary in the mean time. I hope to communicate more at length in a few days. I am, dear Sirs, yours faithfully,

(Signed) J. A. W. HARPER, Secretary.

In an affidavit sworn on the same day, William Leonard verified this letter, and swore to having received it in course of post, and further said that Harper was secretary of the association, "as had already been proved in this case by the production on Sept. 5th, on the hearing thereof, of the printed London Directory, published under the authority of her Majesty's Postmaster-General." The copy telegram inclosed and filed at the same time was the telegram already set out as appearing in the affidavit to lead warrant. On Sept. 9th Stevens, the proctor, filed a copy of the register of the *Olymping*, also verified by affidavit, by which it appeared that John Harvey and William Benjamin

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Harvey were the registered owners of 48-64ths and mortgagees of 16-64ths of the *Olymping*, and on Sept. 26th Stevens filed a document purporting to be the bill of lading of the cargo of the *Olymping*, which was signed by George Hedgecock, and in which the named consignees were Schemeil Brothers and Co., of Liverpool, and this bill of lading was forwarded to Leonard in a letter purporting to be from Harper. The bill of lading had on it signatures purporting to be those of George Hedgecock and Schemeil Brothers and Co.

The questions arising upon the proceedings upon protest were argued upon the 5th, 12th, and 14th Sept., before Sir Antonio Micallef, judge of the Vice-Admiralty Court, and on the 4th Oct. 1870 the learned judge pronounced two decrees—the first decided in favour of the jurisdiction of the court; the second, which related to the subject of this appeal, was as follows:

"The court, on the protest or exception of the defendant against the title of the plaintiff Leonard, in the names of which the instituted action has been entered in the action book of the court under date 16th July 1870, by the notary, William John Stevens, duly authorised to practise as proctor in this court, and appearing for the plaintiffs, represented in this island by the aforesaid Leonard.

"Considering—

"That, although it is manifest from the telegram despatched from London on the 12th July 1870, and received in this island on the 13th July 1870, as set forth in the affidavit of the said Leonard, under date of the 16th July, 1870, that one 'Harper, secretary salvage committee, Lloyd's,' did empower the said Leonard, for Robinson Duckworth, to arrest for the said committee, under the authority of this court, the French steam vessel *Euxine*, for 10,000*l.* sterling, pretended amount of damages caused on the 2nd June 1870, in the vicinity of Alexandria, to the English brig *Olymping*, lately commanded by Captain George Hedgecock, and this at the suit, as asserted in the said telegram, of one John Harvey and another, of Littlehampton, in the county of Sussex, owners, as therein stated, of the said brig, and of Emile and Biachra Schemeil, of Liverpool, in the county of Lancaster, owners, as is also therein stated, of the cargo of the said brig, consisting of cotton seed, as likewise of the said Captain Hedgecock and others of the crew of the said brig for private effects, it has not been, however, proved by the said Leonard that the said telegram was sent to the said Leonard by the said Harper; that although a copy of the said telegram was transmitted on the 15th July, 1870 to the said Leonard for Messrs. Robinson Duckworth, and Co., in a letter bearing the signature of J. A. W. Harper, who is therein qualified as secretary of the Association for the Protection of Commercial Interests as respects Wrecked and Damaged Property, incorporated by royal charter; and although the receipt of the said letter, besides being corroborated by the Post-office stamps, is affirmed by the said Leonard in his affidavit of the 9th Sept. 1870, no proof has been produced in authentication of the handwriting of the subscriber of the said letter not admitted by the defendant; that, besides the want of said authentication, no proof has been produced that the said Harper, is the secretary of the before-mentioned committee, and for such an object the Post-office London Directory, exhibited

by the aforesaid Leonard is not admissible, because, according to law, similar directories form no proof (see Taylor on Evidence, vol. ii., No. 1585); that the royal charter by which it is alleged the before-mentioned association was incorporated has not been produced, and consequently it does not result either from the said charter or from any other document what are the powers of the said secretary, and therefore whether he is a person competent to appear in this suit for the said committee; that it has been in no way shown in what consists the interest of the before-mentioned committee in the present cause, in which are also made to appear the alleged owners of the vessel and cargo of the vessel and individuals alleged owners of private effects on board the said vessel; if the said committee he interested in this cause on behalf of the insurers, such interest ought to have been proved by means of the policies of insurance and of the act of abandonment on the part of the owners; that owing to the defect of proof as required by law in confirmation of the telegrams annexed to the two affidavits of the aforesaid Leonard, under date of the 29th Aug. 1870, no proof of a warrant to the said Leonard to effect the before-mentioned arrest is afforded either by the telegram directed to Duckworth, Malta, on the 17th July 1870, as is alleged in the said telegram by Harvey, Littlehampton, or by the telegram directed to Robinson, Duckworth, and Co., Malta, on the before-mentioned day of the 13th July 1870, as is alleged in the said telegram by Schemeil Brothers and Co., Liverpool; that no proof such as required by law has been produced in authentication of the signatures of John Harvey and William B. Harvey, or at least of the signatures and of the seals of the witnesses attesting the said signatures in authentication of the signatures of Emin Schemeil and of Biachra Schemeil, or at least of the signatures and seals of the witnesses attesting the said signatures, or in authentication of the signatures of George Hedgecock and of the other individuals alleged to form part of the crew of the brig *Olymping*, or at least of the signatures and seals of the witnesses attesting the said signatures, as all such signatures and seals appear opposed to the three proxies alleged to be executed in favour of and directed to the before named proctor, William John Stevens, and exhibited with the affidavits of the aforesaid Leonard and of the said Stevens, under the dates of the 29th Aug. 1870, and of the 26th Sept. 1870; that the signatures of George Hedgecock, and of Schemeil Brothers and Co., have not been authenticated, as they appear on the bill of lading, exhibited by the said Leonard with his affidavit on the 26th Sept., 1870, and which bill of lading is stated to have been by him received on the 23rd Sept., 1870, in a letter (not produced) bearing date the thirteenth of the said month from J. A. Heathcote, of London, on behalf of J. A. W. Harper, Esq., the Secretary of the Salvage Committee at Lloyd's.

"Declares and decides.

"That it does not appear that the said Leonard and the said proctor are persons legitimately authorised to represent in a suit of law the before-mentioned absent parties, and in whose name the action was instituted, and therefore pronounces for the protest of the defendant, and dismisses the suit with costs in favour of the defendant, and against the said Leonard personally recoverable by him

from those parties who may be pledged to him according to law."

From this judgment the owners of the *Clymping* and of her cargo and her master and crew appealed, on the grounds, that the suit was properly instituted on behalf of the appellants; that the appellants adopted and ratified the institution of the suit on their behalf; that the exhibition by the proctor of the appellants of the proxies of his parties was sufficient proof that he had authority to institute and prosecute the said suit; that there was sufficient evidence produced on the part of the appellants to show that they were interested parties, and that they had authorised and adopted the institution of the suit; that William Leonard was no party to the suit, and all questions as to his title and authority were immaterial and irrelevant under the circumstances.

Butt, Q.C. (E. G. Gibson with him) for the appellants.—The telegram of 12th July, 1870, was sufficient authority to institute the suit. The proxies were put in after. It cannot be contended that a proxy may not be given after a suit has been instituted. The parties may ratify the acts of their agents. The decision goes on the ground that there is no proof of the handwriting in the proxies or in the letters. If Leonard and Stevens were not duly empowered how did they come by the original bill of lading? The practice of the vice-admiralty courts is regulated by the Orders in Council of June 27th, 1832, made in pursuance of the powers conferred by 2 Will. 4, c. 51, s. 1. By sect. 40 of these rules and regulations, no doubt, proxies may be required, (a) under certain circumstances. We have complied with this requirement by producing proxies in the form set out in the appendix to the rules. Our proxies are witnessed in the same way as required by that form, and are proper proxies under the rule. This is a claim against a foreign ship, and she may never come into our hands again. Is it to be said that because the proxies may possibly be forgeries they are not to be of any effect? They raise a *prima facie* presumption that Stevens was duly authorised, and it lies upon the respondents to rebut that presumption.

E. C. Clarkson for the respondents.—The real question is, how did the matter present itself to the respondents in the court below and to the judge of that court? The rule as to proxies is positive. Whatever may be the practice of the High Court of Admiralty, in the Vice-Admiralty Court it was competent to the respondents to require the production of proxies. Do proxies require evidence to prove them, or do they prove themselves? There was no proof that they were of more value than blank papers. The appellants had every opportunity of giving evidence of their authenticity, and chose to go to trial without doing

so. In paragraph four of our reply we required the production of the authority. The persons taking active proceedings in the matter were not persons entitled to sue, they being only Lloyd's Salvage Committee. [Sir R. Phillimore.—As agents in the first instance, and then a proctor took up the suit, and I should have thought this ratified the proceedings. Sir J. Colville.—You contend that on the pleadings the appellants must prove the signatures?] In Clarke's *Praxis*, p. 13, it is said: "The warrant of attorney or proxy in civil and maritime causes is made in the same form with the proxy or procuratory *ad lites*, in ecclesiastical causes, &c. . . . Proxies of this kind, in order to be authentic, should be sealed with an authentic seal, in the same manner that such papers are in the ecclesiastical courts." See also Pritchard's *Digest*, p. 519. The ancient practice of the court was for proctors to exhibit and file proxies. Now the court may order a proxy to be brought in; and it is not sufficient to bring in a proxy without due verification. [Sir R. Phillimore.—I have always understood that proctors were responsible officers, and that they were liable for dismissal for doing anything wrong.] No doubt, but this is a question whether the documents produced by the proctor were sufficient. [Sir R. Phillimore.—Ought this question to have been raised in this way? The Judge decided that he had jurisdiction in the case, and then decided that those parties could not proceed.] I should have thought that the powers of the proctors were not matter of pleading, but as both parties have chosen this way it must be considered. [Sir R. Phillimore.—It would be a special issue; a preliminary point altogether. Sir MONTAGUE SMITH.—The suit ought to have gone on. There should have been an application to stay proceedings to await due proof of authority. Rule 40 of the Vice-Admiralty Regulations is to prevent proceedings under a colour of authority where there is none, but it is an increase of expense, and therefore ought not to be enforced unless absolutely necessary.] The rule has been enforced in the *Dumfriesshire* (Stuart's Vice-Admiralty Cases in Lower Canada, p. 245). [Sir R. Phillimore.—Rule 40 is to prevent proctors proceeding without authority. Is there any ground in this case for supposing that there was no right on the part of Leonard and Stevens to proceed?] It appears by the *proscript* that Harper and Leonard were improperly joined. No doubt this raised the suspicions of respondents. The judgment, however, goes on the ground that the signatures and seals were not duly authenticated. (3 Burns' Ecclesiastical Law by Phillimore, 9th edit., p. 377). A document is not a proxy until the handwriting is duly proved before the court. A proxy is a warrant of attorney, and no such document would obtain payment out of the Court of Chancery without authentication. There was ample time to prove the signatures.

W. G. F. Phillimore, on the same side.—There are three questions. Had we a right to call for proxies? Did we call for them? Did we get proxies? Sect. 40 of the Vice-Admiralty Regulations is made under statutory authority and not by the judge himself, and he could not disregard it. The rule was framed for such a case as this. Two persons were joined in the suit who had no right to intervene. In a court of common law

(a) See "Rules and Regulations made in pursuance of an Act of Parliament passed in the second year of the reign of His Majesty King William the Fourth, touching this practice to be observed in suits and proceedings in the several Courts of Vice-Admiralty abroad, and established by the King's Order in Council," p. 26. Rule 40 is as follows: "Although proxies are not usually exhibited in maritime suits, yet they may sometimes be required, in order to prevent proctors from proceeding in causes on instructions from parties not being themselves entitled to intervene, or not having a legal person *stans* to prosecute a cause." For the form of the proxy required, see the appendix to these rules, No. 239.

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or Chancery misjoinder of plaintiffs was formerly fatal, and is now ground for striking out the names. This was sufficient to cause suspicion and to give a right to call for proxies. The *Wilhelmine* (1 W. Rob. 335; 2 Notes of Cases, 213), decides that a proctor is not only bound to give the names of the parties for whom he appears, but to show that he has authority. The *Dumfriesshire* (sup.) was a case to recover penalties under the Passengers Act (5 & 6 Will. 4, c. 58), and shows that the non-production of a proxy is ground for the dismissal of a suit. We called for proxies by appearing under protest. When so appearing parties are bound to set forth their reasons at once, and we did so in our reply, par. 3. We there deny that the proctor held a proxy. [SIR JOSEPH NAPIER.—Do you contend that no suit can be instituted without a proxy?] No. A suit may go on to the end without a proxy, but if a proxy is called for at any stage it must be produced. This would be the rule of the High Court of Admiralty, and by Rule 40 it is binding in vice-admiralty courts. These proxies were merely pieces of paper until the attesting witnesses had been called to prove the signatures. The form of the proxy is that of a deed, and it should be proved as such. If these proxies had been attested before a notary public, under 17 & 18 Vict. c. 78, s. 8, it would have been sufficient, as the seal of a notary would have been accepted in an English Court.

BUTT, Q.C., in reply.—The respondents assume that we were ordered to produce proxies, whereas we have never been so ordered. In the *Dumfriesshire* (sup.) there was a positive order to produce, and disobedience to that order; the suit was dismissed for non-compliance with the order of the court, not with the demand of one party. It is enough to give the names of the parties for whom a proctor appears. We have done more and produced proxies. They made no application to dismiss the suit.

SIR ROBERT PHILLIMORE delivered the judgment of the Court.—This is an appeal from the Vice-Admiralty Court at Malta, raising questions of practice in the admiralty courts. Their lordships have no doubt at all as to the advice which it will be their duty to tender to Her Majesty upon this matter. It appears that a suit was instituted in the Vice-Admiralty Court at Malta by an English ship, the *Clymping*, against a French ship, the *Euxine*, for a collision at sea somewhere near Alexandria. The suit was instituted in that court by a proctor who appeared in the usual form, and stated the nature of the suit and his title to appear in the usual manner. It has been contended that he was duly called upon to produce a proxy, and that having been so duly called upon he did not comply with the order, but produced an imperfect document, which cannot be taken in law as being a proxy, and therefore that the judge of the court below was justified in taking the course that he did take, namely, of dismissing the suit altogether. With regard to the practice of the court as to proxies, it is very clearly laid down by that experienced judge, Dr. Lushington, in the case of the *Wilhelmine* (sup.). He says: "Now, looking to the ancient practice of the court, it is perfectly clear that the rules with regard to appearances in the Court of Admiralty were originally the same as are now adopted in the ecclesiastical courts. In the more modern practice of this court these rules, it is true, have been relaxed for the convenience of

the practitioners, and for a period of probably not less than 200 years, proctors have been permitted to appear on behalf of parties suing without being called upon to exhibit any proxy, as is the indispensable custom in the ecclesiastical courts. The first question, then, which I must consider in the present instance is this: What is the duty and what the responsibility attaching upon a proctor who so appears without exhibiting a proxy? Upon general principle, I apprehend that the court is entitled to expect from such proctor when he does appear that he be duly authorised by some person having an interest in the cause in issue, or that he should have a justifiable and strong ground for believing that the individual for whom he appears has such an interest. I apprehend further, that at any period of the cause, and at any time before the case is dismissed out of court, the court has a right to call upon that proctor to state, not generally but specifically by name, the whole of the parties for whom he is authorised to appear. The authority of the court to make this demand upon the proctor is, I conceive, inherent in the jurisdiction of this court, in common with all other courts, and is absolutely essential to the due administration of justice for the purpose of preventing unauthorised litigation. If it were otherwise what would be the consequence in regard to the proceedings in this court? The consequences would be that proctors might appear for individuals who either were not in existence, or for persons who gave no authority, or who, assuming the names of others, might take the chance of a decree being made in their favour, without at any time being obnoxious to the consequences of an unsuccessful litigation." Now it is quite clear from the passage of the judgment which I have read, first, that the usual practice is for proctors in the Court of Admiralty to proceed without the exhibition of any proxy, and, secondly, that when they are called upon for their proxy they satisfy the law by stating the names of the parties for whom they are authorised to appear. Read by the light of this judgment, there appears to be no difficulty in constraining the rules and regulations of the Vice-Admiralty Court, which were made at a subsequent period, one of which rules is (Rule 40): "Although proxies are not usually exhibited in maritime suits, yet they may sometimes be required, in order to prevent proctors from proceeding in causes on instructions from parties not being themselves entitled to intervene, or not having a legal *persona standi* to prosecute a cause." In this case there is no question whatever that the appellants before the court, being the owners of the cargo on board the brig, and the master and crew who appear, as is usual, as to their personal effects, are the parties who are really interested and entitled to prosecute the cause in this case. The objection which has been taken, has been truly said to be one of the most technical description. The proxy is said not to have been duly signed and sealed, and it is said that there is no evidence of the handwriting of the witnesses who appear to have subscribed the instrument. The answer to that is that if there had been a strict order of the court (and none was made on this occasion) that they should produce their proxy, there would have been a *prima facie* compliance with that order by the production of those instruments, and those who sought to impugn their authenticity should have taken further steps in

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the matter. It is also to be observed that great confusion appears in the pleadings of the court below, and in the protest, because this is an objection which should have been taken separately and at once, and should not have been mixed up with other matters, as it appears to have been in this protest. Even if the argument of the counsel for the respondents could be sustained to its utmost extent, the duty of the judge would have been no more than this, to have stayed proceedings until the doubt which they alleged with respect to the authenticity of the document could have been properly solved. Upon all grounds therefore,—upon the ground first of all that there were no circumstances of suspicion in the case which warranted the departure from the usual admitted practice and called for the production of a special proxy,—upon the ground that if there were such circumstances they were *prima facie* fully complied with by the instruments which are before the court on this occasion, that the objection ought to have been taken at the earliest period, and not mixed up with the other proceedings, and that the utmost the court could have done in any case would have been to stay proceedings until further information could have been obtained,—their Lordships have no hesitation whatever in saying that it will be their duty humbly to advise Her Majesty to reverse the sentence of the court below. Their Lordships think that looking to the confusion which prevailed in these pleadings, the facts of which does not lie entirely upon one party but must be shared by both, no order should be made as to the costs of the appeal. The costs in the court below will be costs in the cause.

Appeal allowed.

Butt, Q.C. asked the court to retain the suit in accordance with the prayer of the appellants.

Sir R. Phillimore.—This court has always been extremely reluctant to retain cases and to depart from its functions of a court of appeal and to become a court of original jurisdiction, but if both sides wish it they will do so.

Solicitor for the appellants, *Thomas Cooper.*

Solicitor for the respondents, *Francis Kearney.*

HOUSE OF LORDS.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Monday, April 3, 1871.

(Present: THE LORD CHANCELLOR (Hatherley), LORD CHILMSFORD, LORD WESTBURY, and LORD COLONSAY.)

McLEAN AND ANOTHER v. FLEMING.

Charter-party—Dead freight—Deficiency of cargo—Lien—Indorsees of bills of lading also charterers—Quantity specified in bill of lading.

“*Dead freight*” means compensation, liquidated or unliquidated, for the loss suffered by the shipowner by the failure on the part of the charterer to supply a full cargo, and the amount payable in respect thereof, where it is unliquidated, is such reasonable amount as the shipowner would have earned, after deducting such expenses as he would have incurred if a full cargo had been shipped.

A lien on the cargo actually shipped for dead freight may be created by express stipulation in the charter-party.

Where a charter-party is entered into on behalf of the indorsees of the bills of lading given under the charter, so that they are the actual charterers, they are bound by a stipulation as to lien in the charter-party.

Bills of lading signed by the master are prima facie evidence that the quantities named therein were received on board by him; the onus of rebutting this presumption and of showing that a less quantity than that specified was received lies on a shipowner. (a)

(a) The exact words of the charter party, so far as they are material, are as follow: “It is this day mutually agreed between Samuel Donaldson, of the good ship or vessel *Perisan*, of Liverpool, of the measurement of 598 tons or thereabouts, now lying at this port (Cannatopole), whereto himself is master, and Mr. A. Carrington of this city, freighter of the said vessel, that the said ship, being tight, staunch, and strong, and in every way fitted for the voyage, shall with all convenient speed, after discharging her present cargo, be made ready to sail and proceed to Onieh, Kerraonnada, in a third place of Marmora, and to fill up in a fourth place below, viz., Enos, Kbero, Orfano, Port Lagos, Salonica, Smyrna, or Scala Nuova, at charterer’s option, or so near thereunto as she may safely get, and there load from the agent of the said freighter a full and complete cargo of cattle bones in bulk, the captain to sign bills of lading at each port, at the option of the freighter, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provision, and furniture; and being so loaded, shall therewith proceed to a safe port in the United Kingdom, orders on signing bills of lading on the last port or lay days to commence, and deliver the same, on being paid freight as follows—viz., at the rate of, say, 35s. (thirty-five shillings) sterling English per ton of bones of 20 cwt. Delivered in full. . . . The captain or owner to have an absolute lien on the cargo for all freight, dead freight, and demurrage. The cargo to be brought to and taken from alongside, &c. . . . The freight to be paid on unloading and right delivery of the cargo, half in cash, and the remainder by approved bills, &c. . . . sixty running days, &c. for loading and unloading, &c. . . . Penalty for non-performance of this agreement, amount of freight. Charterers binding themselves to ship at Onieh and Kerraonnada from 170 to 200 tons of said bones. It is understood that the ship is to be loaded in four of the above places.” On reference to the case of *Gray v. Carr* (ante p. 115), it will be seen that the charter parties in the two cases are almost identical, more especially in those parts giving a lien for dead freight. Brett, J., commenting on *McLean v. Fleming* in his judgment in *Gray v. Carr*, says: “The charter party was in respect of the carriage of a uniform cargo, and the freight was payable at a fixed sum per ton, and the charter party ascertained the amount of the cargo that was to be loaded;” and he distinguished the two cases. In *Gray v. Carr* it will be seen that the charter party (as to the cargo actually shipped) was in respect of a uniform cargo, that is, of oak staves; that the freight was payable at a fixed sum per 100 pieces of oak staves; and that the charter party, by giving the ship’s tonnage, gave the same means of ascertaining, in that case, the amount of cargo that was to be loaded in the same way as it was given in *McLean v. Fleming*. In fact, in *McLean v. Fleming* the actual amount of cargo shipped was only ascertained by weighing at the port of discharge, and in that sense the damages were unliquidated. The fact that it might have been easier to measure the damages in the one case than the other cannot affect the principle. The bills of lading were different, as that in *Gray v. Carr* contained the words, “Paying freight and all other conditions or demurrage for the said goods as per the aforesaid charter party;” whilst in *McLean v. Fleming* the words were “paying freight for the said goods as per charter party.” The majority of the court in *Gray v. Carr* lay down that dead freight does not include damages for not loading a full cargo unless the sum is specified in the charter party. On the other hand, the Lords in *McLean v. Fleming* say that dead freight means damages for not loading a full cargo, whether such damages are ascertained by the charter party or not. Therefore the decisions here given are in

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THIS was an appeal from a judgment of the second division of the Court of Session, affirming a judgment of the Lord Ordinary.

The appellants, merchants in Edinburgh, ordered a cargo of cattle bones from Messrs. W., at Constantinople, and Messrs. W. obtained, on payment of £1, a transfer to them, from a broker at Constantinople, of a charter-party of the ship *Perseus*, of which the respondent was owner. Messrs. W. forwarded the charter to the appellants, and charged them with the £501. and other advances made in pursuance of the charter, which the appellants paid.

By the charter-party it was "mutually agreed" that the ship should proceed to certain ports, "and there load, from the agents of the freighters, a full and complete cargo of cattle bones in bulk," the cargo to be completed at four ports, and thence to a port in the United Kingdom, and "deliver the same on being paid freight at the rate of 35s. per ton. The captain or owner to have an absolute lien on the cargo for all freight, dead freight, and demurrage," &c.

Messrs. W.'s agents at the different ports shipped bones, and received bills of lading, purporting to be for an amount equal in Turkish measure to 701 tons, in the names of the appellants, as shippers, "to be delivered unto order or to their assigns, paying freight for the goods as per charter-party," and endorsed the bills of lading in the words "weight and quality unknown."

Before the ship had received a full cargo, the shipper's agents at the fourth port found they had no more bones, and told the master he might sail for Great Britain; the master voted a protest that he was despatched with a short cargo, and when he arrived at Aberdeen only 386 tons were delivered, and no more were then on board, whereas the measurement tonnage of the ship was from 596 to 598 tons. The respondent (the shipowner) claimed a lien for "dead freight" to the amount of 367l. 10s. as due on 210 tons short shipped, at the rate of 35s. a ton, the stipulated rate of freight; and the consignees (the appellants) claimed damages for the nondelivery of the 701 tons stated to have been shipped in the bills of lading. The Lord Ordinary found that the appellants had no right to claim for damages for non-delivery, as the amount actually shipped was only 386 tons. The Court of Session confirmed it is finding. The facts are sufficiently noticed in the judgments.

Young, Q.C. (Lord-Advocate), Sir R. Palmer, Q.C., and Langton, for the appellants.

Kirchner v. Venus, 12 Moo. P. C. C. 361; *Abbot on Shipping*, 11th ed., pp. 238, 239, 279, and 280;

Phillips v. Rodie, 15 East, 547;
Bell v. Puller, 2 Taunt. 285; 12 East, 496, note (a);
Gray v. Carr, ante p. 115; L. Rep. 6 Q. B. 522;
Bell's Principles of the Law of Scotland, s. 430;
Birley v. Gladstone, 3 Man. & S. 205;
Smith v. Siercking, 4 E. & B. 945;
Pearson v. Gochen, 17 C. B., N. S., 332; 10 L. T. Rep. N. S. 758.

Sir G. Honyman, Q.C., Jessel, Q.C., and S. Will, for the respondent.

direct conflict with the majority of the court in *Gray v. Carr*. The only distinction that can be drawn between the two cases is, that in this case the consignees were really the charterers, whilst in *Gray v. Carr* the consignees claimed under the bill of lading, and were not parties to the charter party.—Ed.

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Small v. Moates, 9 Bing. 579; 2 Man. & S. 674;
Gledstanes v. Allen, 12 C. B. 202;
Kern v. Deslandes, 10 C. B., N. S., 205; 30 L. J. 297, C. P.; 5 L. T. Rep. N. S. 349;
Bell's Dictionary and Digest of the Law of Scotland, tit. "Dead Freight";
Haddow v. Parry, 3 Taunt. 303;
Bell's Commentaries, 7th ed., pp. 620 and 621;
Gladstone v. Birley, 2 M. & C. 401.

THE LORD CHANCELLOR (Hatherley).—The case of *Kirchner v. Venus* (12 Moo. P. C. C. 361) is distinguishable on the ground that there was no such express contract as there was here. "Dead freight," though, as observed by several authorities, not a very accurate term, is intelligible enough. "Dead freight" has been defined by Lord Ellenborough in *Phillips v. Rodie* (15 East, 555), as "unliquidated compensation for loss of freight." The question whether there has been an engagement by the parties for a lien of such unliquidated damages is matter of proof. There is no difficulty as to what the engagement was in this case. So much per ton was agreed to be paid for a full cargo of a uniform description, and a full cargo was agreed to be supplied, and there was no difficulty in ascertaining either the quantity of the cargo agreed for or the amount agreed to be paid per ton. The payment was to be at the same rate in respect of the goods not supplied as for those supplied. Of course there might be always some difficulty in liquidating the damages, because it might be that the captain might have had it in his power to fill up the deficiency with other cargo; but that was not the case here. It is enough to say that here there is a clear case of an omission to supply a full cargo as contracted for, and a clear case therefore for applying the definition of Lord Ellenborough as to what "dead freight" is—a definition exactly agreeing with that given in *Bell's Commentaries* (vol. 1, p. 620, 7th ed.). As to the contention that the appellants claimed under the bill of lading, which did not incorporate the terms of the charter-party, the appellants were, to all intents and purposes, in the position of charterers, and were therefore bound by the terms of the charter-party. I am of opinion, therefore, that the judgment of the court below must be affirmed.

LORD CHELMSFORD.—My Lords, the first question is, whether there was evidence that the cargo shipped was only to the extent of the quantity found to be in the ship on arrival at Aberdeen. On this point your Lordships held so clear an opinion that you did not require any argument for the respondent upon it. The master is the agent of the shipowner in every contract made in the usual course of the employment of the ship; and though he has no authority to sign bills of lading for a greater quantity of goods than is actually put on board, yet, as it is not to be presumed that he has exceeded his duty, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the onus of falsifying them, and proving that he received a less quantity of goods to carry than is thus acknowledged by his agent. But it being admitted that it lay upon the shipowner to rebut the *prima facie* evidence arising from the bills of lading, he appears to me to have satisfactorily done so. If the evidence of the master is to be believed, and there seems no reason to doubt it, it is impossible that the additional quantity of bones could at any time have been on board the vessel. In the course of his evidence, the master

said, "I brought to Aberdeen the whole of the cargo that was shipped. No part of it was put away either by myself or anyone else, nor interfered with from the time it was put on board till it was landed at Aberdeen." It is no slight confirmation of the evidence that there was not a full and complete cargo when the ship sailed from Enos, the last place of loading, that the quantity of bones delivered on April 3, 1865, having exhausted all that were there for delivery, the captain on the following day went before the Vice-consul at Enos, and in a formal document stated that he had informed the agent of Whittaker and Co., in the presence of the Vice-consul (who must have known whether the statement was correct), that not having received a full cargo for his vessel, he reserved his right to protest, and formally protested against the freighter. The appellants were not able to meet this evidence by proof that the quantities mentioned in the bill of lading, or any more than the 386 tons, were actually shipped, and this question was therefore properly determined by the Lord Ordinary, and by the court of second division in favour of the respondent. The questions then remain: First, whether the 210 tons short of a complete cargo can be regarded as dead freight, to which the lien in the charter-party applies? and, secondly, supposing a lien to have existed, whether it was available against the appellants? The Lord Advocate argued that the rule as to dead freight was inapplicable to a case where the neglect to supply a full cargo under a charter-party, results in a claim to unliquidated damages, and that by law dead freight can exist only where there is an express stipulation for a certain amount to be payable *ex nomine*. Upon the question of enforcing the lien against the appellants in respect of dead freight, he contended that they were indorsees for value of the bills of lading, which bound them merely to pay "freight for the goods as per charter-party," and imposed upon them no liability for dead freight, even if any were payable under the charter-party. It must be admitted that the term "dead freight" is an inaccurate expression of the thing signified by it. "It is," as Lord Ellenborough said in *Phillips v. Rodie* (15 East, 554), "not freight, but an unliquidated compensation for the loss of freight recoverable in the absence and place of freight." The learned counsel for the appellants, in support of their argument that no dead freight properly so called was agreed to be paid under the charter-party in question, cited the cases of *Kirchner v. Venus* (12 Moo. P.C. 361) and *Pearson v. Goschen* (17 C. B., N. S. 352), *Pearson v. Goschen* was referred to for some dicta of the judges, not defining what dead freight was, but stating what it was not. In the case of *Kirchner v. Venus* there was no attempt to define, and no necessity for a definition of the term "dead freight." The Judicial Committee merely decided that a sum of money payable before the arrival of a ship at her port of discharge, and payable by the shippers at the port of shipment, did not acquire the legal character of freight because it was described under that name in the bill of lading; that it was in effect money to be paid for taking the goods, and not for carrying them. With respect to the observations of the learned judges upon the subject of dead freight in *Pearson v. Goschen*, your Lordships were told that there is a case *Gray v. Carr* (sup.) standing for judgment in the Court of Exchequer Chamber, in which their opinions

may have to be considered. I shall therefore abstain from any remarks upon them. It was argued for the appellants that, even if a claim for damages for breach of a covenant in a charter-party to furnish a full lading to a ship may correctly be called "dead freight," and yet that no lien can exist where the damages are unliquidated. But I understand the case of *Phillips v. Rodie* not to have denied that though the damages were unliquidated, there might have been a lien upon the cargo for them if the contract of the parties had stipulated for it, which it had not. And in the case of *Birley v. Gladstone* (3 Mau. & Sel. 205), cited by counsel for the appellants, there was no actual decision upon the question of lien for dead freight; but it was held that a clause mutually binding the shipowner and the ship, and the freighter and the cargo in a penalty, could not be considered as intended to give the shipowner a lien for the performance of the covenant in the charter-party to load a full cargo. It may be observed that even where there is an express stipulation to pay full freight, as if the goods had been actually loaded on board, and that the master shall have the same lien upon the goods actually on board as if the ship had been fully laden, the case may be one of unliquidated damages, for the master may have filled the vacant space with the goods of other persons, and the freighter would be entitled to have any allowance for the profit thus made. In construing the charter-party it must be assumed that the parties understood the meaning of the terms they employed, and that, amongst others, the term "dead freight" meant (according to Lord Ellenborough's definition) "an unliquidated compensation for the loss of freight." The freighter with this understanding agrees to load on board the respondent's ship a full and complete cargo of cattle bones, and to pay freight at the rate of 35s. sterling English per ton. He knows that, if he fails to perform his covenant to load a full and complete cargo, he will be liable to the shipowner in damages under the name of dead freight, and he agrees to give the captain or shipowner an absolute lien on the cargo for all freight, dead freight and demurrage. Why should not his agreement have its intended effect? This case can hardly be considered to be one of unliquidated damages, because the master, not having brought home any other goods than those of the appellant's, the proper measure of the shipowner's claim appears to be the amount of the agreed freight which he would have earned upon the deficient quantity of 210 tons of bones. But whether the amount of his damages is to be regarded as ascertained or not, I am of opinion that the charter-party gives him a lien for his claim on account of the deficient cargo. Was the lien, then, available against the appellants? I quite agree that, if they were merely holders of the bills of lading for valuable consideration, the shipowner would not have been entitled to a lien upon the cargo on board the ship for anything more than the freight upon the quantity actually shipped and brought home. But it appears to me that there is evidence to show that the charter-party was entered into by their agents on their behalf. The appellants were really the charterers; and, therefore, although as indorsees of the bills of lading merely, they would not be bound by the stipulation as to lien in the charter-party, yet, as the real charterers, it is binding upon them. I am

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of opinion that the interlocutors appealed from ought to be affirmed.

Lord WESTBURY.—My Lords, two questions were argued at the bar: First, what is the meaning of the term "dead freight," in respect of the remedy which it gives the shipowner? Does it entitle him to say that the deficient quantity shall be paid for at the rate assigned per ton in the charter-party. I think that that would be a very unreasonable construction; for if the full freight had been furnished to the captain, the charge for boarding and the other outlays attendant upon the additional 210 tons which were wanting, would have occasioned some expenditure to the shipowner. The result, therefore, is that in a charter-party giving no specific sum as the amount to be recovered by way of compensation for dead freight, the shipowner becomes entitled only to a reasonable sum, which is another phrase for unliquidated damages. The next question is, whether considerations of convenience would prevent the shipowner from having a lien upon the cargo, seeing that he would become entitled to retain it during the time occupied in ascertaining the amount of the unliquidated damages. There may be some inconvenience in that construction, but that ought to have been considered by the parties when they entered into this express stipulation. I think it is impossible to set up any consideration of inconvenience in answer to the clear terms of the contract. There remains but one further point, and that is, whether the shipowner has a right in respect of dead freight and the damage pertaining to it, as against an indorsee of the bill of lading for valuable consideration? Now that has been examined specially by my noble and learned friend who has just sat down, and I agree with him that, substantially, the present appellants are not only indorsees of the bill of lading, but that in reality they were bound as the persons who originally authorised the chartering of the ship, and who remained entitled to the benefit of that charter party, and were therefore subject to the obligations contained in it. The result is that their title to the bill of lading is controlled by their liability under the charter-party. I am of opinion that the appeal is without foundation, and should be dismissed with costs.

Lord COLONSAAT.—I agree that the appellants were in the position of charterers. I cannot find the slightest difficulty in holding that, under this charter-party, there was a claim for "dead freight." It is not a very accurate expression, but it is the only expression we have for the claim which arises in consequence of the failure to furnish a full cargo. It is so described in the English authorities, and in the Scotch authorities, such as in Bell's Commentaries (vol. 1, p. 620, 7th edit.), in his Law Dictionary and Principles; and it is a phrase which had also obtained a place in our mercantile authorities. As to the lien, I think it clear both on principle and authority that, if there be a stipulation in a charter-party that dead freight shall be exigible, and that there shall be a lien for it in the cargo, then a lien is constituted by contract, although there be no lien for dead freight by law. I adopt the words of Sir William Grant in *Gladstone v. Birley* (2 Mer. 401), where he says, "The question always is whether there be a right to retain goods till a given demand is satisfied." This charter-party says in so many words that there shall be a lien for dead freight; and it makes

no difference that the words were in print—they were allowed to remain. The circumstance that the precise amount was not specified does not affect the principle; questions of amount may arise where the rate has been specified. In the present case there is no difficulty. It was not pleaded in the court below that the claim for 210 tons is an exorbitant claim, or one from which a deduction ought to be made. The vessel was proved to have been capable of carrying a good deal more, and there was no allegation that anything ought to be deducted from the sum awarded.

Interlocutor affirmed.

Solicitors: for the appellants, *Simson and Wakeford*; for the respondents, *W. and H. P. Sharp*.

ROLLS COURT.

Reported by H. PEAT, THOMAS BRETT, and G. WELBY KING, Esqrs., Barristers-at-Law.

July 17 and 18, 1871.

PEEK V. LARSEN.

Ship—Charter-party—Lien on cargo for freight—Advertisement as general ship—Shipment without notice of charter-party.

C. and Co., who chartered a foreign vessel under a charter-party, which provided that the captain should have a lien on the cargo for freight, dead freight, and demurrage, advertised the vessel as a generalship, the advertisement inviting applications as to the freight, &c., to be made "to C. and Co. brokers." The plaintiffs entered into an agreement with C. and Co. for the carriage of certain goods at a certain rate of freight, and put the goods on board without notice of the charter-party. The captain refused to sign the bills of lading, except subject to the charter-party, and claimed a lien on goods for expenses:

Held, that the plaintiffs were not bound by the charter-party as they had no notice of it when they put the goods on board, and that they were entitled to have the goods returned to them free from any claim by the captain:

Held, also, that as the vessel was advertised as a general ship, the plaintiffs were not bound to inquire whether it was subject to a charter-party or not. (a)

THIS was a suit by a firm of tea merchants, carrying on business in the city of London under the style of Francis Peek, Winch, and Co., against Larsen, the master, and Bjorn, the owner, of the Norwegian ship *Alliance*, praying that the defendants might be restrained from sailing with, or removing certain packages of tea, which the plaintiffs had put on board the ship, and that they might be ordered to concur in the transfer of the tea into the plaintiffs' names at the London Docks.

The circumstances of the case were as follows.

In Feb. 1870 Messrs. Claxton and Co. advertised the *Alliance* as about to sail. The advertisement, so far as material, was in these words:

GUARANTEED FIRST SPRING SHIP.

To sail March 1, 1870.

Direct for St. John, N. B.

The splendid and fast clipper *Alliance*, 5-615-ton *Veritas*

(a) As to the liability of holders of bills of lading for claims arising under the stipulations of a charter-party, see *Gray v. Carr* (ante, p. 115); and *McLean and another v. Fleming* (ante, p. 199).—Ed.

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and coppered, 800 tons, Niels Larsen commander, loading in London Docks. For freight or passage apply to J. D. Claxton and Co., brokers, 51, Lawrence-lane, Cheapside.

In the course of the same month, the plaintiffs entered into an agreement with Claxton and Co. for the carriage of 149 packages of tea from London to St. John's at 17s. 6d. per ton and 5 per cent freight, payable at St. John, primage allowed. The sum payable under this agreement was 104. 16s. 8d. less 5 per cent. primage. The tea was delivered out of bond and put on board the *Alliance* on the 1st March, a receipt being given to the dock company by the mate.

On the same day the plaintiffs presented to Claxton & Co. the bills of lading for the captain's signature.

On the 7th March, Claxton & Co. returned the bills of lading unsigned, inclosed in a letter, in which they stated that, owing to certain unfunded rumours, they were obliged to remove the *Alliance* from the berth, and that they would be glad if the plaintiffs would apply to Messrs. Dahll and Co., the agents for the ship, for the removal of their goods from the ship.

Thereupon the plaintiffs immediately applied to Dahll and Co. for information why the ship was not to sail, and requested their goods to be returned to them. And they were then informed that, in consequence of Claxton and Co. being unable to carry out the terms of their charter-party, the captain claimed a lien on the tea for expenses incurred through waiting for freight and bringing his ship into dock.

This was the first intimation received by the plaintiffs as to the existence of any charter-party affecting the ship. They at once made further inquiries, and learned that the ship was chartered to Claxton and Co. by a charter-party, dated the 27th Jan. 1870, which provided that the ship should, with all convenient speed, proceed to a safe loading place in the London Docks, and load aloft from the factors of the charterers a full and complete cargo of lawful merchandise, including linseed matches, acids, and gunpowder, the freighters binding themselves not to ship more than she could reasonably stow away, and, being so loaded, should proceed to St. John, New Brunswick, and deliver the goods, on being paid freight as follows—30s. British sterling per British register ton, five guineas gratuity in full of all port charges and pilotage. The freight to become due and paid in cash on unloading, and right delivery of the cargo. The charterer's responsibility to cease as soon as such difference as might exist between the freight payable by bills of lading at St. John, and the freight due to the vessel in virtue of the charter-party was paid, such difference to be paid the captain in cash on signing bills of lading. The captain to have an absolute lien on the cargo for freight, dead freight, and demurrage.

The captain, on being formally requested to sign the bills of lading, refused to do so except subject to the charter-party, and he also refused to deliver up the tea, claiming a lien on it for expenses. Thereupon, the plaintiffs instituted the present suit.

An interlocutory order was soon afterwards made in the suit that the tea should be removed to London docks and placed there in bond, in the joint names of the solicitors of both parties, to abide the result of the suit.

The cause now came on for hearing.

Sir Richard Baggallay, Q.C. and Marten for the plaintiff.—We submit that, as we had no notice of the charter-party, the defendants are not entitled to the lien which they claim. The present case, we submit, is governed by *Paul v. Birch* (2 Atk. 621), where it was held that where a factor makes an agreement for the hire of a ship with the master on his own account for a certain sum a month, and not on the part of the merchants, his principals, they are not liable, nor their goods put on board, to satisfy the master's demand, but they are liable to pay the factor for the cargo; and as he was bound by the charter-party, which gave the master a specific lien on the goods, he had a right to be paid in the first place. In *Mitchell v. Seafie* (4 Camp. 298), where a ship was chartered for a particular voyage for a gross sum by way of freight, and the captain signed bills of lading for the cargo (which was the property of and consigned to a third person), specifying a rate of freight amounting to a less sum than that mentioned in the charter-party, it was held that the shipowner had no lien on the cargo beyond the freight specified in the bills of lading. In *Fry v. The Chartered Mercantile Bank of India, London, and China* (14 L. T. Rep. N. S. 709; L. Rep. 1 C. P. 689), where a vessel was chartered to ship cotton to a certain place under a charter-party containing the stipulation, "the ship to have a lien on cargo for freight, 3d. 10s. per ton, payable on right delivery at the port of discharge; the goods shipped fell short of a full cargo; the bill of lading of these goods stated "freight to be payable as per charter-party;" the rest of the cargo was shipped at a lower freight, and the defendants were indorsees for value of the bill of lading, and it was held that the plaintiffs (the owners of the vessel) had no lien on the goods for the whole amount of freight, and that the provision as to freight being payable as per charter-party only incorporated the charter-party as far as the rate of freight was concerned. In his judgment in that case, Montague Smith, J. said that "it would require very strong words to render the defendants liable for the freight, payable under the charter-party for the whole cargo." Here it would be impossible to hold the shippers' goods liable for the whole cargo, as they had no notice of the charter-party. They also referred to

Howard v. Tucker, 1 B. & Ad. 712;

Foster v. Colby, 3 H. & N. 795;

Shand v. Sanderson, 28 L. J. 278, Ex.;

Sandeman v. Scurr, 15 L. T. Rep. N. S. 608; L. Rep. 2 Q. B. 86.

Southgate, Q.C., J. C. Mathew (of the Common Law Bar), and *F. H. Colt* for the defendants.—We contend that we are entitled to a lien on the goods in question for general freight. The plaintiffs knew that the ship was a foreign ship, and might have inferred that it was chartered. By the charter-party we were to have an absolute lien on the cargo for freight, dead freight, and demurrage. In *McLean and Hope v. Fleming* (L. Rep. 2 Sc. App. 123; ante, p. 160) dead freight is defined to be simply an unliquidated compensation recoverable by the shipowner from the freighter for deficiency of cargo. They also referred to

Kern v. Deslandes, 10 C. B. N. S. 205;

Blakie v. Stenbridge, 6 C. B. N. S. 894;

Gladstone v. Birley, 2 Mer. 401;

Champion v. Coleville, 3 Bing. N. Cas. 17;

Small v. Moates, 9 Bing. 574.

No reply was called for.

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THE ACHILLES.

[ADM.]

July 18.—Lord ROSSLY said that the case turned upon the question whether the plaintiffs had notice of the charter-party, and whether it was their duty to inquire whether there was a charter-party or not. Every person who had notice of a charter-party was bound by its contents, but until he had notice of the charter-party or was set upon inquiry, he was not bound. All that the plaintiffs knew in this case they learned from the advertisement, which would have led anyone to suppose that Messrs. Claxton and Co. were the agents of the owner of the ship, and not the charterers of the ship. True it was that the master could not enter into a fresh contract, but he was bound to sign a bill of lading as soon as he received the goods on board. He ought to have signed the bills "as per charter-party," and then the plaintiffs would have been put on inquiry as to the charter-party. How was a shipper to get notice of a charter-party except from the master on board the ship? It was the duty of the master to give that notice on signing the bill of lading. If the plaintiffs had been guilty of laches, they might have lost their claim to relief, but there was no such thing in this case; the moment they heard of the charter-party, they refused to be bound by it and demanded back their goods. No authority was produced to show that persons acting as the plaintiffs had done could be bound by a charter-party of which they had no notice at the time they put their goods on board. Of the cases cited the nearest to the present case was *Small v. Moates* (9 Bing. 574). But that was nothing more than this: the master on board the ship had goods which belonged to the owner; that is, the owner had a lien on them and the master chose to sell those goods and to treat them as if there was no lien on them at all; then the court had to consider which of two innocent parties was to suffer—whether the man who sold the goods as his own gave a good title to them, or whether he could only sell what he himself possessed, which was subject to the lien of the owner of the vessel. That did not govern the present case; there the judge said "that a shipper putting his goods on board the ship a general ship,"—which was the case here—"upon the faith of a bill of lading signed by a person whom the owner has allowed to bear the character of master, would be entitled to receive the goods at the end of the voyage upon payment of the freight reserved by the bill of lading, may be readily admitted, as well upon the reasonableness of the proposition itself as upon the authority of the cases referred to by the plaintiffs in the course of the argument." That merely showed that if the master had signed a bill of lading for these goods *simpliciter*, without any notice of the charter-party the shippers would have been entitled to receive the goods at the end of the voyage upon the ordinary payment of freight. But, in the present case, the master had not done that, but had said that he would only sign the bills of lading subject to the charter-party. Could that bind a shipper who then heard of the charter-party for the first time and refused to be bound by it? Why was the shipper under such circumstances not to have back his goods? He had entered into no contract, and the effect of holding him to be bound by the charter-party would be to bind him by a contract into which he had not only not entered, but had refused to enter, and which was of a very onerous character, to be carried out by the

owner and charterer, and of the existence of which he had had no previous intimation. His Lordship was of opinion that such a decision would not be according to equity. That was not the doctrine of notice in the courts of equity. The doctrine of those courts was that a man was bound by notice whenever he had either distinct notice, or such information as should set him on inquiry; and accordingly, in *Small v. Moates* (*sup.*), one of the persons was treated as having been set upon inquiry. But there was nothing in the present case to set the plaintiffs on inquiry; the advertisement was simply an advertisement of a general ship, with nothing about it to suggest such a thing as a charter-party. Therefore his Lordship was of opinion that the plaintiffs were not bound by the charter-party, as they had not received any bill of lading, and no transaction was completed between the parties, and as they knew nothing of the charter-party, and had no notice of it, and were not set on inquiry as to whether a charter-party existed or not.

Decree accordingly in the terms of the prayer of the bill.

Solicitor for the plaintiffs, H. G. Stokes.

Solicitors for the defendants, Plews and Irvine.

COURT OF ADMIRALTY.

Reported by J. F. ARNOLD, Esq., Barrister-at-Law.

Tuesday, Nov. 28, 1871.

THE ACHILLES.

Costs—Consent to a motion—Practice.

The court will not give the costs of appearing to consent to a motion where the party so appearing is not in any way prejudiced by the motion.

THIS was a suit instituted by the holders of a bottomry bond on the *Achilles* and her cargo against the cargo only.

The *Achilles* broke down on her voyage home, and her master chartered the *Ellen Ashcourt* to bring the cargo home. The *Achilles* and her cargo were subject to a bottomry bond. On the arrival of the *Ellen Ashcourt* at Liverpool the bondholders seized the cargo. The consignees refused to receive it, and thereupon the master of the *Ellen Ashcourt* discharged the cargo under the Mersey Dock Acts Consolidation Act (21 & 22 Vict. c. xciii), s. 166. The owners of the *Ellen Ashcourt* claimed a lien on the cargo for freight, and gave notice to the Mersey Docks and Harbour Board to detain it under sects. 193 and 194 of the same Act.

E. C. CLARKSON now moved the court for an order to sell the cargo for the benefit of all parties, as the Mersey Docks and Harbour Board had no power to do so.

BRUCE for the trustee in bankruptcy of the holders of the bill of lading consented, and claimed the costs of appearing on the motion.

CLARKSON objected, as the sale was for the benefit of all, and the trustee of the holders of the bill of lading was not in any way prejudiced. He did not appear to oppose the motion, and need not have appeared at all.

SIR R. PHILLIMORE.—There is no practice of the court by which I can give Mr. Bruce his costs. The principle on which costs are awarded to a party appearing on a motion, is that he appears to protect his own interests from something in the

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motion which prejudices them. Here the motion is for the benefit of all parties, and nobody can be prejudiced. Mr. Brue's objects could have communicated their consent to this motion without appearing in court. I cannot give costs here.

Proctor for the owners of the *Ellen Ashcourt*, Ayrton.

Proctor for the holders of the bill of lading, Stokes.

Tuesday, Dec. 5, 1871.

THE THURINGIA.

Collision—Objection to registrar's report—Motion for further evidence—Affidavits—Practices.

The court will not hear further evidence in objection to the registrar's report, unless the party making the application can satisfy the court that the further evidence could not, by proper diligence, have been produced before the registrar and merchants, or that they asked at the reference for an adjournment to produce it, and were refused.

The affidavit in support of a motion for leave to produce further evidence, where the object is to vary the evidence already given, should be clear and precise as to the witnesses it is proposed to call, and the nature of their testimony.

The affidavit of a witness, who is not tendered for cross-examination, and who deposes to a fact material to the inquiry before the registrar and merchants, should be filed before the hearing.

The adjournment of the hearing of the motion for the convenience of counsel does not preclude the parties making the motion from filing and using a further affidavit.

THIS was a motion for leave to adduce further evidence on the hearing of the objection to the registrar's report on the case. The *Thuringia* was a German steamer, bound for Hamburg, and on the 14th Oct., 1870 she ran into the English steamer, *J. B. Watt*, which was bound from Hamburg to West Hartlepool, in ballast. The collision took place about 18 miles north-west of Heligoland, and the master and crew of the *J. B. Watt* abandoned her, and went on board of the *Thuringia*. The *Thuringia* was arrested at the suit of the owners of the *J. B. Watt*, and the case was heard before the Judge of the Admiralty Court, and he found that the *Thuringia* was solely to blame, and referred the question of damages to the registrar and merchants. The case was heard before them, and the question at issue was whether the master and crew of the *J. B. Watt* were or were not justified in abandoning her after the collision, and on this question evidence was called on behalf of both plaintiffs and defendants. For the plaintiffs, the master, the chief officer, the carpenter, the boatswain, a seaman of the *J. B. Watt*, and a pilot who was on board of her as a passenger were called. The evidence of these witnesses went to show that the *J. B. Watt* was severely damaged by the collision, and that at the time they left her she was making water fast, and they all considered that it would have been unsafe to remain on board of her. The engineers of the *J. B. Watt* were not called. On behalf of the defendants, the chief mate, the second engineer, and the pilot of the *Thuringia* were called. They proved that there was a good deal of water in the hold, and that the boilers had a pressure of 80 lbs. to the square inch, and that the donkey engine was not going, and that these

things were called to the attention of the engineers of the *J. B. Watt*, and that thereupon the donkey engine was set going by them. As part of the defendants' proof, the registrar admitted an affidavit of M. Senex, a second captain in the French navy, who was not tendered for cross-examination. This affidavit was not filed before the hearing, but was produced at the opening of the defendant's case, no notice having been given that such evidence was going to be given. The affidavit was objected to on behalf of the plaintiffs, but was admitted by the registrar, who offered to adjourn the hearing to give the plaintiffs an opportunity of answering it, or of considering what course to pursue; as a matter of fact, the hearing was, at the end of the first day when this affidavit was produced, adjourned for a week. The plaintiffs did not accept the offer of adjournment, nor did they at the next hearing, or at any time, produce any evidence before the registrar to contradict the evidence of M. Senex. From his deposition it appeared that he was second in command of the French ship of war, *L'Héroïne*, which was then cruising in company with the French fleet in the neighbourhood of Heligoland. Between two and three o'clock in the afternoon, owing to certain manœuvres which appeared suspicious on the part of a large steam vessel (which was the *Thuringia*), *L'Héroïne* was ordered by the French Admiral to proceed towards her. The *Thuringia* steamed away, and he then observed the *J. B. Watt*, apparently damaged by a collision. He did not go on board, but saw the place where she had been damaged, and said that it was not below the water line, and that, although she was struck abait the bridge, and was down in the water astern, she was not so in any extraordinary degree. *L'Héroïne* remained for about twenty-five minutes near the *J. B. Watt*, and then steamed away again to rejoin the French fleet. He said he continued to watch the *J. B. Watt*, and that at half-past five o'clock, at which time they were twelve miles away from her, she was still afloat. He was not allowed to go on board, as his captain (now Admiral Bruat) thought the *J. B. Watt* might be in a sinking state. They returned to look for her the next day, but could not find her. He further stated that the weather was at the time very fine, the sea was calm, that there was hardly any wind, and that the same kind of weather continued during the night and the next day, and that the *J. B. Watt* was eighteen miles from Heligoland. A Captain Petley, R.N., was also called by the defendants to prove that, if the *J. B. Watt* had been got to Heligoland, she might have been run into shoal water, and temporarily repaired there. The defendants had no notice before the reference that this evidence would be given. On this evidence the registrar, on June 13th, reported that the master and crew of the *J. B. Watt* were not justified in abandoning her; that they had left the engines in a highly dangerous state for low pressure engines, and that she might have been got to Heligoland or some other place, and there temporarily repaired; and that, therefore, the owners of the *Thuringia* were only liable for the amount it would have cost to repair the *J. B. Watt* had she been taken into port, and that that amount was 2750*l.*; her value was about 15,000*l.* The report was filed on June 15. From this report the plaintiffs appealed, and now moved the court for leave to adduce further evidence on the hearing

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of the petition on objection. Two affidavits were filed; one, sworn by the plaintiff's proctor, was as follows:—

1. Henry Graham Stokes, of Doctors' Commons, proctor, makes oath, and say as follows:

1. I am proctor for the plaintiff in this cause, and as such proctor I attended the reference before the registrar and merchants held in this cause.

2. The plaintiffs in this cause claimed to recover from the defendants as for a total loss of the steamer, *J. B. Watt*; but the registrar in his report has reported against the claim for a total loss, upon the ground that the *J. B. Watt* was improperly abandoned by the master and crew.

3. The evidence at the reference on the part of the plaintiffs was taken by the oral examination of witnesses. At the end of the plaintiffs' case, an information made by one M. Senex, an officer in the French navy on board a French frigate named *L'Héroïne*, was tendered in evidence by the defendants. The defendants had not previously filed this affirmation, nor given any notice to the plaintiffs of their intention to tender any such evidence, nor had the plaintiffs any knowledge that any such evidence would be tendered. The admission of such affirmation was objected to by counsel for the plaintiff, but such affirmation was admitted by the registrar. I have perused the shorthand writer's notes of what took place on the occasion, and therefrom and from my own recollection I verily believe that no offer was made to adjourn the reference for the purpose of producing the said M. Senex for cross-examination; nor was it suggested by the defendants that they had it in their power to produce the said M. Senex, he not being within the jurisdiction of the court.

4. From the registrar's reasons annexed to his report, I verily believe that he attached great weight to the evidence of the said M. Senex, and in a great manner formed his opinion on the case therefrom.

5. From inquiries which I have caused to be made on the part of the plaintiff since the registrar made his report, I believe that if leave be given to the plaintiffs to adduce further evidence on the hearing of their petition in objection to the report, they will be able to adduce strong evidence showing that the said M. Senex formed the opinion expressed in his affirmation on erroneous and insufficient grounds, and showing that at the time when the said frigate *L'Héroïne* fell in with the *J. B. Watt*, she (the said *J. B. Watt*) was in a sinking condition and incapable of being taken to Heligoland, or elsewhere.

6. I further say, that it was not until the hearing of the said reference that the plaintiffs had any notice or knowledge that the defendants were about to suggest that Heligoland was a place where the *J. B. Watt* could have been taken and temporarily repaired. From inquiries I have caused to be made since the said reference, I verily believe that if leave be given to the plaintiffs to advance further evidence, they will be able to prove that, even if the *J. B. Watt* could have been taken to Heligoland, there was no place there where she could have obtained shelter, and no place where or by means of which she could have been temporarily repaired, but on the contrary, that she must, if taken there, have been broken up.

7. I further say, that I have been informed and believe that the first and second engineers of the *J. B. Watt* were absent from this country on foreign voyages at the time of the said reference. They had been examined and cross-examined as witnesses at the hearing of the cause, but owing to their absence aforesaid, they having respectively left this country in the month of March, 1871, it was impossible to produce them at the reference. I believe that the plaintiffs will be able to avail themselves of the evidence of such engineers if such leave be given as aforesaid, and that their evidence will benefit the plaintiffs. I am further informed and believe that the registrar was in error in thinking that the engines of the *J. B. Watt* were low pressure engines.

8. I say that the plaintiffs are desirous that leave should be given to them to adduce further evidence upon the hearing of their said petition.

Sworn, &c.

H. G. STOKES.

Another affidavit was filed by the plaintiff, sworn by G. J. Hogg, the plaintiff's agent, who stated that he had gone to Heligoland after the reference, and had seen the harbour master there, who

showed him a letter from Messrs. Pritchard and Sons, the defendants' proctors, asking him (the harbour master) to swear an affidavit to the effect that such a ship as the *J. B. Watt*, in the condition she was after the collision, could have been beached and repaired there, and inclosing an affidavit to that effect. From Mr. Hogg's affidavit, it appeared that the harbour master had refused to do this, and was of opinion that such a ship could only be put on shore there for the purpose of saving her cargo, and Mr. Hogg further affirmed that, from information received, he believed that it would have been impossible to have repaired the *J. B. Watt* at that place (a).

But, Q.C. for the plaintiffs, in support of the motion.—It is now the rule that further evidence is only admitted on good ground shown. The difference between the amount allowed and the amount of value is 12,000*l.* In an application to admit further evidence, the amount is of importance when it is remembered that the parties appear before the registrar without pleading or particulars. We did not know certain facts on which they relied, which we should have known if there had been pleadings. The evidence that the ship might have been taken to Heligoland and beached took us by surprise. We wish to show the impossibility of this. We knew nothing with respect to the excessive steam pressure on the boilers. The registrar assumed that they were low pressure engines, whilst they were not. [Sir R. PHILLIMORE.—Did you make any application to the registrar and merchants to adjourn or to hear evidence on these points?] We had no reason to disbelieve the evidence there given, but we have since found it to be untrue, and our affidavits set this out. The affidavit of M. Senex ought not to have been admitted. He ought to have been produced for cross-examination. We wish to produce further evidence to show the state of the *J. B. Watt* when *L'Héroïne* came up. The report seems to find that the engineers neglected their duty in leaving the engines as they did, and we wish to call evidence to show how this really was. We had no knowledge of any charge against the engineers. Our case was, that the injury to the ship's bottom was such that she must have gone down before we could have got into a place of safety. [Sir R. PHILLIMORE.—If you had made any application for adjournment, I should go a long way with you. I object to the system of going before the registrar and not applying at the time; letting everything be finished and then objecting to the report and trying to get in fresh evidence. I always require very strong affidavit showing why the evidence was not produced.]

(a) Sir John Karslake objected to this affidavit being received at all, on the ground that the hearing of this motion had been originally fixed for Tuesday, Nov. 28th, and was only postponed for convenience of counsel, and this affidavit had been filed since (on Friday, Dec. 1st). It is not right practice that, after a motion has stood over which would have been heard but for the absence of counsel, that a fresh affidavit should be filed.

But, Q.C. contra.—The defendants would have been in no worse position if the motion had stood in to-day's paper. The affidavit would then have been admissible, and a mere adjournment cannot affect the question. The practice in this court usually is, that notice of motion is given and then the affidavit is filed.

Sir R. PHILLIMORE.—I think I must admit this affidavit, subject to all objections to the affidavit itself, and subject also to any postponement which Sir John Karslake may require to answer it.

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duced at the hearing.] We are entitled to great indulgence, on the ground that we had no means of knowing the issue that they were about to raise.

Clarkeon, on the same side.—The report finds that she could have been taken to Heligoland, and when there could have been beached and repaired. If we were surprised on one or both of these questions we are entitled to a further hearing. *Senex'* affidavit, should have been filed in the usual way before hearing. It is a serious thing to ask for an adjournment. If the affidavit had been duly filed we could have communicated with the other French officers on board *L'Heroine*. It is material to see how she could have been repaired at Heligoland. [Sir R. PHILLIMORE.—The great difficulty in the way of your application is this; the issue before the registrar was whether your crew was justified in abandoning the vessel; notice was given to you that you must produce the evidence of all those persons knowing anything about the navigation of the ship. No application was made for adjournment. You do not appeal on the ground that the registrar was wrong on the facts which he finds, but that there is further evidence behind. There must be some strict practice on this point. I have always held that further evidence shall not be admitted unless it can be shown that it could not have been produced at the hearing below, or that you had no means of getting it at the time.] The evidence shows that the only means of repairing was by beaching, and this was impossible, as we are prepared to show. [Sir R. PHILLIMORE.—The registrar did not refuse to adjourn, nor did he improperly admit or refuse evidence.] I objected to *Senex'* evidence being admitted, and this put it on the other side to offer to produce him, and not upon me to ask for an adjournment to produce him. If we can prove by further evidence that the ship was sinking, it would be a miscarriage of justice to refuse to admit the evidence. If we ought to have produced this evidence at the reference, it is now only a question of costs.

Sir J. Karlake, Q.C., for the defendants.—The rule as to surprise in the common law courts is, that to get a new trial it must be shown that the side applying did not know and had no means of knowing facts which were given in evidence for the first time at the trial. *Senex'* statement was read the first day, and the plaintiffs should have applied for time to answer it. The fact as to beaching was no surprise; it was cross-examined to. The engineers were examined at the hearing of the principal cause, and ought to have been before the registrar. Surprise does not mean the not seeing the necessity of keeping witnesses in England. There is no information in the affidavit of Stokes to show that they can alter the effect of *Senex'* evidence. They knew that we were going to prove that she could have been saved if she had not been abandoned. She must have been taken ashore to be saved. It is a first principle that, when a case is tried upon a particular issue, and without any imputation of unfairness, it was not right to come afterwards and say there is a further evidence, and a consequent right to a fresh hearing.

W. G. F. Phillimore on the same side.—The nature of the defence must have been known to the plaintiffs. We are not bound to file *Senex'* affidavit before the plaintiffs' witnesses had been cross-examined. It was put in as soon as our case was begun.

Clarkeon, in reply.—It is a standing rule in this court that a party may call upon the other side to produce a witness, who has made an affidavit, for cross-examination. The report finds facts on improper evidence, and we may fairly say we were taken by surprise.

Sir R. PHILLIMORE.—This is an application to the court in the case of an objection to the report of the registrar, assisted by merchants, to allow the admission of fresh evidence on an appeal from that report. That the court has power to admit fresh evidence is unquestionable since the decision of the Privy Council (see *The Flying Fish*, B. & L. 436, 442; 12 L. T. Rep. N. S. 619), but nevertheless it is a power which the court ought in my judgment to exercise with great caution, and I think I do not go too far in saying, with great reluctance. It certainly is for the interests of justice that no person should be deprived, by reason of surprise, of the means of making a fair and just statement of his case; but it is no less for the interests of justice that no person should be enabled, after having gone to a fair trial, to patch up the defects which that trial has disclosed in his case by new evidence before another tribunal. It is manifest that there is no door more widely open than that which I have mentioned. In this case the application to the court is founded on an affidavit which, though it does not expressly use the term "surprise," contains averments from which the court is to infer that upon material points upon which the decision of the court below turned, the plaintiffs at the reference were surprised, and that therefore they were unable to state their case as fairly and fully as they otherwise would have been enabled to do. One of the first questions which every court of justice must look to in an application of this kind is the question of dates. I find, upon referring to the minutes, that the decision of the registrar, assisted by merchants, took place in June, and that the registrar's report was filed on the 15th of that month. No application is made to the court till the middle of November for the introduction of new evidence, and that is a circumstance of light materiality in determining the judgment of the court. Turning to the affidavit to which I have referred, it is stated that at the end of the plaintiff's case an affirmation made by one M. *Senex*, an officer in the French navy, on board a French frigate called *L'Heroine*, was tendered in evidence by the defendants, and that the defendants had not previously filed this statement or affirmation, or given any notice to the plaintiffs of the production of any such evidence. The reception of this affirmation in evidence by the registrar is now made a ground for the introduction of further evidence. It appears now, from the statement of counsel, and from the evidence before the court, that it was correctly stated that the affirmation of M. *Senex* was not filed before the hearing of the cause before the registrar and merchants, and it should have been so filed, I think. I think, also, that it is impossible to read the report of the registrar without seeing that he attached weight, and in some degree founded his report on the evidence of M. *Senex*. Now M. *Senex* was an officer in the French navy, under the command of Admiral Brunt at the time, and his evidence went, in effect, to this—that he came up to the *J. B. Watt* after the collision, and that in his opinion when he so came up the appearance of

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the vessel was such as to lead him to think that she was not in a sinking state at the time, and might have been saved. Inasmuch as the main issue submitted to the registrar and merchants was whether or not the crew were, in the circumstances of the case, justified in abandoning their vessel as they did immediately after the collision, it cannot be denied that this is an affidavit of importance; and unquestionably, if the plaintiffs had made any application to the registrar and merchants that they might have had any opportunity of cross-examining the maker of the affidavit, or if they had made an application for an adjournment in order that they might have time to consider what course to pursue, and such application had been refused, I should have no hesitation whatever in granting the present motion. But no such application was made. On the contrary, the registrar informs me that he offered the parties to have an adjournment for the purpose of considering what course they would pursue, and that that offer was rejected. As a matter of fact, it appears that after the introduction of this affidavit there was an adjournment for a whole week, and that this affidavit of M. Senes was brought to the attention of the opposite side, notwithstanding two or three days before, or one day before the reference, as it ought to have been strictly speaking, but still on the day upon which the reference was first heard. I do not find in the affidavit of Mr. Stokes that there is that amount of precise statement which the court requires on a point of this description. The language of the affidavit is very vague in a case where it ought to be as precise as possible. It states that the plaintiffs will be able to adduce strong evidence showing that M. Senes formed his opinion on erroneous grounds, but it does not state with the amount of precision requisite the witnesses who are to be brought forward to show this, nor does it in any way indicate the nature of their evidence with regard to this point; it should also be remembered that the registrar did not form his opinion on M. Senes' evidence alone. The second point urged by the plaintiffs is, that they had no notice that the defendants were about to suggest that Heligoland was a place where the *J. B. Watt* could have been taken and temporarily repaired; and again, that is stated in the vaguest possible manner on the affidavit. Now there is, I think, some mistake in the argument of counsel on this point. I cannot discover in any part of the registrar's finding any statement that the vessel must necessarily have been taken to Heligoland in order to be beached, which seems to have been assumed throughout the whole of the arguments which have been addressed to me. The statement is, that she might have been taken to Heligoland, which was distant, I think, about eighteen miles, and that there proper measures might have been taken by which the leak might have been stopped, so as to have enabled her to go on to another port, where permanent repairs might have been effected. A third point was taken, that the opinion of the registrar and merchants was partly founded on the evidence of the engineer and other witnesses from the *Thuringia*, and that the first and second engineers of the *J. B. Watt*, although examined in the principal cause when heard before this court, were absent from this country on foreign service at the time of the reference, and that it was impossible to call them. I have already said that the main issue which the parties knew they had to

meet before the registrar and merchants was, whether or not the crew of the *J. B. Watt* were or were not justified in leaving her directly after the collision; and it is impossible to entertain the slightest doubt that the knowledge of the nature of the issue must have admonished those who had to prove the negative, that the most important witnesses they could adduce would be the engineers; and it cannot avail now on an application for the introduction of new evidence to say, if we had known that reliance could have been placed on the examination of the engineers as to the state of the low pressure and the general machinery of the ship, we should have produced the absent witnesses, and we now ask leave to produce them in the Court of Appeal, because we believe that we shall be able to avail ourselves of the evidence. On the whole, I am satisfied, looking to all the circumstances, that the court ought not to admit the introduction of fresh evidence on the ground of surprise, which is in reality the ground on which the application is founded in this case. I am of opinion that the applicants have not brought, themselves within the conditions of the rule which I have determined to observe in all applications of this description, namely, that they must satisfy the court that the evidence which they now seek to introduce, could not, by proper diligence and by proper application, have been produced in the court below. I must, therefore, reject this application with costs, but I think it right to say that this is a matter in which, if you ask for leave to appeal, I will grant it.

Proctors for the plaintiffs *Dyke and Stokes*.

Proctors for the defendants, *Pritchard and Sons*.

Dec. 5, 9, 12, and 19, 1871.

THE CITY OF BUENOS AYRES.

Collision—Measure of damages—Demurrage—Time and rate—Reference to registrar and merchants—Objection to registrar's report.

In a cause of limitation of liability arising out of a collision, where the fund in court being insufficient to satisfy the claims against it, a reference has been made to the registrar and merchants to assess the damages as to time and rate, the court will review the registrar's report and correct it, if it should appear that any portions of the report are founded on what the court deems to be an erroneous view of the evidence.

Demurrage is allowed to the owners of a ship damaged by collision during the time that she has been necessarily delayed for the purpose of effecting the repairs rendered requisite by the collision, and of transacting business unquestionably connected with the collision.

As the master has, in some circumstances, the duty cast upon him of acting as agent for the cargo as well as the ship, the making a protest and obtaining the necessary official documents in a foreign port relating to the damage done to both ship and cargo is business unquestionably connected with the collision. Delay in their preparation caused by the dilatoriness of the foreign authorities, and by no default of the master, is chargeable to the collision.

Quare, whether trans-shipment and forwarding of cargo can be said to be business connected with the collision.

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The usual rate of demurrage allowed to steam vessels of the ordinary class, carrying cargo, is 6d. per ton on the gross tonnage, or 9d. per ton on the net tonnage, per day. This estimate is arrived at by doubling the amount of the wages of the crew and of the cost of their provisions, so as to include both expenditure and loss of trade.

THIS was an objection to the registrar's further report in this cause. The suit arose out of a collision which took place at the island of St. Vincent between the British steamship, the *City of Buenos Ayres*, and the North German steamship, *Bismarck*, of Hamburg. The owners of the *City of Buenos Ayres* admitted their liability, and instituted a suit to obtain a limitation of the amount, and paid into court the sum of 10,514*l.*, being at the rate of 8*l.* per ton on the registered tonnage of the vessel, with interest up to the date of such payment. Two sets of claimants appeared, namely, the owners, master, and crew of the *Bismarck*, and the owners of the cargo on board her. The court thereupon, as the amount paid in was insufficient to satisfy both claims, referred the question to the registrar and merchants to decide the proportion in which each claim should be paid. The evidence before the registrar and merchants, on which the first report was based, was entirely documentary evidence. The protest, which was made before the North German consul at Rio de Janeiro on 4th June 1869, contained an extract of the log of the *Bismarck*. From this extract, it appeared that on 30th Nov. 1868 the *Bismarck*, bound on a voyage from Glasgow to the Cape of Good Hope, moved out into Glasgow roads and took on board some powder. On 1st Dec. she went to sea in good order, with her cargo well stored, and with her coals on board. After landing her channel pilot at Queenstown, she proceeded on her voyage until 10th Dec., when a fire was discovered in her coal bunkers. The powder was then thrown overboard, and by the use of the steam pump, the fire was mastered and apparently extinguished. On 16th Dec. the coals again commenced to burn, and were again extinguished by the steam pump, and some coals were taken out of the bunkers. On 19th Dec. the *Bismarck* cast anchor at about 6 p.m. in the roads of Porto Grande, St. Vincent, and about 9 p.m. on the same evening she was run into and was very seriously damaged by the *City of Buenos Ayres*. As the vessel was fast making water, and there was a fear that she would sink in deep water, the pumps were set to work, and were kept going all night; and on the following morning the ship was got under steam into shallow water, whereupon the dry portion of the cargo was discharged. The master of the *Bismarck* at once went ashore to enter a protest against the *City of Buenos Ayres*, but could obtain no security either from the English Consul or from the Portuguese authorities, and that steamer left St. Vincent. On 22nd Dec. a survey was held on board the *Bismarck*; the steam pump was continued at work without intermission; the discharge of the cargo and of the coals to the amount of 115½ tons, went on, and attempts were made to stop the leak, but without success. On 28th Dec., a second survey was held on board, and in consequence a diver was sent down, and he discovered that the hole in the ship's side went down 8ft. under the water line. After continued efforts to stop the leak, and to lessen the water in her by pumping, on 5th Jan. the ship was given a list to starboard in order to raise the leak better

out of the water, and the boiler smiths began at the repairs from the outside. On 16th Jan., whilst the repairs still went on, the captain, the first and second officers, and the first and second engineers, went on shore to note a protest prepared by a notary. On 18th Jan. the ship was hove further over to starboard by means of filled water casks, to which on 22nd Jan. were added three boats filled with water in order to enable the smiths to reach the lowest plates. On 29th Jan. the boiler makers had finished the plates outside but, according to the protest, it was not possible for them to cover the lowest part of the cut with plates, and that part was stopped as well as possible from the inside with sacks and wood. The ship was then tight, and the fires in the boilers were allowed to go out, and the pumps to stand. Thereupon the ship was cleaned, and on 1st Feb. a survey was held by a boiler maker and the commanders of two Brazilian steamers, who reported to the captain of the port, that the ship was repaired as far as the means at that port would admit, but that as the lower part of the repairs had been effected under water, they could not have been sufficiently complete to warrant the reloading of the vessel with her cargo; they therefore recommend that she should be sent to a port in Europe for permanent repairs, and the cargo forwarded to its destination by some other vessel; they further suggested that a short trial of the engines should be made in order to test if any damage had been sustained by them in the collision. The trial trip did not take place until 14th Feb. and, according to the protest, "the intermediate time was used to caulk the deck and take in coals." The trial trip took place in the presence of appointed surveyors, who found that the repaired side of the ship made much water, and, therefore recommended that the ship should not go to a European port, but should go to Rio de Janeiro there to effect the necessary repairs. The Bremen three-masted schooner *Willy* was, thereupon chartered to take on to the Cape of Good Hope the undamaged part of the cargo, and on 16th March the *Bismarck* put to sea for Rio de Janeiro, being, according to the surveyors, in sufficient seaworthy state for this voyage, and arrived there in safety on 30th March.

On 31st March she was surveyed, and after stating the damage the surveyors recommended "that the ballast and coal be discharged and the steamer put in dry dock, and another survey held when in dock; that before going into dock she should make a trip in this harbour for the purpose of examining the working of her machinery, it being, nevertheless, understood that the machinery has to be re-examined after the steamer leaving the dock." On 3rd April a survey was held on the machinery, and the surveyors reported that they "have this day inspected the machinery of the said steamer while under steam, and found it working satisfactorily, but, nevertheless, are of opinion that the said machinery should have a thorough overhaul after leaving the dock." On 9th April the steamer being then in dry dock, a survey was held and certain repairs were ordered, in order "to make the steamer in as good condition as she was before the accident," and amongst other things that "the hull of the steamer be thoroughly cleaned and painted with three coats of red metallic oxide, the floorings to be taken up for examining the bulkhead." On 28th April another survey was held, the vessel being still

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in dry dock, and the surveyors inspected the watertight compartments, and reported that "some leaks were perceptible in the bulkheads, only the sides of the vessel being perfectly watertight; that the inside painting of the hull has been destroyed by the salt water that remained in it a long time at St. Vincent, and also by the repairs that have been requisite," and they recommended that "the inside of the hull and bulkheads be well cleaned and painted with red metallic oxide." On 29th April the vessel left the dry dock. On 8th May surveyors inspected the machinery, and recommended some repairs to the clutch coupling at the end of the shaft, and further, that "the donkey pumping engine will require a thorough repair, as it has been working night and day to keep the water out of her as much as possible the whole time the vessel was at St. Vincent, as also on her passage to Rio de Janeiro, and the working parts are much worn, and one of the cocks broken." All these surveys at St. Vincent were signed by the surveyors on the days on which they were held, but on each of them appeared the following endorsement:

The above survey took place in our presence, and the signatures of the experts (here are the names of the various surveyors) are genuine and written with their own hands. Otherwise without prejudice as to the extent and liability of the insurance.

Rio de Janeiro, May 21, 1869.

LOCKEMANN and Co.,
Agent to the Hamburg Underwriters.

On 31st May a further survey was held, and the surveyors reported:—"We found her under steam with engines ready to work; having set same at work, while at anchor, ahead and astern, found same in good state and condition. Examining from the exterior accessible parts of the bottom, we found that some parts were denuded of paint, while since the ship came out of dock, the whole, by lying in the lively and warm water of the harbour to complete the repairs, has become sufficiently dirty for the said bottom to be released and repainted." On 3rd June she was finally surveyed, and it was reported that "the vessel is in perfect condition to undertake any voyage to Europe." These last two surveys were also signed by the surveyors on the dates of the surveys, and had on them an endorsement similar to the one already set out, but dated 10th June. The *Bismarck* sailed for Hamburg on 19th June with a valuable cargo shipped at Rio. The registrar and merchants had before them all the accounts and vouchers relating to the expenses incurred.

On 1st July 1870, the registrar made his first report, and found that the expenses incurred in consequence of the collision, and the demurrage due together, amounted to £2054. As to the demurrage, which was afterwards the only question contested, the registrar reported that, as the *Bismarck* would have been delayed at St. Vincent in consequence of the fire among her coals, and would have taken till the end of January to proceed to her ports of destination, demurrage did not begin to run until 1st Feb.; that the repairs were completed at Rio de Janeiro on 8th May; that the further surveys were only to fit her for her homeward voyage; that three days more were to be allowed for necessary work on coming out of dock, and he thereupon found that 100 days was the time during which the owners of the *Bismarck* could claim demurrage. As to the rate at which demurrage was allowed he reported, that the usual

rate was 6d. per ton on the gross tonnage of a vessel, or 9d. per ton on the net tonnage; that it was an ample allowance in the present case as appeared from an account filed of the wages of the crew, numbering twenty-four hands; their wages amounted to 1211. per month; the cost of provisioning them at 1s. 6d. per head would be 36s. per day, or say 21. per day, or 601. a month; so that the cost of the wages and provisions of the crew would be about 1801. per month, and as the amount allowed for demurrage at 121. 10s. per day would be 3751. per month, this would leave 2001. a month to cover interest in capital, wear and tear, which would of course be trifling whilst the vessel was lying in harbour and undergoing repairs; this made the total sum allowed for demurrage 12501. for the period of 100 days.

From this report the owners of the *Bismarck* appealed and in the particulars of objection filed by them in pursuance of an order of the judge, they objected, amongst other things, to the rate of demurrage allowed; first because 1s. per ton is the usual and proper rate allowed to vessels of the description of the *Bismarck*; secondly, thirdly, and fourthly, because 121. 10s. per day was an inadequate sum, and only just covered daily cost and not interest on capital and wear and tear, and, fifthly, because St. Vincent and Rio de Janeiro were especially expensive ports and the cost of maintaining the crew there was unusually large; to the reduction of the number of days for which demurrage ran they objected, first, because, admitting that some deduction should be made for the time which the *Bismarck* would have taken to sail from St. Vincent to her ports of destination, forty-three days was an excessive deduction; secondly, because twenty-one days was sufficient deduction; thirdly and fourthly, because the *Bismarck* was not ready for sea on 8th or 11th May, but on 4th June; fifthly, because demurrage should have been allowed from 19th Dec. to 4th June, deducting only twenty-one days.

These objections were argued before the court and the report was confirmed in all respects, except so far as it related to the plaintiff's claim for demurrage, and as regards that part of the report, the court, without expressing any opinion, referred it back to the registrar and merchants, with liberty to hear fresh evidence and with an express direction that the registrar should be at liberty to award in respect of the claim for demurrage a less or a larger sum than had been awarded in the first report.

On the further evidence three witnesses were called. The first witness was Mr. Edward Leopold Avis, a provision merchant in the city of London; he stated that he had been in business for twenty-eight or thirty years, and that he had a general knowledge of the price of provisions all over the world, and that he supplied provisions to ships sailing to all parts; that the cost of provisioning ordinary seamen in the port of London for the last three years was from 13d. to 15d. per head per day, for common seamen, and for officers from 3s. to 3s. 6d.; that the expense of provisioning ships at St. Vincent is much more expensive than in London as everything has to be imported and nothing is produced there, except vegetables and sugar; that at Rio de Janeiro the cost of ship's provisions was dearer still, owing to heavy import duty; that all salt provisions were imported; that fresh beef and vegetables were the only native products avail-

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able; that at St. Vincent the cost would be twice, at Rio three times, that of provisions in London that German crews cost less than English to provision, as they require less meat, and eat more farinaceous food; that his evidence as to the cost of ship's provisions referred to salt beef, and that he had no knowledge that there were large stores of wild cattle running wild at St. Vincent; that the cost of fresh beef at Rio was as he had been informed from 6d. to 8d. per lb., but that he knew nothing of the price at St. Vincent, except that fresh beef would be somewhat dearer at Rio than at St. Vincent on account of the mode of trade.

The second witness was Wilhelm Lauer, the master of a German vessel of about 1000 tons burden. He stated that he had never been at St. Vincent, but often at Rio; that in 1868 he was at Rio with his ship for three months; that he usually laid in his ship's stores (not fresh stores) at Bremen, where the prices were about the same as in London; that at Rio everything is dearer than in England, including fresh stores; that the price of fresh meat at Rio depends on the season of the year, it being in the dry season sometimes double the price it is in the wet season; that the wet season is from April to October; that during that time fresh meat is cheaper than in England or at Bremen; that the price of salt meat at Rio is about double that in London; that the cost of provisioning a ship at Rio for a German crew would be about double that in London; that the cost of provisioning the officers, including the master when at sea, would be about double that of a common seaman; that by the German law a master is bound to give his men fresh meat twice a week whilst in port; that the cost of fresh meat at Rio was about the same as the cost of salt meat at Rio; that biscuit at Rio was double what it is at Bremen.

The third witness called was Constant Staevens, who was the managing clerk to Messrs. Lippert and Co., the owners of the *Bismarck*, and he stated that he was sent out by that firm to St. Vincent, when the news came of the collision; that he arrived at St. Vincent on the 14th Feb. 1869; that he had bought the *Bismarck* for her owners at Glasgow, and had fitted her out, and that her total cost was 13,500l.; that she was fitted out to trade on the coast of South Africa, Cape Colony, and up to Port Natal, and to the Mauritius eventually, because it was in negotiation to have a mail contract from the Mauritius to Port Natal which she got later, and carried out until the French and German war began; that she sailed from Glasgow with 230 tons on board, her tonnage being 497 tons; that he took this cargo at low rates of freight as she was obliged to go out for the local trade, and they were willing to take any rates rather than go in ballast; that the freights paid were from 30s. to 60s., mostly about 35s., instead of 80s. per ton, the usual rate; that it was intended, when the ship sailed, that she should put in at St. Vincent for coals; that arrangements had been made with the firm of Messrs. Miller and Son, of Bristol, that their firm at St. Vincent should supply the ship with coals; that the *Bismarck* put into St. Vincent in pursuance of this arrangement; that it never took more than twenty-four hours to coal a steamer at St. Vincent; that he chartered the schooner *Willy* to take on the cargo on 20th Feb. 1869, but that it took about three weeks after this date to get the cargo ready and on board the *Willy*; that

the delay at St. Vincent from 1st Feb. to 16th March was, first, for the purpose of making the ship as safe as possible for her journey to Rio; secondly, to get the *Bismarck's* documents properly drawn up as required by the local authorities and by the law that refers to such average cases; thirdly, to enable the master to provide for the cargo as in duty bound; to get the damaged parts of the cargo put to rights as far as possible, and to discharge the duties he had undertaken by signing bills of lading at Glasgow; that the accommodation for reloading the cargo was very bad; that they stayed at St. Vincent about five days after the *Willy* sailed; that his orders were to get away as soon as possible, and that every possible exertion was made to get away; that they were obliged to buy stores at St. Vincent or they would have been starving several times, and they were nearly starving; that steamers calling there had only got their own amount of provisions; that there were no cattle on the island of St. Vincent, but only on the island of Antonio, about seven miles distant, and that there was an occasional steamer trading between the islands; that they had three months' ship's stores on board; that they bought stores for three weeks at St. Vincent for the voyage to Rio; that expenses were much heavier than in London; that there was very little fresh meat; that the cost of provisioning a common seaman in Europe would be about 1s. 6d. per day, and for an officer three or four times as much; that he sailed to Rio de Janeiro with the *Bismarck*; that he was present at all the surveys held there; that they got the steamer out of dry dock as soon as they could; that the surveyors would not look at the engines in the dry dock; that they only did such repairs in dry dock as could not be done elsewhere, as they were anxious to save the rent of the dock; that from 27th April to 8th May repairs were still going on; that everything was done as the surveyors recommended, and as quickly as possible; that no cargo was engaged for her at Rio until 6th June, and none shipped until 8th June, and that she was not chartered; that the time between 8th May and 31st May was entirely taken up by the repairs to her engines; that the cost of provisions at Rio in some cases is two or three times that in London and Hamburg; that the *Bismarck* took on board about five weeks' provision at Rio for the voyage to Hamburg; that if there had been no collision she would have taken twenty-one days to go to the Cape of Good Hope, one day at the Cape, three days to Port Elizabeth from the Cape, one day there, three days from Port Elizabeth to Natal, and two days there; that the documents prepared at St. Vincent were so prepared by orders of the master, and that the delay with regard to them was owing to the want of persons competent to prepare them, and to the Portuguese authorities requiring so many forms to be gone through, and being very dilatory.

In addition to this evidence, the documents above referred to were produced at the reference. First, a protest entered into by the master, first and second officers, first and second engineers, and the carpenter of the *Bismarck*, relating to the collision; the proceedings relating to this document began on 24th Dec. 1868, and finished on 1st Feb. 1869, but the master did not obtain a certified copy from the notary until 9th March 1869; secondly, a public form of civil inspection of the cargo ordered by

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the Court of the Island of St. Vincent on the petition of the master of the *Bismarck*; the proceedings connected with this document began on 31st Dec. 1868, and were concluded on 13th Jan. 1869, but the master did not obtain a certified copy until 11th March 1869; thirdly, a public form of civil inspection of another portion of the cargo ordered by the above court on the petition of the master; the proceedings in connection with this document began on 22nd Jan. 1869, and were concluded on 3rd Feb. 1869, but the master did not get a certified copy until 11th March 1869; fourthly, a protest, entered into by the same persons as the first protest, with reference to the coals damaged by fire on the voyage from Glasgow to St. Vincent; the proceedings with reference to this protest began on 21st Dec. 1868, and were concluded on 1st Feb. 1869, but a copy was not supplied by the notary till 10th March 1869; fifthly, a copy of civil proceedings instituted at St. Vincent against the *City of Buenos Ayres*, to recover damages for the collision, commenced on 16th Feb. 1869, and concluded, on the non-appearance of the defendants, 4th March 1869; a notarial copy was furnished on 8th March 1869; sixthly, a copy of civil proceedings of inspection instituted in the court by Millers and Nephew for the appointment of surveyors to report on the possibility of repairing the ship at St. Vincent; these proceedings were commenced on 14th Jan. 1869, and on 15th Jan. the surveyors appointed reported that it was not possible to institute thorough repairs at St. Vincent, but only a temporary repair to enable her to proceed to some other port where she might be thoroughly repaired, and the proceedings were concluded on 20th Jan. 1869; and seventhly, a similar document as to the reports of the later surveys held at St. Vincent, from which it appeared that proceedings were begun on 27th Feb. 1869, that, on 4th March the surveyors reported the extent of the damage done, and that the proceedings were concluded 8th March; notarial copies of these two documents were furnished to the captains on 9th March 1869, and it appeared from the notaries' verification that there was only one notary in the island; and ninthly, an account sent in by Miller and Nephew to the master of the *Bismarck*, from which it appeared that they had supplied 24 live sheep, at the price of 91,200 reis (about 21l. 5s. 8d.), and 1723lb. of fresh beef at 241,220 reis (about 56l. 5s. 10d., or 784d. per lb.), and other provisions, which had been chiefly purchased from ships lying in the harbour. The defendants produced no evidence, but at the reference the registrar produced and read in the presence of both parties two letters which are set out in his report.

The further report was made on 8th July 1871 and the registrar, after stating the way in which the case had come before him, and disposing of certain preliminary questions, set out the evidence as appearing from the various documents, and then proceeded as follows:—

"The question that we have to consider is, what portion of the time between the vessel's arrival at St. Vincent, on 19th Dec. 1868, and her departure from Rio on 19th June 1869, is properly chargeable to the collision. Now the first point to be observed is, that on the voyage to St. Vincent, and previous to her arrival at that place, fire had twice broken out amongst the coals, first on 10th Dec. and again on the 16th of that month; and although the crew ultimately succeeded in getting the mastery

over the fire, it is idle to suppose that they would have continued their voyage from St. Vincent without a thorough overhaul of the vessel, and without discharging the whole of the coals, if not a portion of the cargo, in order to ascertain the origin of the fire. That this would have taken some time to effect, is apparent from the length of time which seems to have been required to discharge the coals and cargo after the accident, when they had every inducement to employ the greatest expedition in order to save the cargo from being damaged; they had also the assistance of the crew of a Russian frigate, which was in port at the time. Looking at all the circumstances of the case, we think that, even had there been no collision at all, the vessel could hardly have discharged her coals, overhauled the cargo, and replenished her stock of coals, and have been again prepared to pursue her voyage under five days. The collision occurred within three hours of her arrival at St. Vincent; so that there would have been five days, during which she would have been necessarily detained at St. Vincent, and which cannot be charged to the collision.

"Secondly, it will be seen from the manifest of the *Bismarck's* cargo, which is the last document in the printed appendix, that the vessel was originally destined to the Cape of Good Hope, Port Elizabeth, and Port Natal, rather less than one fourth of the freight being payable in respect of goods to be carried to the Cape of Good Hope, about the same amount for those to Port Elizabeth, and rather more than half the freight for the cargo which was to be landed at Port Natal. As has before been stated, when it was ascertained that the vessel could not continue her voyage, the damaged portion of the cargo was sold, and the undamaged portion was put on board a vessel called the *Willy*, which had been hired expressly for the purpose of carrying it to its destination, and thus enabling the owners of the *Bismarck* to claim the freight. And as, in addition to the freight which they have received, they have been allowed for any loss they may have sustained in respect of the damaged goods, together with the whole cost of transshipping the remainder of the cargo, and of the hire of the schooner *Willy*, it follows that a deduction must be made from the demurrage for the time which would probably have been required to complete the voyage to the three above-named ports, and to there discharge the cargo. Objection was at first taken to any deduction on this account, but it is so clear that, if the claimant gets the full freight, which he would have earned had no collision taken place, he must allow for the time during which he would have been employed in earning that freight, that it seems strange that the point should ever have been contested; ultimately, however, the objection was withdrawn. Now, according to the evidence of Mr. Staevens, it would have taken the vessel from twenty to twenty-one days to get from St. Vincent to the Cape of Good Hope; he allowed one day to discharge cargo there, three days from the Cape to Port Elizabeth, one day discharging there, three days thence to Port Natal, and two days discharging at that port. In all, then, he allows from thirty to thirty-one days to complete the voyage from St. Vincent; and it will probably not be thought that the time is at all too long, when it is remembered that the Cape is above 5000 miles from St. Vincent, and Natal nearly 1200 miles from the Cape, and that she had to

discharge cargo at three different ports. We shall, therefore, deduct thirty-one days on this account. Mr. Phillimore contended that some allowance must be made, on account of the freight which it is thought she might possibly have earned for cargo, which she might have taken at the Cape or at Port Elizabeth. No evidence, however, was given that she would have obtained any such cargo, or as to the amount of freight which she would thereby have earned, so that it was impossible to form even a 'conjectural estimate' on this point. It is also not to be forgotten, that if she had taken in cargo either at the Cape or at Port Elizabeth, it is probable that she would have been detained somewhat longer at those places than has been allowed for. On the whole, we think that thirty-one days would be a fair allowance to make for the completion of the voyage and the discharge of the cargo, and that period must, therefore, be deducted from the time for demurrage.

"And now we come to a very important question, namely, whether any, and, if so, what amount of time was wasted at St. Vincent, and whether the ship could by reasonable diligence have sailed from St. Vincent at an earlier period than she did; if so, and that this time was not necessarily required for the repair of the damages sustained by the vessel in the collision, it is clear that the plaintiffs cannot claim, as against the defendants, the time that has been so wasted. It must not be forgotten, that all that was done at St. Vincent was to discharge the coals and the cargo, and to do certain temporary repairs to the vessel, sufficient to enable her to get to some port where the permanent repairs could be effected. On the other hand, we must remember that St. Vincent is an open roadstead, that, therefore it could hardly be expected that repairs could be performed as expeditiously there as at a port where there were docks and other facilities for the purpose. The coals and cargo were, it seems, discharged by the 28th Dec., and without examining too minutely whether the subsequent repairs were as expeditiously performed as they might have been, we find from the survey and protest, that on the 1st Feb. the temporary repairs have been completed, sufficient to enable her to proceed to a port for the purpose of having the permanent repairs done; but that the surveyors recommended that she should previously have a short trial of her engines. It was not, however, until the 14th Feb. that this trial trip took place. Why it was that it was so long deferred we are not informed, except that we are told that 'the intermediate time was used to caulk the deck and take in coals. On the trial trip it was found that the vessel made so much water on the repaired side, that it was determined to send her to Rio for repairs, instead of to a north European port, as had been previously intended.

"It was at this time that Mr. Constant Staevens arrived at St. Vincent, a circumstance which, it appears to us, was not attended with all the advantages which the owners no doubt contemplated, when they sent him out to manage the vessel's affairs. From the position which he held, as representing the owners on the spot, he might have given us the fullest information on the case; but unfortunately he was troubled with that kind of memory which consisted in remembering very distinctly all those matters, however trifling, which seemed to tell in favour of his owners, and in ignoring altogether facts which seemed to have an

opposite tendency, and which it might reasonably have been expected that he would have known.

"The vessel, as I have said, had undergone her trial trip on the 14th Feb.; it was not, however, until the 16th March following that she sailed for Rio. What was the reason of this great delay we are not informed. Mr. Staevens, when asked, took refuge under the plea that the ship was under the management of the master, and the master was not produced before us for examination. There was a suggestion that the vessel was detained from the 14th Feb. to the 16th March, to enable Mr. Staevens to arrange about the sale of the damaged cargo, and to despatch the undamaged portion to its destination. There was also some evidence that Mr. Staevens was employed during this time in obtaining the necessary papers to enable him to claim against the underwriters, as well for the damage occasioned by the fire which had broken out on board, as for that resulting from the collision. But, even were it so, it would be no reason for detaining the vessel at St. Vincent. The cargo had been long before discharged from the *Bismarck* and placed on shore in the hands of Messrs. Miller, Brothers, who were the agents at St. Vincent of the owners of the *Bismarck*. Any duties, therefore, connected with the sale or despatch of the cargo could have been readily performed by those gentlemen, and if Mr. Staevens preferred to see to the sale and transhipment of the cargo, and to collect the necessary documents himself, that can be no reason why he should have detained the vessel for that purpose. Mr. Staevens might, if he had thought it necessary have remained behind at St. Vincent, and when he had disposed of all the business, have followed the ship to Rio; but he could have no right to detain the vessel for this purpose at the cost of other parties. If Mr. Staevens had never come out at all, is it supposed that these duties would not have been efficiently performed by Messrs. Miller, the owners' agents, on the spot? Or, if Mr. Staevens was unwilling to allow the master to go to Rio without him, not having sufficient confidence in him to entrust him with making arrangements for the permanent repairs, is that a ground upon which we can allow this vessel to be detained, at the expense of third parties, for a period of some thirty days, at a cost, according to the owners' claim, of nearly 25*l.* per day? We are clearly of opinion that no good reason has been given why this vessel was detained at St. Vincent from the 14th Feb. to the 16th March; nothing, in fact, which would induce us to throw the cost of this detention upon third parties. There seems, indeed, to be no reason why she might not immediately after the trial trip have made arrangements for going to Rio; and, allowing two days for this purpose, we think that there was here a loss of twenty-eight days, that is from the 16th Feb. to the 16th March, which cannot properly be charged to the collision.

"The vessel then arrived at Rio on the 30th March, and no time seems to have been lost in having her surveyed, a preliminary survey having been held on her on the 31st. On the 3rd April the machinery was surveyed, and on the 9th of the same month the vessel underwent a thorough survey. We are not disposed, considering the port at which the repairs were done, the nature of the climate, and the character of the people, to complain of the time during which she remained in

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dock. Something also would probably have had to be done to the vessel after she came out of dock on the 20th April; at the same time we are at a loss to understand why the engines were not overhauled during the twenty-six days that the vessel remained in dock, in order that the repairs to the vessel and the engines might have gone on together. Instead, however, of this being done, it was not until the 8th May, more than a week after she had come out of dock, that the engines were surveyed. When, too, this was at length done no such damage was discovered as would have required any very long time to repair, for it was chiefly the donkey engine that required repair, and that certainly could have been done whilst the vessel was in dock. We are not told when the repairs to the engines were completed; but on the 31st May another survey is held, and it is then said that the vessel, by 'lying in the lively and warm water of the harbour to complete repairs, has become sufficiently dirty for the said bottom to be re-cleaned and painted.' It should here be observed that the vessel had only come out of dock on the 20th April, and that whilst there her bottom had been 'thoroughly cleaned and painted with three coats of red metallic oxide,' or at all events a charge for it has been made and allowed. To suppose then that a vessel that had been thoroughly cleaned and painted with three coats of paint should, after being in the harbour of Rio only one month, have become so dirty as to require to be re-cleaned and re-painted is utterly unreasonable. It is very well known that vessels, even after a long transatlantic voyage, are detained at Rio for considerably more than a month discharging and taking in cargo, without its being considered necessary to dock and re-paint them; were it otherwise the port would hardly be so much frequented as it is. The claim then for this second cleaning and painting of the vessel's bottom, which was at one time strongly insisted upon, appears to us to be utterly unreasonable. But if the necessity for re-painting the vessel is given up, what becomes of the claim for demurrage during the time that this re-painting was going on? It is clear that this must go also. And what we must endeavour to ascertain is, not when it was that the last repairs were done to her, but when they might with reasonable diligence have been completed, and the vessel have been placed in a position to enter upon a new voyage; to put her, in fact, in the same condition as she would have been upon her arrival at Natal, had she prosecuted her voyage to that port, and there discharged her cargo.

"I have already stated that there seems to be no reason why the repairs to the engines might not have gone on at the same time as the repairs to the ship, instead of being deferred until after she came out of dock. But giving the plaintiffs the benefit of the doubt, and assuming that no time was lost up to the time of the survey of the 8th May, let us inquire what would be a reasonable time to allow from that date to complete all the repairs shown by that and the previous surveys, both to the engines and to the vessel itself. Now there is a fact, apparently trifling in itself, which seems to indicate that by a particular day the repairs had been completed. If the surveys of the 31st March, 3rd, 9th, and 28th April, and 8th May be examined, it will be seen that they were all signed by Messrs. Luckemann and Co., the agents to the Hamburg underwriters

at Rio, on one and the same day, namely, the 21st May 1869; and to each survey the following words were added: 'without prejudice as to the extent and liability of the insurance.' Now is it possible that at this date all the repairs had been completed, and the accounts were being made up and submitted to the underwriters' agent; and that the subsequent re-docking, re-cleaning, and re-painting the bottom had relation to some engagement subsequently entered into by Mr. Staevens for the voyage to 'Hamburg'? Is it possible that the merchants may have made it a condition to their shipping this very valuable cargo on board the *Bismarck* that those additional repairs should be done to her? But whether this be so or not, what we are clearly of opinion is, that all the necessary repairs, all such as were occasioned by the collision, ought to have been, even if they were not, completed by the 21st May. There is nothing in the surveys to show us that they were not completed by that day; and the time allowed by us appears to be amply sufficient for the purpose. If then we are right in this opinion, no demurrage would be due after that day.

"Now the whole time claimed by the plaintiffs is from the 19th Dec. 1868 to the 19th June 1869, a period of 182 days. From this then we must first deduct the five days during which the vessel would have had to remain at St. Vincent, in discharging her coals and overhauling her cargo to discover the origin of the fire, and in replenishing her stock of coals, even if no collision had occurred. Secondly, there is the deduction of thirty-one days for a time which would have been required to complete her voyage and earn her freight. Thirdly, there is the loss of time at St. Vincent from the 16th Feb. to the 16th March, a further period of twenty-eight days. Fourthly, there is from the 21st May, when the repairs ought in our opinion to have been completed, to the 19th June, or twenty-eight days more. In all there would be ninety-two days to be deducted from the 182 claimed, leaving ninety days as the number in respect of which demurrage is properly due.

"Secondly, as to the rate at which the demurrage ought to be allowed.

"In our former report we had estimated it according to the rate usually adopted by us in the case of steam vessels of this class; that is to say, at 6d. per ton per day on the gross tonnage, or 9d. per ton on the net tonnage. This is the rate which experience has shown us to be generally sufficient to cover all the expenses, and to leave a fair remuneration to the owner for the loss of the services of his vessel. The gross tonnage of the *Bismarck* was 497 tons, which at 6d. per ton would give 121. 8s. 6d.; the net tonnage was 336 tons, which at 9d. per ton gives 121. 12s. We allow it at 121. 10s. per day. The rest of our remarks under this head, were only to show that the rate which we had allowed appeared to be fair and reasonable, looking at the wages paid to the crew, and the probable cost of the provisions. I stated that, according to their own showing, the wages paid to the crew amounted to 121l. a month, or about 4l. a day; and that as 1s. 6d. per head per day for provisions, would only give for the whole crew of twenty-four, officers and men included, 36s. per day, if we allowed it even at 2l. a day, that would make the cost of wages and provisions to amount to only 6l. a day. I added that as a general rule, it was found that the demurrage was

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equal to about twice the cost of the wages and provisions, and that as we had allowed 12*l.* 10*s.* a day, it appeared to us to be more than sufficient.

"It was not objected that the sum of 6*d.* per ton on the gross tonnage, or 9*d.* per ton on the net tonnage, was not the usual rate for vessels of this class, or that, as a general rule, this would not be a proper rate at which to allow the demurrage; nor was it said, that about double the cost of the wages and provisions would not be a fair allowance; but it was contended that, under the exceptional circumstances of this case, which I will presently state, the amount was not sufficient. No evidence of these exceptional circumstances was given when the case was formerly before us, which is the more remarkable if they intended to rely upon them for an exceptional award. And it was chiefly to establish this point that the witnesses were produced before us at the second hearing. The tenor of their evidence I will now proceed to state."

The learned registrar here set out the evidence of the witnesses as above, and, after specially noticing the evidence of Staevens as to the scarcity and the cost of provisions at St. Vincent, and as to his statement that they were starving, continued:—

"Now, one of the peculiarities of these references is that we are not obliged to shut our eyes to facts which are within our own cognisance, even though they should not be proved by the evidence in the case, nor are we compelled to believe statements, even though they should be sworn to, which are contrary to our experience; thus if a witness were to swear before us that the usual price of rope was 100*s.* per cwt., when we knew it to be worth only from 3*s.* to 4*s.*, or that a fir-built American vessel was more valuable and more expensive than an oak-built English vessel, we should simply not believe him, and should prefer to act upon our own experience and knowledge of the facts. Applying then, these principles to the evidence of Mr. Staevens, we can only say that they are contrary to our experience. From having had a brother resident for many years at St. Vincent, as judge in the Mixed British and Portuguese Commission Court, established at that place, I happened to have some knowledge of the place, and I had always understood that fresh provisions of all kinds were most abundant and cheap at St. Vincent; that large herds of cattle were to be found in some of the islands in a semi-wild state, from which the market at St. Vincent was amply supplied; that it was a favourite place of resort, especially for American merchant vessels, and for our own ships of war, to obtain fresh provisions, and that of late it had become a very important coaling station. With this knowledge, it was impossible for me to accept without question the evidence of Mr. Staevens, unreliable as we had found it to be upon other points, and with a strong bias in favour of his own side. Accordingly I wrote to Mr. George Miller, a partner of the firm of Messrs. Miller Brothers, who had acted as the ship's agent at St. Vincent, and who I knew to be in this country, for information on the subject, and I received from him a letter, of which the following is a copy:

"St. Werburgh Chambers, Bristol,
"3rd Feb. 1871.

"Dear Mr. Rothery,—I have thought the best answer I can give to your note will be the enclosed

account just received from our St. Vincent house for supplies made to a steamer put in there in distress. You will see that the price of beef is 140 reis per pound, which is equal to about 7*d.*

"In your brother Charles's time beef was about 2*d.* per pound; but the constantly increasing demand at St. Vincent of late years for supplies to steamers, and the imposition of a municipal tax, has caused this increase in price. At some of the other islands, where the consumption is generally limited to the wants of the inhabitants, the price is less, but it has been affected in all of them, as supplies of cattle have been drawn from them for St. Vincent.

"At St. Jago, St. Antonio, St. Nicholas, Foze, and Brava, there are abundant supplies of fresh vegetables and fruits, and at very moderate prices; but as the harbours are not good, and at times dangerous, they are little frequented, except St. Jago, which has a tolerable harbour, safe for nine months in the year, but, then, it is notoriously unhealthy. Comparatively few vegetables are grown in St. Vincent, but there is nearly a daily importation of them from the island of St. Antonio, distant about twelve miles. You will see in the account several articles supplied under the head of engineers' stores. The large number of steamers and colliers that now go to St. Vincent has led to our having kept in store there almost everything that can be required for refitting either steamers or colliers, and we have besides a staff of skilled English engineers, smiths, &c., supplemented by taught natives, available for undertaking light repairs when needed.

"Will you kindly return me the account in the course of a post or two?—Believe me, yours truly,
"G. MILLER."

(Here followed the account mentioned in the letter, showing the price of fresh beef as 140 reis, or about 7*d.* per pound.)

"As Mr. Miller had not replied to my question about the cattle, I wrote again to him, and received the following reply:

"Bentry, Westbury-on-Trym, Gloucestershire,
5th Feb. 1871.

"My dear Mr. Rothery,—Nearly all the cattle at the Cape Verde Islands may be said to be in a half wild state, they roam about nearly at will for pasturage over unenclosed common lands, and herd together, but they are all marked and owned. Formerly there was an export trade to the West Indies, but it has ceased for many years. The supply now is fully sufficient for the existing demand, but it cannot be said that there are large herds from which an unlimited supply could be drawn. If the demand increased, no doubt a largely increased production would be stimulated; at present breeding is left entirely to chance, and no sort of attention given to it. The only island in which I ever knew wild cattle to exist was Santa Lucia, one of the smallest of the Cape Verde group; there were very few there, probably not more than a hundred, but I believe there are none there now.

"The fights described by your brother he will have seen on the plains at St. Nicholas, not between actually wild cattle, but between cattle accustomed to roam nearly at will.

"I am sorry that I did not fully reply to your first note. If there is any other point upon which you wish information, and think I can give, pray

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do not hesitate to ask me for it.—Believe me, yours very truly,
"G. MILLER."

"But the case does not rest here; and I am glad that it does not, for it would not be satisfactory to have to decide a question of this description, upon information received from a gentleman who, however competent and however trustworthy I might know him to be, had not been sworn to give evidence in the cause. It happens, however, that the information furnished by Mr. Miller is strongly corroborated by documents which have been brought in by the plaintiffs themselves, and which are now before us. One of these documents is the account of the provisions supplied to the *Bismarck* during the time she was at St. Vincent, by Messrs. Miller Brothers, and bears date the 15th March 1869, the day before the vessel left the island. If this account be examined it will be seen that, in addition to twenty-four live sheep, the *Bismarck* during her stay at St. Vincent's was supplied with 1723lb. of fresh beef; and that the price at which it was supplied was the same as that mentioned in the account sent to me by Mr. Miller, namely, 140 reis—equal to about 7½d. per lb. It further appears that she obtained bread and provisions from eight different vessels that were in the harbour, but at what price there is nothing to show, as the quantities are not stated.

"With these facts before us, how is it possible to believe the statements of Mr. Staevens, that, whilst at St. Vincent's, they were nearly starving; that they could obtain no supplies from the vessels that were in the harbour, that fresh meat and provisions were not to be had, and that the market was not well supplied with cattle, or, as he describes it, that 'sometimes there came one or two muttons, sometimes one,' and that 'there might be occasionally a small Portuguese steamer as a sort of adventure.'

"I should add that, as it seemed only fair that both parties should know the contents of these letters, I read them aloud at the meeting of the 6th Feb., but neither counsel applied to be allowed to produce any further evidence on the point.

"On the whole, then, we have no hesitation in saying that the evidence of Mr. Staevens as to the cost of difficulty of obtaining provisions at St. Vincent's cannot be relied upon. As to the cost and quantities of the provisions supplied at Rio, Mr. Staevens either could not or would not give us any information.

"How then stands the case in regard to the cost of the provisions at St. Vincent and at Rio? It is impossible to give much weight to the general statement that the cost of provisioning a ship at those places is two or three times that at London or Hamburg; for when the witnesses spoke of provisioning a ship, it is clear that they meant provisioning her for a voyage, not merely supplying the crew with provisions during the time that the ship remained in port. Salt meat and biscuit could no doubt be more cheaply purchased in London or at Hamburg or Bremen than at St. Vincent or Rio; but, on the other hand, sugar, cocoa, coffee, lime-juice, rum, and a variety of other things which go to the provisioning of a ship, could be purchased more cheaply at Rio at all events, if not at St. Vincent, than they could be either at Hamburg or in London. And as to fresh meat, with which of course the crew would be largely supplied, it has been shown not only

that there was no want of it at St. Vincent, but that it was obtained at a not unreasonable price—namely 7½d. per lb. As to Rio, we find from Captain Laner's evidence that the time during which the *Bismarck* was at Rio, from April to June, was the season when fresh meat is cheapest. Fresh vegetables also would appear to have been abundant and reasonable at both places.

"It has therefore not been shown to our satisfaction that the cost of provisions at St. Vincent and Rio was so great as to justify us in awarding a higher rate of demurrage; indeed, there seems to be no reason to think that the cost of maintaining the crew at St. Vincent and at Rio would be much, if at all, more than the cost of provisioning a ship at London or Hamburg; at all events, there is no evidence to show us that it was so.

"The question then remains, whether, with the additional evidence now before us, there is reason to think that the estimate in our former report of 2l. per day for the maintenance of the crew of the *Bismarck* was or was not too little; and whether this sum would not as a general rule cover the cost of provisioning a vessel of this size with her crew of twenty-four, officers and men included?

"And first, it should be observed that all the witnesses concur in saying that the cost of provisioning a ship at London and at Hamburg is about the same. In the next place, Mr. Aris, the provision merchant, says, and he is clearly the best authority on this point, that the cost of supplying provisions for the common seamen is, and has been for about the last three years past, from 13d. to 15d. per man per day; let us take it at 14d. Thirdly, Captain Laner, the German master, who must also be the best witness as to the relative cost of provisioning an officer and a common seaman on board a German merchant vessel, says that the keep of an officer is double that of a seaman. Now, of the crew of twenty-four hands all told, eighteen were common seamen, and six officers, including the master and two superior officers. The cost, then, of provisioning the whole of the crew per day would, according to the evidence of Mr. Aris and Captain Laner, amount to

Eighteen men, at 14d. each.....	£1 1 0
Six officers, at 2s. 4d. each.....	0 14 0

Total.....£1 15 0

"Supposing, however, we allow the cost of provisioning the six officers at three times that of the men, we should only have

Eighteen men, at 14d. each.....	£1 1 0
Six officers, at 3s. 6d. each.....	1 1 0

Total.....£2 2 0

"Indeed, this was the estimate claimed by Mr. Phillimore, although he made up the account in a somewhat different way; he claimed for twenty-one of the crew at the rate of 1s. 6d. a day each, and for the master and two chief officers at 3s. 6d. a day each. This would give

Twenty-one men, at 1s. 6d. each ...	£1 11 6
Three officers, at 3s. 6d. each.....	0 10 6

Total.....£2 2 0

"We may, therefore, take the total cost of provisions per day to be at the outside 2 guineas. As to the wages, there is no question upon this point. By the plaintiff's own documents, the monthly

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wages appear to have been 12*l.*, which would be 4*l.* 0*s.* 8*d.* per day. The total cost then for wages and provisions would be 6*l.* 2*s.* 8*d.*; doubling this, which is one mode of obtaining the sum proper to be allowed for demurrage, we get only 12*l.* 5*s.* 4*d.*, whereas the sum which we have allowed for the demurrage of this vessel is 12*l.* 10*s.* per day. Tested, therefore, by this rule, our award, so far as the rate is concerned, would appear not to be unreasonable.

"But it was said that the cost of this vessel, and the expenses of navigating her, were so great that the rate of demurrage allowed by us would not cover the expenses, and at the same time afford a fair remuneration to her owners on the capital employed. It was said by Mr. Staevens that the original cost of the vessel was 13,500*l.*, but that, owing to the expense of fitting her out and other charges, he estimated that she had cost them altogether 15,000*l.* He stated that the insurance was at the rate of 9 per cent. per annum on this value. He claimed also 5 per cent. on the capital expended, and 10 per cent. for wear and tear, making altogether 24 per cent. on the capital expended, which would be 3600*l.* per annum, or rather less than 10*l.* a day. This then, added to the cost of wages and provisions, would make about 16*l.* a day instead of 12*l.* 10*s.*, the amount allowed by us.

"Now, the first thing that strikes us as strange in this calculation is that a claim of 10 per cent. per annum should be made, for the wear and tear of a vessel which was not being navigated, not tossed about by the winds and waves with the chance of injury to her masts, sails, and rigging, but which was lying safely in port part of the time in dry dock, and undergoing a thorough and complete repair. That a vessel would or could, under these circumstances, depreciate at the rate of 10 per cent per annum, is what no one in the smallest degree conversant with these matters would allow. Vessels, it should be observed, depreciate by being used, not whilst undergoing repair and when in dry dock.

"Again, it is to be observed, that when vessels are insured for a whole year, it is not unusual for the insurance office or the underwriters to make some abatement when it is shown that the vessel has, from some cause or other, been laid up in harbour instead of being exposed to the dangers of navigation. Mr. Staevens denied that any such abatement had been made in this case; and although we have shown that implicit reliance cannot be placed on the word of this gentleman, we will admit for the moment that this was so. We will take the value of the vessel at 15,000*l.*, and allow that the rate of insurance was as stated, at 9 per cent. We will also allow the owners the 5 per cent. claimed on the capital employed; but we can hardly allow them for supposed wear and tear, for which there was no pretence. We should thus have to allow at the rate of 14 per cent. on a capital of 15,000*l.*, which would give 2100*l.* per annum, or something under 6*l.* per day. If, instead of allowing 5 per cent. on the capital, we allowed 6 per cent., this would give 2250*l.* per annum, or under 6*l.* 4*s.* per day. Add to this the cost of the wages and provisions, which has been shown to be at the outside 6*l.* 2*s.* 8*d.*, and we get 12*l.* 6*s.* 8*d.* per day as the rate proper to be allowed for the demurrage of this vessel. What, however, we have allowed is 12*l.* 10*s.* per day, a sum therefore fully sufficient, not only to cover the wages and pro-

visions of the crew, but to give the owner a fair interest on his capital.

"From whatever point of view then we regard this question, it seems to us that the rate which we have allowed for the demurrage of this vessel, namely, 12*l.* 10*s.* per day, is a reasonable and proper sum, and is amply sufficient to cover not only all the owners' expenses, but to allow them a reasonable compensation for the capital employed. By our former report we had allowed for the demurrage of the vessel 1250*l.*, being for 100 days at the rate of 12*l.* 10*s.* per day. As, however, by the additional light which has been thrown upon the case by this further inquiry, we have come to the conclusion that 90 days would be a sufficient allowance to make, and as we see no reason to alter the rate previously allowed, our award in regard to the demurrage must be reduced to 1125*l.*, being at the rate of 12*l.* 10*s.* per day for 90 days.

"We are very glad to have been afforded this opportunity of correcting the estimate which we had formed on the case as it was at first presented to us. And although the result may not perhaps be quite so satisfactory to the plaintiffs as they may have anticipated, it will no doubt be a satisfaction to them to feel that the case has now been thoroughly investigated, and that their arguments have been most fully weighed and considered. To us also it is a satisfaction to feel that the principles which have hitherto guided us in awarding demurrage in cases of this description, appear, upon a more careful examination of the subject than we have ever before given to it, to be sound. The attempt which the owners of the *Bismarck* have made to obtain a larger award having proved unsuccessful, it only remains for us to say that they ought, in our opinion, to pay all the costs occasioned thereby.

"H. C. ROTHERY,
Registrar."

"8th July 1871.

From this report the owners of the *Bismarck* appealed, and filed a petition in objection, of which the material allegations are as follows:—

11. . . . The owners of the *Bismarck* claim that one day only instead of five should be deducted for the probable stay at St. Vincent, had no collision happened.

12. The learned registrar has further deducted from the time allowed for the repairs, the whole time allowed from 14th Feb. to 16th March before the time from the *Bismarck's* trial trip to the date when she actually left St. Vincent. This deduction was not made in the first report. . . . But it is submitted as matter of law that the master, being in the circumstances agent for the cargo as well as ship, was bound to perform these duties, and especially to attend to the transhipment of the cargo, for which he had signed bill of lading, and for the due conveyance whereof he was responsible; and that this was the view taken by all concerned with the *Bismarck* at St. Vincent is clear from the evidence of Staevens. Then it appears that the whole time between 14th Feb. and 16th March was required for the performance of these duties.

13. . . . And it is submitted that there is no ground for ascribing wilful delay to the masters and others concerned in the management of the *Bismarck*, and that on the contrary, there is every probability for supposing that they, as it is in fact avowed, used their best endeavours to leave St. Vincent as soon as possible.

14. It appears, moreover, from the evidence of Staevens that the ship was out fit for sea on 14th Feb., and that for the purpose of fitting her for sea alone some days must have been consumed.

15. As to the date of the final repair of the damage, it appears that the last survey of the *Bismarck*, at Rio Janeiro, was held on 3rd June, and it was not till then that she was certified to be fit for sea. There is no reason for ascribing any wilful delay to the master or others con-

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cerned with the *Bismarck*; on the contrary, they had every motive for expedition. . . .

16. (This paragraph set out that the repairs at Rio had been done in as short a time as possible, and in accordance with the surveys.) On the 3rd June the vessel was again surveyed, and on the 4th June, the time for demurrage claimed by the owners of the *Bismarck* expires.

17. . . . It is moreover sworn that there was not even a beginning made of engaging cargo for her till the 5th or 6th June; and, in fact, she did not leave Rio with her cargo till the 15th June.

18. The period from the 19th Dec. to the 4th June, less one day's delay at St. Vincent, and thirty-one days for completing her original voyage, makes 135 days demurrage of the *Bismarck*, the time claimed on behalf of her owners.

19. As to the rate of such demurrage a day the learned registrar has found the value of the vessel to have been 15,000*l.*, the amount contended for by the petitioners, and he has allowed interest on that amount, and insurance at 9 per cent., in estimating the amount of the demurrage, as claimed by the petitioners. The amount of the wages of the crew is agreed at 4*l.* 0*s.* 8*d.* a day, and the ordinary cost of provisioning the crew (that is, the cost at London or North German prices) has been found by the learned registrar, in terms of the petitioner's contention, at 2*l.* 2*s.* a day, instead of 3*l.* 0*s.* 2*d.* a day, as found in the first report. The learned registrar has, however, disallowed any claim in respect of the wear and tear or wasting of the ship, although he allowed for it in his first report, and although it is manifest that there must be, and in fact was, such wear and tear or wasting; and he has disallowed all claim in respect of increased cost of provisions at the ports of St. Vincent and Rio de Janeiro.

20. (This paragraph set out the evidence as to prices at St. Vincent and at Rio de Janeiro.)

21. (This paragraph set out the evidence as to natural products at those places.)

22. It is, however, suggested that fresh meat could be procured very easily and cheaply at St. Vincent, in spite of the testimony of Avis and Stevens to the contrary. The learned registrar has for this purpose thought fit to refer by letter to a Mr. Miller, who seems to have some connection with St. Vincent. It is submitted on behalf of the petitioners that such reference to a person not summoned by either party, unsworn and not cross-examined, is irregular and improper, and the petitioners desire to take every objection available to them in law to the information given by him. . . . The petitioners therefore claim as allowance on an average of double the ordinary price of provisions on account of the dearth of the ports of St. Vincent and Rio de Janeiro.

23. If to the items of the petitioners' claim allowed by the learned registrar addition be made of a reasonable sum in respect of wear and tear, and the price of provisions allowed by him be doubled, the sum will amount to something in excess of 16*l.* a day, and the petitioners claim 16*l.* a day.

24. The learned registrar has improperly reported that the petitioners ought to pay the costs of both references.

The answer of the respondents, so far as it was material, was as follows:—

4. As to the 11th article of the petition: The averments in the said 11th article contained are untrue. It is proved by the evidence that 115*l.* tons of coal, that is to say, more than one half of the quantity of coal which the vessel could carry, were discharged at St. Vincent.

5. As to the 10th and 11th articles of the petition: It is submitted that the reasons given in the registrar's further report, as well as the evidence before the registrar and merchants as to the legal proceedings which were taken at St. Vincent solely on account of the fire and the consequences thereof, fully warrant the conclusion that had there been no collision the ship would at least have been detained five days at St. Vincent.

6. As to the 12th, 13th, and 14th articles of the petition: (a) The averments in the said articles contained are untrue or inaccurate. (b) The *Bismarck* was reported ready for sea on the 1st Feb. and the learned registrar has not only allowed the interval between the 1st and the 14th Feb. for taking in coals, for certain necessary repairs, and for the trial trip, but has also allowed a further time of two days for any further preparations that might be necessary to enable the ship to proceed to Rio. There was no evidence to show, nor is any ground alleged in the

petition, why the said interval of two days was not a sufficient allowance, and it is submitted that on a practical question of this nature the decision of the registrar and merchants ought to be held conclusive in the absence of any reason or evidence to the contrary. (c) The learned registrar, in his first report, stated that the detention of the vessel between the 14th Feb. and the 16th March at St. Vincent was unaccounted for, and that he thought that if he had erred at all, it was by allowing too much time for demurrage. On the argument on the objections to the registrar's first report, it was urged on behalf of the respondents, that the demurrage allowed in that report was even excessive, because the detention of the vessel between the 14th Feb. and the 16th March, being unaccounted for, ought not to have been allowed in the calculation of the demurrage, and it was because the appellants alleged their desire to adduce fresh evidence to explain this and other points connected with their claim for demurrage that their said claim was referred back to the registrar and merchants. (d) It is submitted that the learned registrar was right in disallowing in his further report the time between the 14th Feb. and the 16th March, because, although it was incumbent upon the appellants to prove that the detention was the necessary and proximate consequence of the collision, they failed in adducing any satisfactory evidence to that effect, and also because the evidence adduced before the registrar and merchants shows that the afore-mentioned detention was not such a necessary and proximate consequence of the collision as to make the owners of the *City of Buenos Ayres* legally liable in respect of the same. (e) It is further submitted, that the reasons given for the ship's detention in the afore-mentioned articles of the petition are not proved by the evidence before the registrar and merchants, and that, even if they had been proved, the owners of the *City of Buenos Ayres* would not have been legally liable in respect of such detention as a consequence of the collision.

7. As to the 15th, 16th, 17th, and 18th articles of the petition: (a) The statements therein contained are untrue or inaccurate. (b) As to the second repainting at Rio, this court has already decided that the appellants claim in respect of the same must be rejected, and it is therefore submitted that their claim for so much of the demurrage as was occasioned by the second repainting cannot be supported. (c) It is submitted that the question when with reasonable diligence the necessary repairs at Rio might have been completed and the vessel made fit for sea, is one which the tribunal of registrar and merchants is peculiarly competent to decide, and that their decision ought not to be overruled unless it appears manifestly to be wrong, but it is also submitted, that the evidence before the registrar and merchants fully supports that decision.

8. As to the 19th, 20th, 21st, and 23rd articles of the petition: (a) The averments therein contained are untrue or inaccurate. (b) The learned registrar founded his estimate of the rate of demurrage on the consideration that the sum of 6*l.* per ton on the gross tonnage was the usual rate at which demurrage is estimated for vessels of the class of the *Bismarck*, a rate which was generally found to be equal to about double the cost of wages and provisions per day, and the learned registrar awarded a rate of demurrage even exceeding the sum which a calculation upon either basis would give. (c) It was alleged on behalf of the appellants before the registrar and merchants, and is alleged in the petition, that the present case is exceptional, because the expenses of provisioning the crew at St. Vincent and Rio were peculiarly great. But the appellants did not, although they might have done so and were challenged to do so, produce the proper evidence to show the cost of the provisions actually consumed at St. Vincent and Rio. (d) It is submitted, however, that the decision as to the cost of provisions at St. Vincent and Rio by the learned registrar, assisted by merchants, who had the advantage of bearing the examination and cross-examination of the witnesses, ought not to be overruled by this court unless it is manifestly erroneous. (e) It is further submitted, that the account given of the evidence in the afore-mentioned articles of the petition is inaccurate and incomplete, and that the evidence fully warranted the conclusion stated in the registrar's further report as to the cost of provisions at St. Vincent and Rio. (f) As regards the complaint made in the 22nd article of the petition, that the learned registrar referred by letter to Mr. Miller, the said Mr. Miller was member of

the firm of Miller and Co., the appellants' own agents for the ship at St. Vincent, and the appellants neither objected to the production of Mr. Miller's letters nor asked to produce any further evidence, although those letters were read by the learned registrar for the purpose of warning Mr. Staeven, the appellant's principal witness, of the reckless statements he had made, and to afford him an opportunity of making an explanation as well as to enable the appellants to adduce further evidence if they thought proper. (g) It is submitted that the reference to Mr. Miller which is complained of was neither unusual nor improper, but it is also submitted that it is wholly immaterial, not only because the decision of the registrar and merchants as to the cost of provisions at St. Vincent and Rio was not founded on the information received from Mr. Miller, but also because that decision was fully borne out by the evidence, and, finally, because the petitioners failed to prove by satisfactory evidence which they must or might have had in their possession what was actually expended for provisions at St. Vincent and Rio. (h) It was suggested by the appellants before the registrar and merchants that there was a third proper mode of estimating the rate of demurrage, namely, by allowing a sum made up of five per cent. on the original cost price of the vessel, ten per cent. for wear and tear, nine per cent. for insurance and the cost of wages and provisions. But it is submitted that to adopt this basis of calculation would be equally erroneous and unusual, and that although the demurrage might well be measured by the net earnings of the ship, it cannot properly be measured by or made to depend on the original cost price of the ship; and it is further submitted that, in fact, the mode in which the learned registrar fixed the rate of demurrage is simply founded on what experience and practice have proved to be the ordinary net earnings of a ship of the tonnage and class of the *Bismarck*. (i) It is submitted that the decision arrived at by the learned registrar as to the rate of demurrage is one which for many reasons ought not to be overruled unless it is manifestly wrong; but it is also submitted that his decision is right for the reasons stated in the registrar's further report, and also because the net earnings of the *Bismarck*, which is all the appellants lost by the detention, were not proved to be greater, and were even admitted by the appellants before the registrar and merchants not to be greater, than the ordinary earnings of ships of her class and tonnage, and the expenses of the ship during her detention were not proved to have been, and were not, in fact, unusually large.

Dec. 5 and 9.—*Butt, Q.C.*, for the petitioners (owners of the *Bismarck*).—We claim demurrage for 135 days. The sum allowed per day, 12*l.* 10*s.* is too small. As to the time, the deduction of five days at St. Vincent was improper. We do not object to the deduction of thirty-one days for the time that would have been occupied in the voyage to Port Natal. We object to the deduction of the twenty-eight days at St. Vincent, and to part of the deduction of twenty-eight days at Rio de Janeiro. The evidence as to the time occupied at St. Vincent shows that but for the collision no overhauling of the cargo would have been necessary. There is no evidence that the coals need have been discharged, and no inference could be drawn from the fact of the fire, as the discharge of the coals took place after the collision, and was a natural consequence of it. These facts depend on Staeven's evidence, which is uncontradicted. The vessel would only have been two days at St. Vincent but for the collision, and she was going there under any circumstances to coal. As to the disallowance of twenty-eight days at St. Vincent, Staeven's evidence showed that she was not ready to start before the 16th March. It was the duty of the master to find another ship to carry on the cargo, and this was the cause of the delay. If it should be found that they stayed for the purpose of getting the necessary papers prepared with reference to the ship in which the cargo was forwarded, the master only did his duty. There is no evidence

that this could have been done by Messrs. Miller, or that they were agents for the owners of the *Bismarck*. The master was bound to get the documents for the owners of the cargo, or they could not have claimed against the underwriters. As to the deduction of twenty-eight days at Rio, the engines could not have been repaired in dry dock, according to the evidence, and extensive repairs were necessary. The fact of the underwriters' agent signing the surveys does not in any way indicate when the repairs were finished. If the signatures to the surveys ending 8th May prove anything, the same signature is appended to those of 31st May and 3rd June, and the date only differs. The underwriters would only be liable for what was the consequence of the collision. No cargo was contracted for until 5th June. There is nothing on the face of Staeven's evidence to entitle the registrar to discredit it. The production of Mr. Miller's letter was most unjustifiable; it was introducing unsworn testimony for the purpose of discrediting sworn evidence. [Sir R. Phillimore.—I cannot see upon what ground this letter could be admitted in evidence. I presume you objected to it at the time.] We could not object to its use, as it was in the possession of the court; it was not evidence according to first principles, and we were not bound to object. It affected the mind of the registrar as to Mr. Staeven's credibility, if not as to the amount we were entitled to. As to the rate of demurrage, the proper measure is 1*l.* per thousand per day on the value of the ship; (*The Black Prince*, Lush, 568.) We are therefore entitled to 15*l.* per day, as our value was 15,000*l.*

Dec. 9th.—*W. G. F. Phillimore* on the same side.—The common practice in estimating the rate of demurrage is to take the earnings of the vessel before the collision, and so find the amount. Here that is difficult, as the *Bismarck* was fitted out to create a new trade, and her freight was below the usual rate. The averment in the answer that 6*d.* per ton on the gross tonnage is the usual rate of demurrage is contrary to the *Black Prince* (*sup.*) We claim 10 per cent. for interest and wear and tear, that is 5 per cent. for interest and 5 per cent. for wear and tear. There is no question as to the 9 per cent. for insurance. On the question of wages of crew and provisions the first is right, the second is too small. In the first report the registrar allowed for wear and tear; here he does not, and gives no reason for changing. A vessel must deteriorate, even in harbour. The cost of provisions allowed is too small, and we claim 4*d.* a day on account of the extra expenses at Saint Vincent and Rio, as shown by Staeven's evidence, uncontradicted save by the letter of Mr. Miller.

The *Admiralty Advocate* (Dr. Deane, Q.C.) for the respondents (the owners of cargo on board the *Bismarck*).—There is no obligation thrown upon a master whose ship has been injured to remain with his cargo to see it transhipped.

The Humbergh, Bro & Lush. 272; 8 L. T. Rep. N. 8, 175.

The Kornak, L. Rep. 2 P. C. 506-513; 21 L. T. Rep. N. 8, 150-162.

The master stayed to adjust the papers relating to the cargo; this had nothing to do with the collision, and there was no justification for retaining the ship at St. Vincent after Feb. 16th. She was fit to sail after the survey of 1st Feb. 1869. At Rio there is nothing to show that the donkey engine could not have been repaired in dock. The bill of

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Messrs. Miller put in shows that the price of provisions was not excessive. The calculation in the *Black Prince* (*sup.*) was made under the extraordinary circumstances of that case. The *Bismarck* must have discharged her coals at St. Vincent, as the fire had been extinguished with salt water, and this rendered them liable to take fire again. The costs of these proceedings should not fall on the respondents, as the cause of any error in the report is that the owners of the *Bismarck* have not put in any documentary evidence, as to the actual expenses incurred, before the registrar and merchants.

Cohen, on the same side.—The discharge of the burnt coals and the reloading must have taken some days. The legal proceedings connected with the coals lasted three weeks, and this would have been done independently of the collision. We are only allowed five days for this. On the first reference there was no evidence of what the ship was doing at St. Vincent, but on the second there was, and from this it appears that the master was taking part in legal proceedings and the trans-shipment of the cargo, which he was not bound to do, nor was he bound to delay the voyage.

Notara v. Henderson, L. Rep. 5 Q. B. 346; 22 L. T. Rep. N. 8. 577;

Shipton v. Thornton, 9 A. & E. 314.

As the master is not bound to look after the interests of the cargo, he cannot charge us with the delay. The legal proceedings were to obtain evidence against the underwriters. With regard to the delay at Rio, everything was completed on May 21st, the underwriter's agents would not have appended their signatures to the surveys until the repairs were actually done. As to the rate of demurrage. Demurrage cannot be properly measured by the price paid for the ship: (Pritchard's Digest, 707, 708.) This ship would not earn more than usual and is therefore only entitled to the usual rate. The *Black Prince* (*sup.*) was a case where unusual profits were made. The usual rate is 6d. per ton, and that is the basis of the Registrar's report. He goes into the other modes of calculation to make his report agree with the appellant's theory as to wear and tear. The evidence as to the cost of provisions is not satisfactory. The question whether evidence should be objected to before the registrar and merchants should be decided, as they may get information out of court. Miller's letter is not different from other evidence, such as is admitted at these references. [Sir R. PHILLIMORE.—No doubt, but the objection in this case is that Miller's letter is used to contradict Staeveus' evidence; an unsworn document used against sworn testimony. The registrar in his report clearly is guided by this letter, and there was no opportunity of cross-examination. This is not right.] The registrar did not form his opinion on that letter alone, and he came to the conclusion that Staeveus' evidence was untrustworthy, and there is nothing to show the contrary.

Doc. 12.—W. G. F. Phillimore in reply.—There was no opportunity of testing Miller's statements. There was no necessity for us to enter into a protest as to the coals at St. Vincent. The coaling would only have taken twenty-four hours. Although a master is not bound to trans-ship, it is nowhere decided that he may not do so. No doubt this delayed them, but the principal object of the delay was the survey of the damaged cargo and of the ship. The underwriter's certificate on this

Rio surveys only show that surveys have been held. Evidence was that the donkey engine could not have been prepared in dry dock. As to rate of demurrage; this was a first trip, and ordinary rules cannot apply. She was prevented by the delay of collision and the German war from continuing her trade, and future earnings are therefore no test. The rate of 6d. per ton cannot apply to large steamers. The test is the average price of the vessel at the time of the collision. There were extraordinary expenses according to the evidence.

Our. adv. vult.

Dec. 19.—Sir R. PHILLIMORE.—This is an appeal from second report of the registrar assisted by merchants, in a cause of limitation of liability, which was referred to him by this court in order that he might pronounce upon the claims of the owners of the vessel *Bismarck* and of the owners of the cargo laden on board her, against the *City of Buenos Ayres*. The limit of the liability of the *Buenos Ayres* had been fixed by the Court at the sum of 10,514*l.*; the claim of the owners of the *Bismarck* was for a sum of 13,546*l.* 6*s.* 6*d.*; the claim of the owners of the cargo was for a sum of 4444*l.* 19*s.* 6*d.*. The fund, therefore, paid into court of 10,515*l.*, with the interest at 4 per cent. from the date of the collision until the payment into court, was insufficient to satisfy the two claims upon it, and the question to be decided was the proportion in which that fund should be divided between them. The first report of the registrar, made in April 1870, found that the sum of 8205*l.* 0*s.* 8*d.* was due to the petitioners, instead of the sum of 13,546*l.* 6*s.* 6*d.* claimed by them. To the owners of the cargo 3558*l.* 11*s.* was awarded in lieu of the sum of 4444*l.* 19*s.* 7*d.* claimed. With that award the owners of the cargo are content. Objections were taken by the owners of the *Bismarck* to this report, and the case was heard before me in December and January last; and the result was, that all objections were withdrawn, with the exception of those which related to the sum allowed for demurrage, and with respect to this item the court sent back the report for reconsideration, with liberty to both parties to produce further evidence, and with power to the registrar to increase or diminish the amount previously awarded. In July the registrar made a second report, in which he found that 1125*l.* was due to the owners of the *Bismarck* on account of demurrage in lieu of the sum of 1250*l.* previously reported to be due. The owners of the *Bismarck* have appealed against this award to the court, and they place their objections to it upon two grounds—namely, that the demurrage is inadequate, both with regard to the time and to the rate of expenses allowed. The demurrage allowed on the first report was for 100 days, at 12*l.* 10*s.* per day; the demurrage allowed by the second report is for ninety days only, at the same rate. The appellants claimed in their petition 1035*l.* more than the sum allowed, on the ground that they were entitled to demurrage for 135 days, at the rate of 16*l.* per day. That period of time was reduced by five days during the course of the agreement, and 130 days are now claimed by the appellants. It is not without reluctance that the court entertains objections from a tribunal so well calculated to deal with the questions submitted to it as that of the registrar and merchants; nevertheless, as I have before me the evidence upon which their conclusions were founded, and as I learn from the report the way in which it affected

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their judgments, I must not shrink from my duty of correcting any portions of the report which are founded—if any such there be—upon what appears to me an erroneous view of the evidence. And in the present case, also, I must remember that there is some variation between the first and the second report. I must now proceed to state my opinion upon the two questions of the time and the rate as to which it is alleged the demurrage allowed is insufficient. The *Bismarck* left Glasgow on the 30th Nov. 1868 for the Cape of Good Hope. On the 10th Dec. last it appeared that a fire had broken out among the coals. It was extinguished, and on the 16th it broke out again, and was again extinguished. At six p.m. on the 19th Dec. she arrived in the roadstead at St. Vincent, and it is important to observe the fact that the *Bismarck* had always intended to take in coals at this place. Three hours after her arrival at St. Vincent she was run into and seriously damaged by the *City of Buenos Ayres*. The *Bismarck* remained at St. Vincent until the 16th March, when she sailed for Rio Janeiro for the purpose of effecting further repairs, and there she arrived on the 30th March. On the 19th June she left Rio, with a cargo for Hamburg. The question is whether all, or, if not all, how much of this period of time was properly occupied in effecting repairs, rendered necessary by the collision, to the vessel. In their arguments before this court the appellants claimed the whole interval from the 19th Dec. to the 4th June, with the exception of two days at St. Vincent, and four days at Rio, making a total of 130 days. The Registrar has allowed only ninety days. And first, with respect to the delay at St. Vincent. That period admits of two divisions: First, the time occupied by coaling; secondly, the time occupied by the transaction of business and repairs. As to the first period, the registrar has considered that five days of this detention must be ascribed to the coaling as connected with the circumstances of the fire, and cannot be charged to the collision. I think the evidence shows this deduction to be too large, and that, having regard to the fact that the *Bismarck* always intended to coal at St. Vincent, and that the fire seems never to have been connected with the cargo, and to the average of time which is shown to be necessary for coaling, that three days would have been sufficient. I add, therefore, under this head, two days to the ninety days which has been allowed by the registrar. The next deduction is from the 16th Feb. to the 16th March, or twenty-eight days. This deduction, which was not made in the first report, is founded on the ground that the *Bismarck* was in a proper condition to sail for Rio on the 14th Feb.; and allowing two days in addition, she ought, at all events, to have sailed on the 16th Feb. The period between the 16th Feb. and the 16th March was, according to the evidence of Mr. Stevens, occupied with the transaction of business, having for its object to obtain necessary papers properly certified by the Portuguese authorities—who proceed, unfortunately, in a lethargic manner—the sale of the damaged cargo and the trans-shipment of the undamaged cargo upon a vessel called the *Wilby*. After the examination of the evidence, I have come to the opinion that the correct conclusion was arrived at by the registrar in his first report, in which this deduction was not made. There seems to have been no inducement to delay at St. Vincent but on the contrary, from the extreme dearth of

provisions and the want of appliances for making repairs, every inducement for leaving it, and the instructions were positive to get away as soon as possible. It is difficult in this case to draw a line between business unquestionably connected with the collision—such as making the protest and obtaining the necessary official documents—and business connected with the trans-shipment of the cargo. The master had, in the circumstances, the duty cast upon him of acting as agent to a certain extent for the cargo as well as the ship. It is not necessary that I should decide, and I am not prepared to decide, whether, if the time had been occupied entirely by the trans-shipment rendered necessary by the collision, that delay ought or ought not to be charged to the collision, but I am of opinion that the result of the evidence is that the delay was caused by the necessary transaction of business connected with the collision, I must therefore allow the twenty-eight days which have been disallowed. I have now to deal with the question of twenty-eight days' delay at Rio, where the *Bismarck* arrived on the 30th March. I have considered the whole of the evidence, not only derived from the testimony of the witness, but from the documentary evidence. The registrar has disallowed twenty-eight days, including the interval from the 21st to the 31st May. The evidence, especially the documentary evidence, leads me to the conclusion that this is an excess of eight days; I shall therefore allow a deduction of twenty days. Lastly, I have to consider the objection as to the rate of allowance, and, according to the best judgment I can form on the evidence before me, I am satisfied that the finding of the registrar upon this point ought not to be disturbed. Having regard to all the circumstances of the case, and the peculiar position of the respondents, I shall make no order as to costs.

Proctors for the owners of the *Bismarck*, Dyke and Stokes.

Solicitors for the owners of cargo, *Wattons, Bubb, and Wattons*.

Tuesday, Jan. 23, 1872.

THE PALMYRA.

Salvage—Apportionment—Sailing vessel as salvor.

In apportioning salvage reward among the owners, master, and crew of a sailing vessel which has rendered salvage services, the Court of Admiralty will not allot to the owners the same proportion of the reward as in the case of services rendered by a steamship (usually one-half), unless the circumstances show that the vessel itself, as when the services are effected by steam power, was the chief agent in effecting the salvage.

In apportioning the sum of £500L, where the services were mainly the personal exertions of the master and crew of a sailing vessel, the court awarded 500L. to the owners, 650L. to the crew, and 350L. to the master.

This was an application to the court to apportion the sum of £500L., tendered in this suit and accepted by the owners, master, and crew of the sailing vessel *Adelphi*, as salvage reward in respect of services rendered by that ship to the sailing vessel *Palmyra*. The *Adelphi* was a barge of 349 tons register, manned by a crew of twelve hands all told, and was bound on a voyage from Colombo to London with a general

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cargo. The *Palmyra* was a ship of 932 tons register, manned by a crew of twenty-three hands all told, and was bound on a voyage from Liverpool to New Orleans with a cargo of 885 tons of salt. The *Adelphoi* found the *Palmyra* in a disabled condition in the Atlantic, about 700 miles due west of Bordeaux, on the 30th Sept. 1871. There was then a light wind. Some of the *Palmyra's* crew deserted her, and went on board another vessel. The master of the *Adelphoi* boarded the *Palmyra*, and found that her master had the intention of abandoning and scuttling his ship. The master of the *Adelphoi* remained on board the *Palmyra* for some time, and after the *Palmyra's* nautical instruments, the effects of her crew, and some of her stores had been transferred to the *Adelphoi*, he succeeded in inducing the master of the *Palmyra* to stick to his ship, by promising him to remain by him and give him all possible assistance, and by threatening him that "If you leave your ship, I will send one of my mates on board, and if you scuttle your ship, you will run a risk of losing your certificate and of being transported." The master of the *Adelphoi* then left the *Palmyra*, leaving on board of her the master and eleven of the crew; eleven others had been taken away by the other vessel. On the same evening a gale sprang up which lasted for two days, and until the morning of Oct. 3rd, and the *Adelphoi* kept as near to the *Palmyra* as it was possible to do. On Oct. 2nd the master of the *Palmyra* hailed the master of the *Adelphoi* to come on board, and two of the crew of the latter vessel volunteered to take him on board. They went on board and back again to their own ship, and again on board the *Palmyra*, a gale blowing the whole time. The master of the *Palmyra* was very desirous of leaving his ship, but an agreement was entered into between the two masters that the *Adelphoi* should take the *Palmyra* to an English port, and the master of the *Adelphoi* returned to his vessel. On Oct. 3rd, the weather having moderated, the *Adelphoi* took the *Palmyra* in tow, and although the tow rope broke four times, succeeded in towing her safely to Falmouth, whence they arrived on Oct. 6th. On Oct. 3rd, the effects of the crew and the nautical instruments were sent back to the *Palmyra*, and the stores were returned at Falmouth. The *Adelphoi* would not have gone into Falmouth but for the salvage services. During the gale the master of the *Adelphoi* was obliged to direct the *Palmyra's* course as there were no instruments on board of her, and this he did by laying his own ship alongside as close as possible and hailing her. The master and crew of the *Adelphoi* were engaged day and night with little intermission during the services, and they were much exhausted.

The *Admiralty Advocate* (Dr. Deane, Q.C.), and *Wood Hill* for the owners and six of the crew of the *Adelphoi*.—We admit that the master and the two men who went on board the *Palmyra* are entitled to more than the others. Still the master, although he incurs personal responsibility, throws great responsibility on his owners, more especially with reference to their liability for the cargo. The responsibility he incurs is really that of the owners, and they are therefore entitled to the greater proportion of the reward. The owners are entitled to at least one-half.

The *Perla*, Swab. Rep. 230;

The *Spirit of the Age*, Swab. Rep. 236;

The *St. Nicholas*, Lush. Rep. 20.

These are cases of steamers. The same was awarded to the owners of a sailing vessel. (*The Waterloo*, 2 Dods. 443). Although the master and crew behaved well, there is nothing to entitle them to an extraordinary amount. The voyage was delayed and this loss falls on the owners.

Bruce, for five of the crew of the *Adelphoi*.—The services were mainly rendered by the personal exertions of the crew. In most of the cases cited, steamers rendered the services, and steamers are by reason of their steam power themselves the principal agents in services rendered by them.

Phillimore for the master.—The owners did not suffer from the delay. The ship was always on her course. The *Palmyra* was really saved by the encouragement given by the master and crew of the *Adelphoi*, and was not abandoned in consequence of the language used by the master of the *Adelphoi*, which induced the master of the *Palmyra* to stick by his ship. The master's personal services, and his determination and skill, mainly effected the salvage.

The *Admiralty Advocate* in reply.

Sir R. PHILLIMORE.—In all these cases of apportionment, with respect to the amount to be allotted to the owners, a question to be considered is, whether the saving vessel was under steam or sail. In the case of a steamship, the steam power is the chief agent in effecting the salvage, but where a sailing vessel is a salvor, the circumstances of each case must decide whether the owners can possibly be entitled to the same reward as would be allotted to the owners of a steamer. I cannot find such circumstances here. The *Adelphoi* was in some jeopardy, no doubt, but it was not very great. With respect to the claim of the master, it is impossible to doubt that his courage and determination, as well as his skill, were the principal means of saving the *Palmyra*. But for his threat in the first instance, the vessel would no doubt have been scuttled. Taking these circumstances into consideration, I shall award 500*l.* to the owners, 650*l.* to the crew, a double portion going to those two men who went on board in the gale, and 350*l.* to the master.

Solicitors: *Dyke and Stokes; Field and Sumner; and Croese.*

Tuesday, Jan. 23, 1872.

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*Salvage—Value under 1000*l.*—Jurisdiction—Merchant Shipping Act—County Court Admiralty Jurisdiction Act 1868.*

*The jurisdiction in salvage cases above the value of the property saved is under 1000*l.*, taken away from the High Court of Admiralty by the Merchant Shipping Act 1854 (19 & 18 Vict. c. 154), s. 460, and the Merchant Shipping Amendment Act 1862 (25 & 26 Vict. c. 63), s. 49, is restored to that court by the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71).*

THIS was a cause of salvage instituted on behalf of John Purvis and others, fishermen of Whithorn, in the county of Durham, against the steam-tug *Empress*. The *Empress* was abandoned by her crew, and was driven on to Whithorn Rocks, and the plaintiffs on 23rd Dec. 1871, succeeded in getting her off, and took her as a derelict into Sunderland Harbour. The *Empress* was valued in her damaged state, under a commission of ap-

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praisement issued out of the Court of Admiralty at the sum of 720*l*.

Clarkson, for the defendants, the owners of the *Empress*, now moved (by consent, a petition on protest not having being filed) the court to dismiss the suit with costs, on the ground that the court had no jurisdiction. By the Merchant shipping Amendment Act 1862 (25 & 26 Vict. c. 63) s. 49, the provisions of the eighth part of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), in respect of salvage cases, are extended "to all cases in which the value of the property saved does not exceed one thousand pounds," and the latter Act (s. 460) takes away the jurisdiction of this court in such cases and confers it upon justices.

Phillimore, for the salvors.—No doubt the court lost its jurisdiction in these cases under the interpretation of those Acts by Dr. Lushington, but it is now restored by the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71). If we had been content to recover 300*l*., the County Court could have heard this case under sect. 3 (a) of that Act, and could have been transferred by motion to this court under sects. 6 & 8, and again sect. 9 of the same Act, distinctly contemplates a cause being tried in this court, when the value is under 1000*l*., and makes the question a matter of costs only. In the *Doune* (L. Rep. 3 Adm. 135; 22 L. T. Rep. N. S. 627), and in *Everard v. Kendal* (L. Rep. 5 C. P. 428; 22 L. T. Rep. N. S. 408), it is decided that the County Courts, having admiralty jurisdiction, have only jurisdiction in causes in which the High Court of Admiralty has itself jurisdiction, and the converse of that proposition must be true; viz., that wherever the County Courts have admiralty jurisdiction the same jurisdiction at

the same time exists in the Admiralty Court. This question has already been decided by the *Hermann Wedel* (23 L. T. Rep. N. S. 876; 3 Mar. Law Cas. O. S. 530), where it is said that the cases which decide that under the Merchant Shipping Acts the court has no jurisdiction are inapplicable since the passing of this Act. The Court has now a discretion to hear any cause of salvage, whatever the value.

Clarkson in reply.—There is nothing in the County Courts Admiralty Jurisdiction Act 1868 to prevent a County Court from awarding more than 300*l*.. There are in sect. 3 two cases in which a County Court has jurisdiction, and they are totally distinct. The jurisdiction of this court is taken away by express terms in the Merchant Shipping Acts, and cannot be restored by words which merely imply jurisdiction. The *Hermann Wedel* (sup.) does not decide that the court has jurisdiction originally, but only that there was an agreement such as gave it jurisdiction under sect. 9 already cited. [Sir R. PHILLIMORE. This 9th section does certainly appear to contemplate the court taking jurisdiction.] It would be straining the words of the Legislature to hold that where jurisdiction has been taken away by express words it can be revived by words such as those of sect. 9. The words of this section can be satisfied without taking this jurisdiction. It is admitted that but for sect. 9 there would be no jurisdiction. [Sir R. PHILLIMORE.—Does not that section contemplate a case under 1000*l*. in value being tried here, and a state of things where the party suing would be entitled to costs?] No doubt, but that is in one particular case, namely, a case coming from the Cinque Ports. It was decided in *The Jeanne Paul* (L. Rep. 1 Adm. & Ecc. 336; 16 L. T. Rep. N. S. 125; 2 Mar. Law Cas. O. S. 478) that this court had concurrent jurisdiction with the Court of Admiralty of the Cinque Ports where the value was under 1000*l*., and it is more reasonable to suppose that the Legislature, by this section, intended to provide for such a case as this rather than to revive a jurisdiction expressly taken away. The Legislature must be taken to have been perfectly acquainted with the subject with which they were dealing, and it must be supposed that they meant to meet some existing case such as the above, rather than to give general jurisdiction by implication. [Sir R. PHILLIMORE.—The Act gives me power to transfer causes here, even though the amount is below the limit.] Such a cause is still a County Court cause, and the power to transfer does not give this court original jurisdiction. By the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), the County Courts having admiralty jurisdiction, have power to try causes in which this court has no original jurisdiction, and yet they may be transferred here by the Act now in question, and the appeal lies here. Again, there is a distinction between salvage suits and other admiralty causes; in the latter the court has original jurisdiction, but in salvage it has not where the value is under 1000*l*.

Sir R. PHILLIMORE.—It is an unsatisfactory duty to have to construe the sections of this Act, but as it is cast upon me I must interpret them according to the only meaning that, in my view, can be put upon them. The only construction that I can put upon sect. 9 of the County Courts Admiralty Jurisdiction Act 1868 is that which I have already

(a) County Court Admiralty Jurisdiction Act 1868.—Any County Court having admiralty jurisdiction shall have jurisdiction . . . to try and determine . . . the following causes:

1. As to any claim for salvage—any cases in which the property saved does not exceed 1000*l*., or in which the amount claimed does not exceed 300*l*.

Sect. 6. The High Court of Admiralty, on motion by any party to an admiralty cause pending in a County Court, may, if it shall think fit, with previous notice to the other party, transfer the cause to the High Court of Admiralty, and may order security for costs, or impose such other terms as to the court may seem fit.

Sect. 8. If during the progress of an admiralty cause in a County Court it shall appear to the court that this cause could be more conveniently prosecuted in some other County Court, or in the High Court of Admiralty, the court may by order transfer it to some other County Court, or to the High Court of Admiralty of England, as the case may be, and the cause shall thenceforward be so prosecuted accordingly.

Sect. 9. If any person shall take in the High Court of Admiralty of England, or in any Superior Court, proceedings which he might, without agreement, have taken in a County Court, except by order of the judge of the High Court of Admiralty, or of such Superior Court, or of a County Court having admiralty jurisdiction, and shall not recover a sum exceeding the amount to which the jurisdiction of the County Courts in that admiralty cause is limited by this Act, and also if any person without agreement shall, except by order as aforesaid, take proceedings as to salvage in the High Court of Admiralty, or in any Superior Court, in respect of property saved, the value of which, when saved, does not exceed 1000*l*., he shall not be entitled to costs, and shall be liable to be condemned in costs, unless the judge of the High Court of Admiralty, or of a Superior Court, before whom the cause is tried or heard, shall certify that it was a proper cause to be tried in the High Court of Admiralty of England, or in a Superior Court.

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indicated during the argument. I am of opinion that the court has jurisdiction to hear the case, and to award costs according to the view it may take on the bearing. I quite feel the difficulty which must necessarily arise from either construction of the section; but I must, as I interpret the section, allow the case to go on, and decide upon the merits hereafter whether it was a proper cause to be tried here.

Proctors for the salvors, *Dyke and Stokes*.
Solicitor for the owners, *Thomas Cooper*.

COURT OF QUEEN'S BENCH.

Reported by J. SPOWETT, M. W. MCKELLAR, and J. F. ASHINALL,
Esqrs., Barristers-at-Law.

Tuesday, May 30, 1871.

BECKETT v. THE WEST OF ENGLAND MARINE
INSURANCE COMPANY (LIMITED).

Marine insurance—Construction of policy—Inception of risk—Policy on freight—Goods not on board—At and from.

A ship was chartered to carry a cargo from Liverpool to Lagos, on the west coast of Africa, there to discharge and reload another cargo for the United Kingdom, in consideration of a lump sum by way of freight, payable half before sailing from Liverpool, half on delivery of the homeward cargo.

The plaintiff, the shipowner, effected an insurance on freight "at and from Lagos," and the policy contained a clause whereby the defendants, the insurance company, agreed that the insurance "shall commence upon freight and goods or merchandise aforesaid from the loading of the said goods or merchandise on board the said ship or vessel at as above." The ship was lost before she had shipped any of her homeward cargo.

Held, that this clause precluded the plaintiff from recovering against the underwriters, although the freight was chartered freight.

DECLARATION on a policy of insurance (afterwards set out), upon freight to be earned by the ship *Gem*, under a charter party (afterwards set out), lost or not lost, at and from Lagos and [or] any place or places on the west coast of Africa, between Cape Palmas and Cape Formosa to any port of call, and [or] discharge in the United Kingdom; the insurance to commence upon the freight and goods or merchandise aforesaid from the loading of the said goods or merchandise on board the said vessel, alleging interest in the freight, and loss of the vessel by the perils insured against whilst in Lagos Roads and during the continuance of the risk. Pleas: First, denial that the defendants became insurers; secondly, denial of interest; thirdly, that the policy was not made for the benefit, or by the authority of the said persons interested as alleged; fourthly, denial that the ship was under charter; fifthly, denial of loss; sixthly, that the loss of the said ship and subject-matter of insurance did not happen during the continuance of the said risk, but before the same had commenced, and before the said ship was at Lagos, or any place on the west coast of Africa between Cape Palmas and Cape Formosa, within the meaning of the said policy.

On these pleas the plaintiffs joined issue.

At the trial before Blackburn, J., at Guildhall, sittings after Michaelmas Term, 1870, it appeared that the plaintiff was a shipowner at Glasgow, and that the defendants were an Insurance Company,

carrying on business at Exeter. On the 26th April 1869 a charter-party was entered into between the plaintiff and Messrs. Holland, Jacques, and Co., in the following terms:

London, 24th April, 1869.
Liverpool, 26th April, 1869.

[Charter-party.]

It is this day mutually agreed between John Beckett, Esq., owner of the good ship or vessel called the *Gem A Red.*, of the measurement of 120 tons or thereabouts, now in Liverpool, and Messrs. Holland, Jacques, and Co., of London, merchants, that the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall receive and take on board in one of the docks and river for gunpowder, all such lawful goods or merchandise as the charterers or their agents may send alongside, and shall forthwith proceed and deliver the same at any place or places on the West Coast of Africa agreeable to bills of lading, as directed by the charterers' agent, between Cape Palmas and Cape Formosa inclusive, and reload a full and complete cargo of African produce; the vessel to load a full cargo if required inside Lagos Bay, which the said merchants bind themselves to ship, &c., and being so loaded shall therewith proceed to London, and deliver the same (the act of God, &c., excepted). The freight to be paid as follows: In full for the round the lump sum of 600*l.* payable by charterers, acceptance at three months' date for 300*l.* from day of clearing, and the balance on correct delivery of the return cargo, as customary, in cash. Fifty running days, &c. [Here follow various immaterial clauses.]

Signed { HOLLAND, JACQUES, AND CO.
{ JOHN BECKETT.

Pursuant to the charter-party, an outward cargo was shipped at Liverpool by the charterers, consisting of eleven bales of cotton goods, to be delivered at the port of Jellah Coffie, on the West Coast of Africa, and of one hundred cases of hatbets, and fifty tons of salt, and a quantity of mats for drunage to be delivered at Lagos, and for this cargo the master signed bills of lading on 10th May.

On 11th May the policy in question was effected by the plaintiff's brokers, and its material parts are as follow:

West of England Insurance Company (Limited).
No. 4806. 300*l.*

Whereas Walker, Martin and Todd have represented to the West of England Marine Insurance Company (Limited) that they are interested in or duly authorised as owner, agent, or otherwise to make the insurance hereinafter mentioned and described with the said company, and have promised or otherwise obliged themselves to pay forthwith for the use of the said company at the office of the said company the sum of 6*l.* as a premium or consideration at and after the rate of 40*s.* per cent. for each insurance; now this policy of insurance witnesseth that, in consideration of the premises, the said company promises and agrees with the said Walker, Martin, and Todd, their executors, administrators, and assigns, that the said company will pay and make good all such losses and damages hereinafter expressed as may happen to be subject matter of this policy, and may attach to this policy in respect of the sum of 300*l.* hereby declared to be upon freight valued at 300*l.* the ship or vessel called the *Gem*, whereof is at present master, or whoever shall go for master of the said ship or vessel, lost or not lost, at and from Lagos, and, [or] any place or places on the west coast of Africa between Cape Palmas and Cape Formosa, to any port of call and [or] discharge in the United Kingdom, including all risk of craft, warranted free of capture and seizures, and the consequences of any attempt thereat.

And the said company promises and agrees that the insurance aforesaid shall commence upon the freight and goods or merchandise aforesaid, from the loading of the said goods or merchandise on board the said ship or vessel at as above, and continue until the said goods or merchandise be discharged and safely landed as at above; and that it shall be lawful for the said ship or vessel to proceed and sail to and touch and stay at any ports or places whatsoever in the course of her said voyage for all

necessary purposes, without prejudice to this insurance, and touching the adventures and perils, &c. [Here follow the usual perils insured against, the suing and labouring clause, and certain warranties, free from average under 5 per cent., and ship and freight, warranted free, average under 3 per cent., unless general, or the ship be stranded.] In witness whereof the said company have herewith set their common seal at Exeter the 11th May 1869.

The *Gem* left Liverpool on 11th May, and arrived at Jellah Coffie on 12th July, 1869, and there discharged the eleven hales of cotton shipped for that place, and after three days' delay proceeded for Lagos. On 18th July 1869, she arrived in Lagos roads. Between Lagos roads and Lagos harbour there is a bar which makes it necessary for ships drawing more than 9 ft. of water to discharge part of their cargo into lighters in the roads, so as to enable them to get over the bar into the harbour. Vessels usually discharged part, if not all, of their cargoes in Lagos roads, and when the *Gem* arrived there, several vessels were then discharging in that place. On 19th July, the master gave notice to the consignees that the ship was ready for discharging in the roads, and on 21st July a portion of the cargo was discharged, and the discharge continued down to 29th July, when the ship had 87 tons on board, and was drawing only 8 ft. of water, and thereupon the master applied to the consignees for a tug and pilot to take the ship inside the bar to enable her to finish the discharge there, and to commence reloading the homeward cargo in Lagos harbour. On 5th Aug. a pilot came on board and a tug took the *Gem* in tow, and they proceeded for the harbour, but in crossing the bar the *Gem* struck the ground and broke the tow rope, and was obliged to pull back into the roads. The *Gem* remained at anchor in the roads, without discharging any more cargo, until 11th Aug. when another attempt was made to tow the *Gem* across the bar, but she again struck the ground, and the tug was unable to get her off. The *Gem* ultimately drifted on the beach, and was abandoned. No portion of the homeward cargo had been shipped.

Upon these facts, Blackburn, J., ruled that the *Gem* had arrived "at" Lagos within the meaning of the policy, and so directed the jury, and a verdict was entered for the plaintiff for 500l., but leave was reserved to the defendants to move to enter a verdict, if the court should be of opinion that Blackburn, J., was wrong in his ruling. The words in the policy—"The insurance aforesaid shall commence upon the freight and goods or merchandise aforesaid from the loading of the said goods or merchandise on board the said ship or vessel at as above"—were not in any way brought to the attention of Blackburn, J., or the jury during the trial.

On Jan. 11, 1871, the defendants moved pursuant to the leave reserved, and brought to the attention of the court the above clause of the policy, and obtained a rule calling upon the plaintiffs to "show cause why the verdict obtained in this cause should not be set aside and a verdict entered for the defendants instead thereof, on the ground that the risk had not attached when the ship was lost."

May 30.—*Manisty*, Q.C. (Barnard with him) showed cause.—This was a policy on chartered freight. It is not so expressed in the policy, but it was so in point of fact. The voyage, therefore, must be considered as a whole, and the moment the vessel arrived at Lagos the policy attached.

The ship had already broken ground upon the voyage on which the freight was to be earned under the charter party by sailing from Liverpool, and on her arrival at Lagos the risk commenced. When she was in Lagos Roads she was "at" Lagos within the meaning of the policy. The fact that she had not discharged the whole of her outward cargo cannot affect the plaintiff's right to recover: (*Foley v. The United Fire and Marine Insurance Company of Sydney*, L. Rep. 5 C. P. 155; 22 L. T. Rep. N. S. 108.) The clause in the charter party which provides that the insurance shall commence when goods are on board cannot apply to freight. No doubt if the policy were on goods or ship it would prevent the plaintiff from recovering, but with respect to freight can have no more effect than if it were omitted altogether. If it should be held binding it will have the effect of rendering void the word "at," as the freight would have been insured during the greater part of the time the ship was at Lagos. The policy in *Foley v. The United Fire and Marine Insurance Company of Sydney* (sup.) was upon chartered freight "at and from Manritins to rice ports;" and Kelly, C.B. says:—"It seems to me that it would be a strained construction of the policy to subdivide the period during which the ship was at Port Louis into two portions, and to say that she shall not be insured for more than one of these two portions." This clause in the policy is only the ordinary printed form of the company's policies, and cannot override an express stipulation applying to a particular adventure.

Watkin Williams (Sir G. Henyman, Q.C., with him) in support of the rule.—The plaintiff admits that if this were a policy in goods, this clause would bar his claim, and we contend that with this special clause in the policy the words in this case can apply only to freight. The clause is printed and used in policies on goods also. "At and from" are words used in the ordinary form of the policy, and must be qualified by the meaning to be given to the special clause. The risk did not commence until the goods were laden on board, and in this case the outward cargo was not discharged [Cockburn, C.J.—The plaintiff was entitled to his freight whether the goods were loaded or not. He gets his chartered freight independently of the loading. The assured cannot have intended that the policy should not be the same as the risk.] Whether the assured did or not cannot affect the defendants, as the brokers made the policy, and they clearly so intended. Again, there is a difference between freight and chartered freight. [BLACKBURN, J.—It has been settled for a century that "freight" must be construed in a policy in its widest sense.] Ordinary policies on freight are made quite irrespective of the goods being laden on board.

Winter v. Haldimand, 3 B. & Ad. 649;

Potter v. Rowkin, L. Rep. 3 C. P. 562; 18 L. T. Rep. N. S. 712; and in the Exchequer Chamber; L. Rep. 5 C. P. 341; 22 L. T. Rep. N. S. 347.

The time for the commencement of the insurance is fixed in order to avoid the risk of the most critical part of the voyage, viz., that during which the vessel lies off a dangerous port, as in the present instance, and the words of the policy are expressly framed to meet decided cases. The trade on the west coast of Africa is peculiar, being a barter trade, consequently large quantities of nuts, oil, and other African produce are constantly

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in store waiting for ships, which, therefore, have a homeward cargo always ready for them. Then it might be said, that a policy of insurance always attached on the arrival of the ship. This clause is inserted to prevent the attaching at that period, and the meaning of it is, that the risk shall not commence until the cargo is loaded, and only then. Should the court decide against the underwriters of the present policy, more stringent terms must be devised and inserted into policies in order to express their obvious intention as to the inception of the risk. This policy is not in the ordinary form of Lloyd's policy; it is a special form. In Lloyd's policies, where an insurance is effected on freight, it is so expressed in the margin of the policy, without the general form being in any way altered, and the clause as to the attaching of the policy is "beginning the adventure upon the said goods and merchandises from the loading thereof on board the said ship," which words are only applicable to a policy on ship or goods. This policy declares the insurance to be on freight in the body of the policy and is on nothing else, and there is a special clause that "the insurance aforesaid shall commence upon the freight and goods or merchandise aforesaid from the loading," &c. In this policy this clause can only apply to freight.

COCKBURN, C. J.—I am of opinion that this rule must be made absolute. The words used are plain, precise, and perfectly intelligible; they mean that the risk shall not attach until the goods are actually on board. I did not at first understand how or why such a stipulation as the one in question should be introduced or submitted to on the part of the plaintiff, the shipowner, seeing that his remuneration on the charter-party—his freight (the term being applied to whatever was earned by the vessel)—was in no wise dependent on the loading and carrying of the goods, but was for the use of his vessel, whether a cargo was carried or not. Therefore it struck me that if there was any way in which we could read these words, *reddendo singula singulis*, the argument of Mr. Manisty might prevail; but I think the answer given by Mr. Watkin Williams quite conclusive, first, that this clause being part of a printed form of policy cannot be intended to apply to goods, for the simple reason that until they were loaded the risk did not attach; but besides that I think Mr. Williams has given a second very good reason for the insertion of the words by the underwriters, viz., the peculiar difficulty of loading vessels on the west coast of Africa, where they are exposed to dangers of tempests and other perils during the process of loading. That being so, one can quite understand the underwriters saying "We do not take upon ourselves, without requiring extra premium, the risk of the vessel loading at the coast under these circumstances." Though it may be that, they said: "When the loading is completed and the vessel is over the bar, with a full cargo on board, we will undertake it." But, even independently of that, I cannot see any possible means of getting over the precise language used in the policy. I think, therefore, that this vessel having been lost before the loading was completed, the risk under the policy never attached, and that the defendants are entitled to judgment, and that the rule must be made absolute.

BLACKBURN, J.—I come to the same conclusion. The policy of insurance is, in fact, a contract by which the underwriters promise that they will

indemnify the assured against certain perils from the particular time. When the clause is looked at, we see that it amounts to this, that the underwriters insure from the time the cargo is on board, whether the subject matter of the insurance is on freight or on goods. Of course then another question comes in—if the freight is merely dependent upon finding a cargo, the ship may never be in a position to earn it. Therefore, although the period may have arrived when the underwriters are responsible for perils, and the ship went down, yet if no freight really existed, it could not be recoverable from the underwriters. Then comes the question, did the period come, and was there freight upon which the risk would attach? It is now perfectly well established that the word "freight" is a general term used, as a merchant would understand it, to mean the benefit that is to be got from the employment of the ship; not merely chartered freight, but also that benefit which the ship would get from carrying the owner's goods in the owner's ship. Therefore I think "freight" clearly included this charter, and that there clearly was cargo in existence, so that freight really did exist, and from the loss of the vessel the freight was lost. Now in the case of an ordinary Lombard-street policy in general use, where there is no particular mention made of freight or the period when it is to be paid, it is to commence "beginning the adventure . . . upon the ship, &c.;" it does not state the time when the risk is to commence, and consequently it is always the practice on those policies for the risk to begin at the place where the voyage insured against begins, viz., "at and from Lagos" (in this case). In the case of *Potter v. Bankin* (sup.) alluded to by Mr. Williams, the policy was effected on chartered freight from Calcutta to London, to attach only during a preliminary voyage to New Zealand. There the freight which was actually provided was freight which the ship would have carried from Calcutta to England, but then the policy had said, "From the Clyde to Southland, New Zealand, while there, and thence to Otago, New Zealand, and for thirty days in port there after arrival," and the underwriters were, I think, perfectly rightly held responsible. But here it was from "at and from" Lagos, and if the matter had stood here I apprehend, that the vessel, having reached Lagos, the underwriters' risk would have commenced there; but then come the words, "and the said company promises and agrees that the insurance aforesaid shall commence upon the freight and goods or merchandise from the loading of the said goods or merchandise on board the said ship or vessel at as above," and those words are printed in a part of the policy where they do not catch attention. At the trial I never noticed them, and I was not even aware of them when the motion for a new trial was made until my attention was called to them. I think the company making a policy which is different from the ordinary form, should print them a little more conspicuously. But, having regard to the words used in it, I cannot see how we can construe this clause applying to the goods and merchandise and not to freight.

MELLOR, J.—The construction which we are asked, on behalf of the plaintiffs, to put on the clause is hardly a fair one. What the words really mean is, the commencement of the risk on the freight shall be when the goods and merchandise are on board at Lagos, and not when the ship

merely arrives there. Once let that construction be put on the policy, and the case is perfectly clear.

HANNER, J.—I am of the same opinion. I think it impossible to put any construction on these words which would give effect to Mr. Manist's argument. We cannot reject operative words in a sentence merely because there may be a reason for a suggestion that one of the parties may not have contemplated the effect they would have. It must be remembered that they are the words of the underwriters as well as those of the assured. Mr. Williams has given us very good reason why the underwriters should desire to put those words in, and I do not see how they could have expressed their intention in other terms, although, as my brother Blackburn suggested, they certainly might have printed them in larger letters.

Rule absolute.

Attorneys for the plaintiffs, Morton and Meadows.

Attorneys for the defendant, Thomas and Hollands.

June 8 and July 6, 1871.

GANDY v. ADELAIDE MARINE INSURANCE COMPANY.

Marine insurance—Concealment of material fact—Lloyd's rules—"Half-time" survey—Loss of class—Knowledge of underwriter.

By Lloyd's rules, a vessel classed A 1 for seven years must undergo a half-time survey, signified when undergone by the letters "H. T." endorsed on the Lloyd's register. If such survey is refused by the owner, the vessel is struck off the register.

Such refusal is not necessarily (Cockburn, O.J., dissentiente) a material fact which need be communicated to an underwriter of Lloyd's, who subscribes a policy on such a vessel after the refusal (the letters "H. T." not being in the register), but before the vessel was struck off the register. The materiality of the fact is a question for the jury.

Seemly, that the initialing of a ship is so far the completion of a contract of insurance that an underwriter is only bound by his knowledge of facts existing at that time, and not by knowledge within his power between that time and the execution of the policy.

DECLARATION on a policy of insurance dated 1st Dec. 1869 on the ship Annie, lost or not lost, for twelve months from 1st Dec. 1869, to 30th Nov. 1870, alleging that the defendants executed and underwrote the said policy for the sum of £1000, at a premium of 7 guineas per cent., and that the ship was totally lost on 31st Dec. 1869, by the perils of the seas insured against.

Fourth plea: That the defendants were induced to execute the said policy and to become insurers to the plaintiff, by the misrepresentation of the plaintiff and his agents, and by the wrongful and improper concealment by the plaintiff and his agents from the defendants of certain material facts then known to the plaintiff and unknown to the defendants, and which ought to have been communicated to the defendants by the plaintiff and his agents.

Pursuant to a master's order, the following particulars of concealment were delivered by the defendants to the plaintiffs:

Whereas the vessel, when the insurance was offered to defendants and accepted by them, stood in the register book under class A the plaintiff, who was managing

owner, had at the time the intention that she should go out of the book, and with that intention had refused to subject her to the survey, which, according to the rules of the book, she must have undergone to entitle her to keep her class, and to which the surveyor of the book, by letter, required her to be subjected. The consequence was, that she was insured at a first-class premium; whereas, if the truth had been known, she would not have been insured at all.

The cause came to trial at the Liverpool winter assizes, before Brett, J. The entry of the Annie in Lloyd's book was produced, and its material parts were as follows: "Annie; bk., 345 N. Bruns. 1865, 6 mo.: 7 A 1, 11, 65;" this meant that the Annie was a barque of 345 tons register, built in New Brunswick; launched in 1865, in the month of June; classed A 1 for seven years, having been surveyed and classed in Nov. 1865. Lloyd's rules were also produced, and those relating to this question are as follow:

Rule 33.—Ships A will consist of new ships and those which have not passed the prescribed age, provided they are kept in a state of complete repair and efficiency. The character A will not, however, be granted to any vessel unless satisfactory evidence of the date and build, and place where built, is produced.

Rule 34.—The number of years to be assigned for this character is to be determined with reference to the original constitution and quality of the vessels, materials employed, and the mode of building; and their continuance for the time so assigned to depend upon its being shown by occasional surveys, annually if practicable, that their efficiency is duly maintained. The characters of ships classed A will be struck out of the ships' book, unless they be submitted to the following intermediate survey, within periods not exceeding four years in case of vessels classed eight years and under either originally, on restoration, or on continuation, and within periods not exceeding half that assigned in vessels classed for longer terms. The survey will be registered in the register book thus: "H. T." (half-time), with the date of the survey affixed. [The rule then set out how the survey was to be made.]

The current rate of insurance of a vessel classed A 1 was then seven guineas per cent.

It appeared that the defendants' copy of Lloyd's book was sent by them to Lloyd's to be posted up on 20th Nov., and was returned to them 23rd Nov., the entry as to the Annie being struck out; but this did not come to the defendants' knowledge until after they had subscribed the policy, as they did not refer to the register after it had been altered.

The remaining facts given in evidence, the questions left to the jury by the learned judge, and the verdict are fully set out in the judgments. A verdict was entered for the plaintiffs, and leave was reserved to the defendants to move to enter a verdict, if the court should be of opinion that the learned judge should have directed a verdict for the defendants on the plea of concealment.

The defendants obtained a rule nisi to enter the verdict for them pursuant to the leave reserved, on the ground that the plea of concealment was proved as matter of law, so that the jury ought to have been directed to find that issue for the defendants, or for a new trial on the ground that the judge misdirected the jury in telling them that there was no misrepresentation, that the insured might have changed his mind as to continuing the classification of his ship, and in not directing them that the defendants were not, under the circumstances, put upon inquiry and also on the ground that the verdict was against the weight of evidence.

June 8.—Benjamin showed cause.—The refusal of the plaintiff to have his ship surveyed, and so

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kept on Lloyd's book, was not material; this did not in itself render the ship degraded. The plaintiff might have changed his mind. There was no concealment of a material fact not practically known to the defendants. Even supposing the refusal to be a material fact, the plaintiff had a right to consider that the ship would be struck out of Lloyd's book, and that the defendants, being members of Lloyd's, had the knowledge that it was so struck out, or, at any rate, that they would know that the time for half-time survey was passed, and that the fact of "H.T." not being entered against the *Annie* would indicate to them that the survey had not taken place. The defendants' underwriter referred to the book, and he ought, with his acquaintance of the rules of Lloyd's, to have been able to read his own book. The defendants' copy of Lloyd's book was returned to them with the entry of the *Annie* struck out before the policy was signed. It may be said that the ship was initialled and the contract entered into, but a ship is not a contract of marine insurance by 30 Vict. c. 23, s. 7.

Mackenzie v. Coulson, L. Rep. 8, Eq. 368;

Parry v. Great Ship Company, 4 B. & S. 556; 33 L. J. 41, Q. B.; 9 L. T. Rep. N. S. 379.

Bull, Q.C. and *Herechell* in support of the rule.—Knowledge acquired by the underwriter after the terms of the contract have been agreed upon cannot affect the defendants' position as to the validity of the contract. The entry at the time of contract showed the ship to be classed A 1, and on that basis the premium was settled. The practice as to half-time surveys is not sufficiently strict to enable an underwriter to judge whether a survey ought to have taken place, or even to put him on inquiry. The ship was supposed to be still A 1 by both plaintiff's agent and defendants' underwriter, and it must have been known to the plaintiff that this was the basis on which he obtained the rate of insurance at seven guineas. The ship was struck out of the register before the execution of the policy, but after the initialling of the ship, which according to the practice of underwriters, although not by law, is the contract; all subsequent matters are mere questions of routine, and the ship once initialled on certain terms, the underwriter is not bound to make further inquiry. No doubt by *Mackenzie v. Coulson* (*sup.*) a ship is not evidence of a contract, and that is all that case decides; it cannot be said on the authority of that case, that after the terms of a contract are arranged, the position of the contracting parties is in any way affected by mere means of knowledge which they subsequently acquire. There was nothing in the book at the time the premium was agreed upon to show that the half-time survey ought to have been held, nor anything to show the plaintiff's determination not to have the ship surveyed. This was a material fact, which the plaintiff knew and the defendant did not know, and had no means of knowing, and which the plaintiff was, therefore, bound to have communicated. If a material fact be not communicated, even although it had once been known to the underwriter, yet if it be not present to his mind at the time of effecting the insurance, the want of such communication affords a good defence to the underwriter. It is not enough for the assured to show that, if the underwriter had given sufficient consideration to the facts of the case, the particulars supplied by the assured, together with the underwriter's previous knowledge, would have made the latter acquainted with

the material fact. This is laid down in *Bates v. Hewitt* (L. Rep. 2 Q. B. 595; 36 L. J. 282, Q. B.); but this case is even stronger, because the underwriter had no previous knowledge at the time of making the contract; even his means of knowledge was acquired afterwards, and he did not use those means, nor was he bound to do so.

Cur. adv. vult.

July 6.—The judgment of Mellor, Lush, and Hannen, JJ., was delivered by

MELLOR, J.—The plaintiff in this case was the owner of the barque *Annie*, built at New Brunswick in 1865, in which year he had purchased her, she being at the time classed at Lloyd's A 1 for seven years from 1865; she was in fact classed in Nov. 1865. In Oct. 1869 she was lying in the Canning Graving Dock at Liverpool for some repairs, and on the 22nd Oct. the surveyor of Lloyd's at Liverpool wrote a letter to the plaintiff, whereby he informed him that the barque *Annie* was then due for half-time survey, and requested to know when she would be ready for survey. To this letter the plaintiff replied on the 23rd Oct. as follows:—"In reply to your memorandum to hand, I beg to say that I have decided not to continue the *Annie* in Lloyd's book." By the rules of Lloyd's a ship classed A 1 for seven years, in order to retain that position in the register, is required to undergo a half-time survey, and upon the report of such survey it is decided by the committee of Lloyd's register to whom such report is referred whether she shall retain her classification of A 1, or shall be degraded from that class. If the survey is satisfactory to the committee, the ship retains her classification, and in that case, the letters "H. T." are placed opposite her name and description in the register, and the date of the survey is affixed; but these letters are only so placed after she has satisfactorily undergone "the half-time survey." If the report is not satisfactory, she is degraded from her class, and if a survey is not had, or is declined, she is struck out of the register. The time for half-time survey is not in practice strictly observed in certain cases, as, if, for instance, the ship is at sea. Every subscriber to Lloyd's obtains a copy of the register, and in the case of London subscribers the books containing the register are sent weekly to Liverpool for correction, where they are posted up and returned the next day. Every subscriber to Lloyd's can get any information he requires by going to the secretary of Lloyd's registry. On the 28th Oct., Messrs. Banks and Co., the plaintiff's brokers at Liverpool instructed Messrs. Maclean and Co., brokers, in London, to ascertain and telegraph to them "to-morrow" at what rate they should insure "the *Annie*, of Liverpool, 345 tons, built at New Brunswick, 1865, for twelve months, being intended to take coal from this to Gibraltar or a Mediterranean port, and to bring home one from Sicily or Pomaron, and will probably continue in this trade." These were the instructions upon which the insurance was subsequently effected with the defendants on the 15th Nov. On receipt of the letter from Banks and Co., of 20th Oct., Mr. Wright, a partner in the firm of Maclean and Co., went to the defendants' office to ascertain at what rate the insurance could be effected, and read the letter of 28th Oct. to Mr. Kemp, the defendants' underwriter. A copy of Lloyd's book was then in the office, and the entry as to the *Annie* was referred to by Mr. Kemp, who asked Mr. Wright, "Is this the

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ship you wish to insure?" To which Mr. Wright replied, "It is." She then stood in the book classed A 1 seven years from 1865; and thereupon Kemp gave Wright a quotation of the rate at which he would insure; and, ultimately, on the 15th Nov., the ship was initialled for an insurance of 300*l.*, and the policy was in due course issued and dated the 1st Dec. 1869. The *Annie* was in fact struck out of Lloyd's register on the 15th Nov., and the plaintiff was informed thereof on the 17th by letter, stating that his vessel not having passed the survey had been struck off the register. The *Annie* was wrecked and became a total loss on the 31st Dec. 1869. At the trial the defendants' counsel contended that the judge ought, as a matter of law, to direct a verdict to be entered for the defendants on a plea of concealment. The judge, however, declined doing so; but at the end of the case he reserved leave to the defendants' counsel to move to have the verdict entered for the defendants if this court should be of opinion that he ought so to have directed. The judge left to the jury several questions, and amongst them the following: "Was the ship on the 15th Nov. in the ordinary business sense degraded from her class?" To which the answer of the jury was, "No." "Was the fact that plaintiff had resolved not to continue the ship on the list and had so stated to the surveyor a material fact?" To this question the jury answered "No." He then asked the jury, "Ought the underwriter to have known on the 15th Nov. that the continuance of the class must depend on whether the ship had been then lately surveyed and passed, and would within a few days be surveyed and passed or repaired; and if, 'Yes,' ought the knowledge to have put the underwriter to ask whether the ship had been surveyed or was about to be surveyed?" To this question the answer of the jury was "Yes." The verdict thereupon passed for the plaintiff. The defendants' counsel, in Hilary Term, obtained a rule to enter the verdict for the defendants, pursuant to the leave reserved; and for a new trial, on the ground of misdirection by the judge in telling the jury that there was in fact no misrepresentation, that the assured might have changed his mind as to continuing the classification, and that the defendants were not, under the circumstances, put upon inquiry; and also that the verdict was against the weight of evidence. On the argument, it was not insisted that there was any misrepresentation in point of fact on the part of the plaintiff, and we have only to determine, first, whether the judge was bound, under the circumstances, to direct the jury as matter of law that the verdict on the plea of concealment must be found for the defendants; secondly, whether there was any misdirection by the judge; and, lastly, whether the verdict was against the weight of evidence. As to the first question, we are clearly of opinion that the judge was quite right in refusing to direct the jury as matter of law that the plea of concealment was proved; without putting it to the jury to draw the proper inferences from the facts proved there was not, in the facts themselves, enough to enable the judge to say "aye" or "no" that there had been the concealment of a material fact; and, under the circumstances of the case, it was impossible to withdraw the question from the jury. It appears to have been contended on the trial that the ship became in fact a degraded ship by virtue of the

resolution expressed in the letter of the 23rd Oct., but this was not insisted upon on the argument, except so far as it was included in the question of materiality. The misdirection complained of resolves itself into two distinct matters: first, that the judge in directing the attention of the jury to the question with regard to the materiality of the resolution of the plaintiff not to continue the *Annie* in Lloyd's book, and his communication thereupon to the surveyor of Lloyd's on the 23rd Oct., submitted to the jury, whether there was anything in those circumstances to preclude the plaintiff from changing his mind and submitting to a survey, and continuing the classification of the ship at Lloyd's, and whether, if the underwriter had been told of those circumstances, he might not have said or thought, "Well, he may change his mind." Now, it is to be observed that this was not a direction in point of law, but merely consisted of observations for the consideration of the jury; and unless we are of opinion that the resolution expressed in the letter of 23rd Oct. was a material fact, we ought not, because of observations of which we may not altogether approve, to hold that they amount to a misdirection. Can we then say that it was a necessary or material fact? The effect of it could not be greater than that of refusing to submit the ship to the "half-time survey," the necessary consequence of which, according to Lloyd's rules, would be to exclude the ship from the register. Is it anything more than an answer to a notice that the time had arrived for the survey? If the mere fact of the ship not undergoing "the half-time survey" would in fact exclude her from Lloyd's register, what necessity was there on the part of the plaintiff to disclose circumstances which only could affect the result by virtue of the rules of Lloyd's with regard to the "half-time survey?" The plaintiff's answer declining a survey could not be otherwise important than as it affected the proceedings of Lloyd's committee under the rules. As a resolution of his own it was of no consequence, and it was only as his answer to the demand for a survey that it could acquire importance, and so far as the plaintiff was concerned, it amounted to neither more nor less than declining a survey, and a desire to remove the ship from Lloyd's register. The value of the classification of the ship as A 1 for seven years at Lloyd's in the eyes of an underwriter can only depend upon the supposition that Lloyd's rules have been, and will be, observed, and that it will not be classed or retain its class except after proper surveys. Under such circumstances can we say affirmatively that the fact was material, and if we cannot, was it not clearly right to put it to the jury? It was further contended that the judge misdirected the jury by leaving to them "whether the underwriter ought to have known on the 15th Nov. that the continuance of the class must depend on whether the ship had been lately surveyed and passed, and, if 'Yes,' ought this knowledge to have put the underwriter to ask whether the ship had been surveyed, or was about to be surveyed?" This, of course, depends upon whether, in the very nature of his profession as an underwriter and a subscriber at Lloyd's registry, he ought not to have been sufficiently acquainted with the rules and practice of the association of which he was a member to have been able with understanding "to read his own book," as Mr. Benjamin expressed it. *Prima facie*, we should

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think that every underwriter who relies upon the classification of a ship in Lloyd's register as determining the rate of insurance, ought to be acquainted with the rules and practice which gave the classification its value. In the present case the underwriter did refer to Lloyd's book before he gave his quotation; and if he had taken ordinary pains, and was, as we are entitled to presume that he ought to have been, acquainted with the rules, he ought to have seen at once that the period for the half-time survey had passed, and that as yet no letters "H. T." with the date of the survey were appended to the description of the ship in the register. It was contended by Mr. Benjamin that as mere matter of professional knowledge, the underwriter, looking at the book for the classification of the ship, and not finding the letters "H. T." and the date of the half-time survey there, ought at once to have seen the propriety of asking how and why it was that the ship had not undergone her half-time survey; and that, not having done so, he had been guilty of negligence which disentitled him to complain that he had been at all misled by any want of communication on the part of the plaintiff. We think that this question was rightly left to the jury, and that the present case is entirely distinguishable from that of *Bates v. Hewitt* (*sup.*), which was much relied upon by the defendants' counsel. It was there said by the Lord Chief Justice, in his judgment, that "No proposition of insurance can be better established than this, viz., that the party proposing an insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the assured. It is true, if matters are common to the knowledge of both parties, such matters need not be communicated. It is also true that when a fact is one of public notoriety, as of war, or where it is one which is a matter of inference, and the materials for informing the judgment of the underwriters are common to both, the party proposing the insurance is not bound to communicate what he is fully warranted in assuming the underwriter already knows." And Mellor, J. quotes from Lord Mansfield's judgment in *Carter v. Boehm* (3 Burr. Rep. 1910) as follows:—"An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew, what way soever he came to the knowledge. The insured need not mention what the underwriter ought to know; what he takes upon himself the knowledge of, or what he waives being informed of." And Sher, J. expressly says:—"He is not bound to communicate facts or circumstances which are within the ordinary professional knowledge of an underwriter." It is therefore, it appears to us, impossible to contend successfully that there was any misdirection on the part of the judge in leaving this question to the jury. The rule, therefore, so far as it relates to the entering the verdict for the defendants, or to imputed misdirection by the judge, must be discharged. It only remains to consider whether there ought to be a new trial, on the ground that the verdict is so unsatisfactory on the questions of fact left to the jury that we ought not to allow it to stand. For the reasons already assigned in discussing the question of misdirection we think that we cannot come to that conclusion, and that there was evidence on both questions fit to be submitted to the jury, and that we cannot say that they were wrong

in the conclusion at which they arrived. The rule, therefore, on this ground also, will be discharged.

COCKBURN, C.J.—I regret to be unable to concur with my learned brothers in the judgment which has just been read. I am of opinion that the fact that the survey of the vessel necessary to enable her to keep her class in Lloyd's register had been declined by the owner was a material fact, and one which ought to have been communicated to the underwriter. The retention of a vessel in Lloyd's register as of the class A 1 is so important to the owner as promoting the profitable employment of the vessel, that the refusal to submit to the survey necessary to enable her to retain her class, leads fairly to the inference that the owner is conscious that the condition of the vessel has so far deteriorated that the result of the survey would be unfavourable; and, as the degradation of the vessel from her class is the necessary consequence of the refusal to submit to the survey, the fact of such refusal would produce the same effect upon the mind of the underwriter as if the vessel had actually been degraded, and he had become aware of it. Now, the degradation of a vessel from her class appears to me important, as necessarily carrying with it the presumption that a deterioration in the condition of the vessel has taken place; a circumstance, of course, calculated materially to influence the decision of the underwriter as to the amount of premium he will require as the consideration for undertaking the risk. I take it, that if an underwriter, not being a subscriber to Lloyd's, who had been in the habit of insuring a vessel represented to him as classed A 1 in Lloyd's register, were asked to renew the insurance at a time when the vessel had been degraded from her class, this not being within his knowledge, the degradation of the vessel would be a fact, the omission to inform him of which would amount to concealment of a material fact. If so, the refusal to submit to the survey being, as it seems to me, equivalent to degradation, the fact of such a refusal was, in my judgment, a material fact which ought to have been communicated to the underwriter, unless the latter knew, or ought to have known it. And this brings me to the second question. Now I entirely adhere to the doctrine laid down in *Bates v. Hewitt* (*sup.*), namely, that a party proposing an insurance is not bound to communicate to the underwriter that which the underwriter already knows, or that which in the course and conduct of his business he ought to know, and may properly be taken to know, or that which may be matter of inference from materials common to both parties. The first of the three cases does not arise here. It is clear that the underwriter did not know of the owner's refusal to submit to the survey. It is said, indeed, that as the plaintiff had given notice to the agent of Lloyd's at Liverpool that he would not have the vessel surveyed, this was sufficient to affect the underwriter with knowledge. I cannot concur in this view, as it appears that in the discharge of his duty the surveyor would communicate the fact of the refusal, not to the subscribers, but to the committee alone, who, again, do not communicate the fact to the subscribers until they have actually caused the vessel to be degraded from her class. The underwriter would therefore have neither actual knowledge, nor the means of knowledge, from the report made by the surveyor

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to the committee of Lloyd's. The question whether the case comes within the second branch of the proposition to which I have referred is one of the greatest difficulty. The date of the building of the ship being stated in the register, which the underwriter had before him, he might have seen, had he reflected, that half the time for which she was originally classed had expired; and, the letters "H. T." not appearing against the ship, he might have inferred that the necessary survey had not been had, and that, consequently, the ship would now be degraded from her former class. I should feel the force of this argument if vessels were uniformly degraded unless surveyed on the expiration of half time; but such, it is admitted, is not uniformly the practice. While it is competent to the local surveyor to call on the shipowner, on the expiration of the half time, to submit to a survey, as the condition of the vessel keeping her class, it appears that this is by no means uniformly done, and that vessels are suffered to remain as of their former class, though the half time has expired and no fresh survey has been held. I think, therefore, that the underwriter—though, if his attention had been called to the ship's age, he might have seen that the half time had expired, and from the absence of the letters "H. T." might have inferred that no survey had been held on her—must not be taken to have been bound to infer that the owner had refused to have her surveyed. Adhering to what I said in *Bates v. Hewitt*, that where a fact is "matter of inference, and the materials for informing the mind of the underwriter are common to both parties," both may be left to draw their own inferences, I am reluctant to apply that principle to a case like the present, where a material fact is matter of positive knowledge to the party proposing the insurance, and only matter of possible inference, from very imperfect materials, to the underwriter. It must never be forgotten that insurance is a contract in which *suberrima fides* is required, and that the assured is bound to disclose every material fact known to him and unknown to the insurer, unless he is justified in believing such fact to be known to the latter. The plaintiff knew he had refused to have his vessel surveyed, and that her degradation must necessarily follow. It does not appear to me that the circumstances were such as to warrant the conclusion that the underwriter knew, or ought necessarily to know, that the survey had been declined. I think the doctrine in *Bates v. Hewitt* goes quite far enough for the protection of the assured, and I should be unwilling to extend it to a case like the present. I quite concur in thinking that there was no misdirection on the part of the learned judge on the trial, and that he was quite right in not withdrawing the case from the jury; but I am of opinion that the facts do not warrant the findings of the jury; and I should myself have thought it right to send the case down to a new trial; but my learned brothers think differently, and the rule must therefore be discharged.

Rules discharged.

Attorneys for the plaintiffs, *Gregory and Bowcliffe*, for *Hull, Stone, and Fletcher*, Liverpool.

Attorneys for defendants, *Waltons, Bubbs, and Walton*.

Nov. 28, 1871; Jan. 11, 1872.

LOYD v. FLEMING; LOYD v. SPENCE.

Action by assignee of marine policy of insurance—Beneficial interest of plaintiff—Policies of Marine Insurance Act, 1868 (31 & 32 Vict. c. 86, s. 1).

In an action by the executors of the assignee of a policy of assurance upon goods shipped against underwriters of the policy, the loss alleged being under the suing and labouring clause, the declaration averred that after loss, the said policy, together with all rights accrued under, and by virtue thereof, was by the assured, for good consideration, assigned to the plaintiff's testator in his lifetime:

Held, upon demurrer, that this declaration was good, although it contained no averment that the plaintiffs were beneficially interested in the subject matter of the insurance at the time of action brought.

The declaration stated that the plaintiffs were the executors of one William Entwistle, deceased, and that by a certain policy of insurance, bearing date the 17th Oct. 1860, certain persons trading and known under the firm of Robinson and Fleming, did ^{as} agents, as well in their own names as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, make assurance and cause themselves and them and every of them to be insured, lost or not lost, at and from Rotterdam to Batavia, on 802 boxes of steel, valued at 800*l.*, in the ship *Two Anthonys*, beginning the adventure from the loading of the said goods on board the said ship as above, and continuing until the same should be at Batavia aforesaid discharged and safely landed against perils of the seas, &c.; and in case of any loss or misfortune it was thereby also agreed that it should be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandise, or any part thereof, without prejudice to the said assurance; to the charges whereof the assurers thereby would contribute each one according to the rate and quantity of his sum in the said policy insured, and the said goods were warranted as usual in marine policies upon goods. And the defendant, in consideration of a certain premium to him paid on that behalf by certain persons interested in the said goods, and whose interest in the said goods is hereinafter averred, underwrote the said policy for 100*l.* and became an insurer thereon to the said persons for that amount on the said goods; and the said goods were shipped on board the said ship at Rotterdam aforesaid, to be carried therein on the said voyage. And certain persons hereinbefore referred to, that is to say, Julius Frederick Siebel, Sylvester Emil Siebel, and Josias Bracken Canning Alexander, or some or one of them were or was then and thence and until and at the time of the happening of the loss hereinafter mentioned, interested in the said goods to the amount of all the moneys by them insured thereon; and the said policy was made by authority and for account and benefit of the said persons so interested. And the said ship with the said goods on board sailed on the said voyage, and while she was proceeding on the voyage the said ship was stranded, and the said goods were by the perils insured

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against injured, damaged, and lost. And by reason of the said loss and misfortune the assured did by their factors and servants, sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods, and thereon end for that purpose did necessarily lay out and expend divers large sums of money. And after the said loss and misfortune, and the said expenditure had been incurred as aforesaid, the said policy of insurance, together with all rights accrued under and by virtue thereof was, by the said Julius Frederick Sichel, Sylvester Emil Sichel, and Josias Bracken Canning Alexander for good consideration to them moving from the aforesaid William Entwistle, duly assigned to the said Wm. Entwistle in his lifetime. Whereby and by reason of the premises, the defendant became liable to pay to the plaintiffs, as such executors of the said Wm. Entwistle, deceased as aforesaid, a large sum of money.

And all things have been done and happened, and all times have elapsed necessary to entitle the plaintiffs as such executors to be paid the said sum of money. Yet the defendant has not paid the same.

This declaration was demurred to on the alleged grounds that there was no averment that Entwistle was entitled to the property insured by the policy, and that the declaration showed no title to sue.

Another ground was that a mere claim under the suing and labouring clause is not within the policies of Marine Insurance Act 1808.

P. M. White (with him *Lanyon*) argued for the defendants, that the intention of the Legislature in this Act was to give the assignee a right to sue only when he has a beneficial interest in the subject matter of the policy, as was the object of the Bills of Lading Act 1855, with respect to bills of lading.

Holker, Q.C. (with him *Madachlan*) for the plaintiff, contended that the words "duly assigned" were sufficient to imply that the assignment was made in an operative manner under the Act.

White in reply, maintained that the word "duly" related only to the form of assignment.

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Jan. 11.—BLACKBURN, J., delivered the judgment of the court (Blackburn, Mellor, and Lush, JJ.).—In each of these cases the declaration is by the executors of William Entwistle against underwriters of a policy of marine insurance on goods. The declaration states a loss by the perils insured against, and then avers that after the loss "the said policy, together with all rights accrued under and by virtue thereof, was, by the assured for good consideration to them moving from the said W. Entwistle, duly assigned to him in his lifetime." To this there is a demurrer, on the ground that the action cannot be maintained in the name of the assignee. It is clear that before the stat. 31 & 32 Vict. c. 86, it could only have been maintained in the name of the original contractor, but by that act, after reciting generally that "it is expedient that the assignees of marine policies of insurance should be enabled to sue thereon in their own names," enacts that "whenever a policy of insurance on any ship or on any goods in any ship, or on any freight, has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy

shall be entitled to sue thereon in his own name." The argument in support of the demurrer was that this enactment was confined to cases where the policy is assigned before the loss along with the goods; and in support of this the words "entitled to the property" were relied on, as it was said the assignee after a loss could not be so entitled, but we do not think that such was the intention of the Legislature, nor do we think the words cited have that effect. A policy of marine insurance is a contract of indemnity against all losses accruing to the subject matter of the policy from certain perils during the adventure. The subject matter need not be strictly a property in either the ship, goods, or freight; for, as has been long said, if a man is so situated with respect to them that he will receive benefit from their arriving safely at the end of the adventure, or sustained loss in consequence of their not arriving safely, he has an insurable interest: (see per Lawrence, J. in *Lucena v. Crauford*, 2 N. R. 269). If the assured, before the termination of the adventure, has parted with all interest in the subject matter of the insurance, he can suffer no damage from any subsequent loss; and consequently, the nature of the contract being one of indemnity, he cannot recover in respect of any loss subsequent to his transfer of the property: (see *Poveles v. Innes*, 11 M. & W. 10.) And, for exactly the same reason, an attempted transfer of the beneficial interest in the policy before loss to a person having no beneficial interest in the subject matter is inoperative; for the *cestui que trust* of the contract, having nothing in respect of which to be indemnified, could recover no indemnity. But after the loss has happened, and the adventure is over, this reason ceases at once. The assured may sell the damaged subject of insurance, thereby, as it were, ascertaining how much his loss is, and yet recover for the loss he has sustained. It is every day's practice, where a ship has sustained damage, to sell the injured hull for the benefit of whom it concerns, and then sue on the policy. If it can be made out that the loss is total, the sale is for the benefit of the underwriters, who pay the total loss. If the loss proves partial only, it is for the benefit of the assured; but no one ever thought of saying that the sale of the damaged hull put an end to the right to recover an indemnity for the partial loss. The reason of the distinction is, that after the loss the right to indemnity no longer depends on the right of property in the subject matter of the insurance, so far as it still exists, but on the right of property in the thing or the portion of the thing lost. After a loss, the policy of insurance, and the right of action under it, might, like any other *chose in action*, be transferred in equity; though at common law the action must have been brought in the name of the original contractor, the assignor. Such an assignment may be objectionable on the ground of maintenance or champerty, but it is not necessarily so, and no circumstances are stated on this record to raise such a defence. It seems to us that the general object of the Legislature was to make the right of action on policies of marine insurance assignable at law, and that the assignment of a policy after loss is within the object of the Act. There is a very common form of commercial adventure, where goods are sold for a price to cover cost, freight, and insurance, payable on receipt of the shipping documents. In

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such a case the policy and bill of lading are habitually made the subject of sale, whilst the parties are ignorant whether the goods are safe or not. It could never, we think, be intended to except from the Act such cases, if it should turn out that the loss accrued before the sale. The words relied on in the case of an assignment before loss express what is necessarily implied, and so are superfluous; perhaps inserted *pro majora cautela*. In the case of an assignment after loss, when the policy and "all rights under and by virtue of it are assigned," it seems to us that the assignee becomes entitled to the property thereby incurred; for then it is ascertained that the interest in the damage, the *chose in action*, is the only property which is covered by the policy, consequently that the words of the Act were literally complied with. We think, therefore, that judgment on these demurrers should be for the plaintiff.

Judgment for plaintiff.

Attorneys for the plaintiff, *Swinburne and Parker.*

Attorneys for the defendants, *Hillyer and Fenwick.*

Friday, Nov. 17, 1871.

JOYCE AND OTHERS v. KENNARD.

Insurance—Indemnity against loss as carriers—Right to complete indemnity.

Plaintiffs, lightermen on the river Thames, caused a policy of insurance, in the ordinary form of a Lloyd's policy, to be effected on their behalf upon craft of every description, on "all goods and produce as interest may appear." At the foot of the policy was written, "to cover and include all losses, damages, and accidents, amounting to 20l. or upwards, on each craft, to goods carried by the plaintiffs as lightermen, or delivered to them to be water-borne either in their own or other craft, and for which losses, damages, and accidents the plaintiffs may be liable or responsible to the owners thereof, or others interested. It is agreed that the amount of each underwriter's liability shall not exceed the amount of his subscription." The policy was subscribed by various underwriters for different sums amounting altogether to 2000l., the defendant underwriting it for 100l.; and during the continuance of the risk a loss happened to goods carried by the plaintiffs as lightermen, for which they had to pay the owners 1100l. At this time the total value of the goods carried in the barges of the plaintiffs which were covered by the policy amounted to 20,000l. and upwards. An action having been brought against the defendant to recover the sum of 55l. as his proportion of the loss sustained, it was

Held, that the defendant was liable for that sum, and not merely for such a proportion of the loss sustained as the sum for which he subscribed the policy bore to the total value of the goods on board all the plaintiffs' craft which were covered by the policy at the time of the loss.

This was a special case stated for the opinion of the court.

1. The plaintiffs are lightermen carrying on business in the city of London, and the defendant is an underwriter also in the city.

2. In the month of Oct. 1869 the plaintiffs

caused the following policy of insurance to be effected on their behalf.

S.O.
£200.

Delivered the day } Be it known that Smith, Sanson & Co., of No. 1, St. James's, & Co., as agents, as well in their own name as for and in the name or name of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance and cause themselves and them and every of them to be insured, lost or not lost, at and from all or any of the wharves, banks, quays, and places of arrival or departure in the river Thames, and any merchant or steam vessel of any description therein, comprising the whole extent of the said river, from Wandsworth downwards to the Victoria Docks, including all or any intermediate docks and wharves, and vice versa, until on board any merchant or steam vessel, barge, or boat, or otherwise landed at any wharf, &c. The risk to commence on the 25th Sept. 1869, and terminate on the 24th Sept. 1870, including both days, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the craft of every description, whereof is master, under God, for this present voyage, or whosoever else shall go for master of the said ship, or by whatsoever other name or names the same ship or the wharf thereof is or shall be named or called, beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, or upon the said ship, &c., and shall so continue and endure during the abode there upon the said ship, &c., and further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at, as above, upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever and whosoever in the river Thames, from Wandsworth to the Victoria Docks, and vice versa, without prejudice to this insurance. The said ship and goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and the assurers in this policy, are and shall be valued at _____, on all goods and produce as interest may appear. Touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us in this voyage, they are of the sea, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mark, and counter mark, surprisals, takings at sea, arrests, restraints, and detentions of all Kings, Princes, and people of what nation, condition, or quality soever, barratry of the masters and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof; and in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for in and about the defence, safeguard, and recovery of the said goods, and merchandises and ship, &c., or any part thereof, without prejudice to this insurance, to the charges whereof we, the assurers will contribute each one according to the rate and quantity of his sum herein assured. And it is agreed by the assured that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard-street or in the Royal Exchange, or elsewhere in London. And so we, the assurers are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, consenting ourselves paid the consideration due unto us for this assurance, by the assured at and after the rate of 70s. per cent. In witness whereof, we the assurers have subscribed our names and sums assured in London.

7th Oct. 1869.

To cover and include all losses, damages, and accidents amounting to 20l. or upwards in each craft to goods carried by Messrs. W. A. Joyce and Son as lightermen, or delivered to them to be waterborne, either in their own or other craft, and for which losses, damages, and accidents,

[Q. B.]

JOYCE AND OTHERS V. KENNARD.

[Q. B.]

Messrs. W. A. Joyce and Son may be liable or responsible to the owners thereof, or others interested. It is agreed that the amount of each underwriter's liability shall not exceed the amount of his subscription.

This policy was subscribed by different underwriters for different sums amounting in the whole to 2000*l*.

3. The defendant underwrote the said policy for 100*l*., and received by way of premium the sum of 3*l*. 10*s*. [A fac simile copy of the policy accompanied this case, and formed part thereof.]

4. On the 7th Dec. 1863, and during the continuance of the risk covered by the said policy, a loss, damage, and accident within the meaning of the said policy happened to goods carried by the plaintiffs as lightermen as aforesaid, in a certain craft called the *Lord Cardigan*, and for which loss, damage, and accident the plaintiffs have become liable and responsible to the owner and others interested in the said goods to the sum of 1100*l*., and have paid that amount.

5. It is agreed that the total value of the risks of the plaintiffs in this and other barges employed by the plaintiffs at the time of the loss, and which were covered by the policy, amounted to the sum of 20,000*l*. and upwards.

6. The total value of the goods in the barge *Lord Cardigan* at the time of the loss was 2500*l*.

7. The plaintiffs contend that upon the true construction of the policy they are entitled to be indemnified for the loss actually sustained, namely, 1100*l*., and to recover from the defendant 5*l*. for his proportion of such loss.

8. The defendant contends that, under the policy sued on, the plaintiffs are only entitled to recover from the defendant such a proportion of their loss as the sum for which the defendant subscribed the policy, namely, 100*l*., bears to the total value of all the goods on board all the plaintiffs' craft, which were between the limits mentioned in and which were covered by the policy at the time of the loss before mentioned, and have paid into court the sum of 6*l*., which is admitted to be sufficient to satisfy the plaintiff's claim, assuming this contention to be correct.

9. The defendant further contends that in any view the plaintiffs are not entitled to more than such proportion of the loss as 100*l*., the sum insured, bears to the total value in the barge—viz., 2500*l*.

10. The court is at liberty to draw all inferences of fact which a jury ought to have drawn.

The question for the opinion of the court is which of the principles above referred to is the proper principle upon which the amount to be recovered ought to be settled.

If the court should be of opinion that the plaintiffs are only entitled to recover such proportion of the loss as 100*l*. bears to the said total amount at risk—namely, 20,000*l*.—then judgment is to be entered for the defendant with costs of defence.

If the court should be of opinion that the plaintiffs are entitled to recover such a proportion of the loss as 100*l*. bears to the total value of the goods in the barge, then judgment is to be entered for the plaintiffs for 3*l*. 19*s*. 3*d*. in addition to the sum of 6*l*. paid into court with costs of suit; and if the court should be of opinion that the plaintiffs are entitled to recover the proportion of the actual loss as contended for by the plaintiffs, judgment is to be entered for the plaintiffs for the sum of

49*l*. in addition to the 6*l*. paid into court, with costs of suit.

If the court should be of opinion that the plaintiffs are entitled to recover either the 3*l*. 19*s*. 3*d*. or the 5*l*., the plaintiffs claim in addition such interest as the court may think fit to allow.

Quain, Q.C. (with whom was A. L. Smith) for the plaintiffs.—This case is peculiar, and turns upon the peculiar language of the policy. The policy is in the ordinary form, but at the end it contains the words "to cover end include all losses, damages, and accidents, amounting to 20*l*. or upwards in each draft to goods carried by Messrs. W. A. Joyce and Son, as lightermen, or delivered to them to be waterborne, either in their own or other craft, and for which losses, damages, and accidents, Messrs. W. A. Joyce and Son may be liable or responsible to the owners thereof or others interested." The intention was clearly to cover all the risks which the plaintiffs ran in the course of their business as carriers of goods on the river. The only case which is at all similar to the present is that of *Crowley v. Cohen* (3 B. & Ad. 473), which the defendant will probably rely on. There the plaintiffs, carriers on a canal, effected an insurance for twelve months upon goods on board of thirty boats named between London, Birmingham, &c., backwards and forwards. The insurance was agreed to be 12,000*l*. on goods, as interest might appear thereafter; the claim on the policy warranted not to exceed 100*l*. per cent., and 5000*l*. only was to be covered by the policy in any one boat on any one trip, the premium being 30*s*. per cent. It was held that upon the loss of goods on board one of the boats the assured was entitled to recover that proportion of such loss as 1200*l*. bore to the whole value of the goods afloat at the time, and not the proportion of 1200*l*. to the whole amount carried during the year. The present case is, however, distinguishable from that; for there the risk covered by the policy was the ordinary marine risk, whereas here it is all risk which the plaintiffs might run as carriers of goods on the river. The words written at the foot of the policy in the present case distinguish it from all reported cases. Lord Tenterden, C. J. in the case referred to said: "As to the mode of calculating the indemnity, the defendant insists that this is to be done by ascertaining the proportion which 1200*l*. bears to the whole value of goods carried during the year, and allowing the assured such a proportion of the amount of loss. But the rule of calculation relied on by the defendant is never adopted in cases of policy on goods with liberty to change the cargoes. Here the whole value of the goods afloat at the time of the loss must be taken, and the plaintiffs will recover such a proportion of their loss as 12,000*l*. bears to the value of all the property on board all the boats at the time of the accident, if that value exceed 12,000*l*., if not, they will be entitled to the whole amount lost." This has no application to a policy such as the present, which is more like a fire policy. In *Wilson v. Jones* (14 L. T. Rep. N. S. 65; 15 L. T. Rep. N. S. 639), where the question was whether the policy, which was effected on a submarine cable by a shareholder in a telegraph company, was to be construed as an ordinary marine policy, or as a policy on the undertaking of successfully laying down the cable, the court adopted the latter construction of the instrument, although the body of the policy was in the ordinary form of a marine insurance. Martin, B., in delivering the judgment of the court

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below, said: "The contract is partly written and partly printed, and the agreement between the parties is to be ascertained by the words of it. The circumstance that it is upon the printed form which is usually adopted for a common marine policy, is wholly immaterial if the language used and adopted by the parties shows that the insurance extended further than marine policies ordinarily do." These observations are strictly applicable to the present case; and it is submitted that the plaintiffs are entitled to recover from the defendants.

Sir G. Honyman, Q.C. (with him Watkins Williams) for the defendant. A policy of marine insurance differs from a fire policy. In the latter case the whole loss sustained must be made good by the insurer; whilst in the former the proportion which the amount for which each underwriter has subscribed bears to the whole risk must be calculated. The amount to be paid does not depend on the number of underwriters who have subscribed the policy; it depends on the proportion which the amount for which each subscriber underwrites, bears to the whole amount stated in the policy, in the case of a valued policy, or to the whole value of the goods in the case of an open policy. The mention of the sum of 20,000*l.* in the policy is only for the purpose of fixing the amount of stamp duty. There was nothing to hinder the plaintiffs from getting insurances from any number of other underwriters. The question, no doubt, is one of construction, but there was no intention to alter the ordinary degree of liability which each underwriter undertook; and that in the present case, is the proportion which 100*l.* bears to the value of all the goods on the plaintiffs' barges at the time of the loss, viz., 20,000*l.* [LUSH, J.—Suppose the intention was to insure the plaintiffs against their ordinary possible losses as carriers, what other words than those written at the foot of this policy could be chosen?] Those words seem to have been inserted in place of the ordinary memorandum clause, protecting the insurers from liability under 5 per cent., which might be inconvenient in the case of goods of a fluctuating value. This case cannot really be distinguished from that of *Crowley v. Cohen* (*ubi sup.*); the object and intention of the assured are the same in both cases. The assured in that case was also a lighterman who effected a policy to cover the risk which he ran as a lighterman, and yet the underwriters' liability was determined by the ordinary principle applicable in cases of marine insurance. When the amount of the premium paid to the defendant in the present case is looked at, it cannot be supposed that for such a consideration he would undertake the liability with which he is now sought to be charged.

Quain, Q.C. in reply.—If the defendant's contention be correct, no efficacy whatever will be given to the words inserted at the foot of the policy.

MELLOR, J.—Our judgment must be for the plaintiffs. It seems to me that the policy in this case is not properly described as a marine policy. It is an instrument by which one of the parties indemnifies the other against any liability which he may incur as a carrier with respect to the owners of the goods carried, and we must construe the words in their ordinary meaning. The undertaking is, in the words of the instrument, "to cover and include all losses, damages, and accidents,

amounting to 20*l.* or upwards, in each craft, to goods carried by Messrs W. A. Joyce and Son as lightermen, or delivered to them to be waterborne, either in their own or other craft, and for which losses, damages, and accidents, Messrs. W. A. Joyce and Son may be liable or responsible to the owners thereof or others interested." It appears to me that the meaning of these words, on the face of them, is that contended for by Mr. Quain. The case is entirely distinguishable from those which have been relied on for the defendant; and, indeed, I think none of the cases which have been referred to throw any light upon the present case. There is no reason whatever why the parties should enter into a contract to give indemnity against such losses as the plaintiffs might sustain as lightermen. It is suggested that no man in his senses would contract to indemnify against such a risk for the premium charged; but I confess I do not see the matter in that light at all. The consideration of the amount of premium paid does not aid us in constraining the contract between the parties.

LUSH, J.—I am of the same opinion. This is an exceptional policy, and we have only to collect from the language of the parties what it was which they intended. Now I cannot doubt, looking at the position of the plaintiffs, who are carriers on the river, that what they wanted was to be secured against any loss which they might sustain as such carriers; and I cannot interpret the contract in any other sense than this—that the defendant undertook to be liable to the plaintiffs for all the loss for which they would be responsible to the owners of the goods carried. That is the very language of the policy; and I cannot entertain a doubt that that was the intention of the parties. It is not an ordinary marine policy; but, a policy of mixed nature, the object of which was to secure to the plaintiffs an indemnity to the extent of the sum subscribed for, or for any loss which they might sustain during the year by reason of their being responsible as carriers for the loss of the goods.

HANNEN, J.—I am of the same opinion.

Judgment for the plaintiffs.

Attorneys for plaintiffs, Plesse and Irvine.

Attorneys for defendant, Parker and Clarke.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING and H. F. POOLY, Esqrs.,
Barristers-at-Law.

Tuesday, Jan. 30, 1872.

BYRNE AND OTHERS AGAINST THE GUANO CONSIGNMENT COMPANY (defendants); WEGUELIN AND OTHERS (trading as THOMSON, BONAR, and Co.), (garnishees).

Lord Mayor's Court—Foreign attachment—Freight—Prohibition.

Where process had issued out of the Lord Mayor's Court against garnishees, and, on a writ being shown against a rule for a prohibition, it appeared that the claim against the original defendants was for extra freight due on a charter-party in respect of a voyage from the Chincha Islands to the Victoria Docks (not within the city of London), and that neither the defendants nor the garnishees resided within the city of London,

Held, that the prohibition must issue, although, by

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the terms of the charter-party, payment of the freight was to be made within the city of London. Semble, that if the cargo had been delivered within the city of London, it would have made no difference.

This was a rule to show cause why a writ of prohibition should not issue to the Lord Mayor's Court of the City of London to prohibit all further proceedings in the said court against the garnishees upon a freight attachment issued out of that court.

The facts may be gathered from the affidavits, which were as follows:—Affidavit of William Slee Wellborne, clerk to Thomson, Bonar and Co., the garnishees, filed in support of the rule.

1. That I have the management of the freight account and matters under the charter of the ship *Talisman*, out of which the question in dispute in the action and foreign attachment now pending in the Lord Mayor's Court, London, arose, and that on the 4th Nov. 1871, Andrew Ewing Byrne, Arthur Bower Forwood and Duncan Campbell entered an action in the said Mayor's Court, London, against the Guano Consignment Company to Great Britain, and issued out of the said Mayor's Court a certain process of foreign attachment attaching all moneys, goods, and effects in the hands and custody of the said garnishees, which should thereafter come to their hands or custody, to the extent of 346*l.* 1*s.* 7*d.*

2. On the 29th April 1880, a charter-party was made and entered into between the said Andrew Ewing Byrne, A. B. Forwood, and D. Campbell, as owners of a ship called *The Talisman*, of the one part, and the said Guano Consignment Company of the other part, by Messrs. J. Thomson, T. Bonar and Co., as their agents, and the said charter party was duly executed by the said Andrew Ewing Byrne, A. B. Forwood, and D. Campbell, and by the said Messrs. J. Thomson, T. Bonar and Co., as agents for the said charterers.

3. That under and in pursuance of the said charter-party, the said Andrew E. Byrne, A. B. Forwood, and D. Campbell have made large claims for freight against the said charterers, and have, as I am informed and verily believe been paid for and on account of the said freight the sum of 5087*l.* 9*s.*, and which said sum is as I am advised and verily believe all that the said charterers admit to be due under the said charter-party; but the said A. E. Byrne, B. Forwood, and D. Campbell, in addition to the said sum already paid to them for and on account of the charterers, claim the sum of 346*l.* 1*s.* 7*d.*, under a certain memorandum dated on or about the 5th Aug. 1880, which provides for the payment of an extra rate of freight of 3*s.* 6*d.* per ton as mentioned in the said memorandum, a copy of which is produced and shown to me at the time of swearing this my affidavit, and is marked with the letter C.

4. That I am informed and believe that the said ship having arrived at Callao after the dated limit for her arrival there, it was arranged that instead of the charter being then and there cancelled, the charter should be maintained, on the condition that the captain should come back for final clearance to the same port instead of going to Payta, and without extra charge, that on the 2nd Aug. the said A. E. Byrne, A. B. Forwood, and D. Campbell caused to be issued out of Her Majesty's Court of Exchequer of Pleas a writ of summons against the said Messrs. J. Thomson, T. Bonar and Co., and against the said Guano Consignment Company, and by such writ they claim the sum of 644*l.* 9*s.* 8*d.*, and interest thereon.

5. The claims in the said action in the Lord Mayor's Court, London, and the claim of the said action in the Court of the Exchequer of Pleas includes the third extra freight claimed under the said memorandum of the 5th Aug. 1880.

6. That at the time of making of the said charter-party the said ship was on her way from Sweden to Melbourne, and so part of the voyage of the said ship, under the said charter-party, was performed, nor was any part of her cargo received, conveyed, or delivered within the jurisdiction of the said Lord Mayor's Court of London.

7. That her cargo was discharged and delivered in the Victoria Docks, out of the jurisdiction of the said Lord Mayor's Court, London.

8. That the said Guano Consignment Company carry on their business at Lima, in the republic of Peru, out of the jurisdiction of the said Lord Mayor's Court, London, and have no residence, offices, or place of business of any kind or description whatsoever within the jurisdiction of the said Lord Mayor's Court.

9. The cause of action (if any) for which the said A. E. Byrne, A. B. Forwood, and D. Campbell have proceeded in the said Lord Mayor's Court, London, and upon which the said attachment is founded, is the extra freight mentioned in the said memorandum of the 5th Aug. 1880, which extra freight is claimed in respect of the said vessel having returned to Callao instead of going to Payta is provided for by the said charter-party, and the said cause of action (if any) did not, nor did any part thereof arise within the jurisdiction of the said Lord Mayor's Court, London.

10. The said A. E. Byrne, A. B. Forwood, and D. Campbell carry on business at Liverpool, in the county of Lancashire, and have no place of business within the jurisdiction of the said Lord Mayor's Court, London, and I believe the said charter-party and memorandum were respectively entered into and signed by the said A. E. Byrne at Liverpool aforesaid.

11. I am advised and verily believe that the said Lord Mayor's Court has not jurisdiction in the matter of the said action, and ought to be stayed from further proceedings therein, and that the said Mayor's Court assumes to have jurisdiction, and will proceed therein unless stayed by prohibition.

12. I am also advised and verily believe that by the course and practice of the said Mayor's Court the defendants are unable to obtain relief against the said assumption of jurisdiction by any application to or proceeding in the said court, and that the defendant will sustain great injury unless the said proceedings are stayed by prohibition.

Exhibit C. was as follows:—

London, 5th Aug., 1880.

Messrs. J. Thomson, T. Bonar, & Co.,
Gentlemen,—In the event of the undermentioned ships owned by us loading at the Guano or Macavel Islands, we agree to give the charterers, or their agents, the option of ordering them to return to Callao for final clearance, instead of Payta, at an extra rate of 3*s.* 6*d.* per ton.—Your obedient servants,

ANDREW E. BYRNE AND CO.

Ship, <i>Talisman</i> .	Tonnage, 1005.	Date of Charter, April 29, 1880.
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Affidavit of William Burrows (in opposition to the rule):

1. That I have had, on behalf of Messrs. Arthur Bower Forwood, William Bower Forwood, and Thomas Forwood the younger, of Great St. Helen's, in the City of London, merchants, who carry on business there under the name or style of Leech, Harrison and Forwood, the management of the matters of the above action on the part of the said plaintiffs. I have read the office copy affidavit of Mr. W. Slee Wellborne made in this matter.

2. I say with respect to the claim in this action, that although this action is brought in the names of the said A. E. Byrne, B. Forwood, and Duncan Campbell, the same has been so brought in their names on behalf of and for the benefit of the said Messrs. Leech, Harrison, and Forwood, who are mortgagees in possession of the said ship.

3. That I have perused a copy of the charter-party referred to in the second paragraph of the affidavit of the said W. S. Wellborne, and I say that one of the terms of the said charter-party is as follows: "This charter-party is affected through the intervention of Lloyd, Lowe, and Co., by whom the ship is to be reported at the Custom House, and through whom the freight and all expenses, if any, are to be settled and paid;" that the said Lloyd, Lowe, and Co., reside and carry on business in London within the jurisdiction of the said Mayor's Court of London.

4. That I verily believe that the said charter-party was entered into and executed and signed by the garnishees, as agents for the defendants, as thereon, appears in the city of London, within the jurisdiction of the said Mayor's court.

5. That the plaintiffs' cause of action arises from the nonpayment in London by the said Messrs. Lloyd, Lowe, and Co. of the balance due for freight.

6. That the said plaintiff, A. B. Forwood, is a member of Lloyd's, and carries on business there as an underwriter (within the jurisdiction of the said Mayor's court of London), and has done so for six years past. That the said Arthur Bower Forwood is also senior partner in the said firm of Leach, Harrison, and Forwood, who carry on the business of merchants in the city of London, and within the jurisdiction of the said Mayor's court, and I say that it is well known to the said Messrs. Lloyd, Lowe, and Co., the said Messrs. Thomson, Bonar, and Co., and to the said W. Sles Wellborne, that the said plaintiff A. B. Forwood is such partner of the said Leach and Co., and does carry on business as aforesaid.

7. That the proceedings taken in this matter in the Mayor's Court have been taken under advice of counsel, because the plaintiffs are advised that the garnishees are not personally liable on the said charter-party, and the said garnishees, who alone represent the defendants in this country, refused through their attorneys to appear for the said company to an action which had been brought by the plaintiffs against the said company.

Affidavit of George Lucas.

1. That I have had the conduct and management of the action hereinafter referred to, and of the action above-mentioned, and the proceedings in foreign attachment in the Mayor's Court of London in relation to such action on behalf of the above-named plaintiffs.

2. That I am informed and believe that the said Messrs. J. Thomson, Bonar and Co. are the only representatives of the said Quana Consignment Company in this country, and carry on its business here at Old Broad-street, in the City of London, within the jurisdiction of the said Mayor's Court of London.

12. That in case this honourable court should interfere by prohibition to stay the said action in the Mayor's Court aforesaid, in my judgment and belief the said plaintiff's would be remediless, inasmuch as the plaintiffs do not, except through the mode of attachment against the said Messrs. Thomson, Bonar and Co., possess any means of procuring the appearance of the defendants, the company, to any action in respect of the plaintiff's claim.

13. That this action is brought in the names of the above-named plaintiffs, inasmuch as they are the registered owners of the ship *Triton*. That the said plaintiff, A. B. Forwood, is a member of Lloyd's, and carries on business as an underwriter there.

14. That the said A. B. Forwood is also the senior member of the firm of Messrs. Leach, Harrison, and Forwood, and carries on business there as a merchant, and within the jurisdiction of the said Mayor's Court of London.

Oohen showed cause.—He cited: *Mayor of London v. Cox* (L. Rep. 2 H. of L. 239.) (The purport of his argument will sufficiently appear from the judgments.)

Shiress Will, in support of the rule, was not called upon.

WILLES, J.—We are all of opinion that prohibition should issue. In the case of *The Mayor of London v. Cox*, the judges advised the House of Lords that the claim of jurisdiction in the Lord Mayor's Court could not be supported, because the cause of action did not arise within the jurisdiction, and it did not appear that the garnishee was more than a mere passenger within the jurisdiction. The present case rests upon the same footing, and the same reasoning is applicable to defeat the attempt made to set up jurisdiction. Such process, if held to be good, might, as there suggested, be a means of extreme annoyance and injury to strangers and foreigners. But it has been argued here that by custom these claims are within the jurisdiction, and that custom may give to an inferior court a right beyond its limits. This argument was noticed and refuted in the above case. The custom of foreign attachment, like other customs, must be

local in order to be valid, and a custom which transgresses the local limits is incongruous and therefore void. Then it is further said that the course of proceedings is such that it is not necessary to show that the cause of action arose within the jurisdiction. But in inferior courts there is no presumption in favour of jurisdiction. This claim falls within the rule laid down by Paterson, J., in *Williams v. Gibbs* (5 A.D. & E.H. 212): "The consideration, therefore, must be within the jurisdiction. To show, therefore, that the action is maintainable, it must be shown that the consideration arose within the jurisdiction." It has also been urged that the breach is non-payment of freight, and that the payment of freight was to be made in London. This does not end the matter; for there was also the consideration which consisted of the carriage of the goods from the Chinchela Islands to this country. Mr. Cohen further adduced the ingenious argument that freight is due for delivery only, and not for carriage; but this is of no avail, because the delivery was at the Victoria Docks, which are not within the city of London. The cause of action must arise within the jurisdiction, and the term "cause of action" cannot be restricted to the mere contract or to the making of the promise. The general rule with respect to inferior courts is, that every part of the cause of action should appear to be within the jurisdiction of the court: (*Thom v. Chinnock*, 1 M. & G. 220; *Peacock v. Bell*, 1 Wms. Sanders, 74a.)

BYLES, J.—I am of the same opinion. I think the prohibition should issue, because the whole cause of action did not arise within the jurisdiction of the Lord Mayor's Court.

BRETT, J.—I am of the same opinion. When the Lord Mayor's Court has jurisdiction, a particular mode of enforcing it may be adopted by seizing the goods of a garnishee; but the whole cause of action must take place within the city of London. Even if the delivery had been in London, that is not the whole consideration for the payment of the freight. The cause of action, therefore, not being within the jurisdiction, the prohibition ought to go.

GROVE, J.—I am of the same opinion.

Rule made absolute.

Attorneys for the plaintiffs, *Fitz and Co.*, 3, East India Avenue.

Attorneys for the garnishees, *W. and H. P. Sharpe*, Old Broad-street.

COURT OF EXCHEQUER.

Reported by H. LEIGH and T. W. BARNES, Esqrs., Barristers-at-Law.

May 30 and 31, 1871, Jan. 17, 1872.

HARRISON v. BANK OF AUSTRALASIA.

Ship and shipping—General average—Cost of pumping ship—Donkey engine and fuel.

A sailing ship sailed from Melbourne to London with cargo on board. The ship was in every respect properly manned and fitted for such a voyage, and had on board a sufficient quantity of coals for an ordinary voyage to work the donkey engine, with which she was furnished, and by means of which she was pumped whenever necessary.

In consequence of the uses to which the donkey engine was applied, the number of the crew was ten less than it would have been if no donkey engine had been carried.

[Ex.]

HARRISON v. BANK OF AUSTRALASIA.

[Ex.]

The ship having encountered a cyclone sprang a leak, and was only prevented from sinking by constant pumping with the donkey engine.

The coal having been much reduced in consequence of the excessive pumping, the captain was obliged to use as fuel the spare spars and ship's stores.

Without the use of the donkey engine the ship could not have continued on her voyage.

Held (per Kelly, C.B., and Brumwell, B., dissenting) Martin and Cleasby, B.B.—That the value of the spars and ship's stores was the subject of general average, and that there was such a certainty of destruction within a short space of time, unless prevented, as to make the peril imminent.

Per Martin and Cleasby, B.B.—That by the terms of the contract the shipowner was bound to deliver the cargo safely; and that as the donkey engine was provided for the purpose of saving the seamen's wages, the owner must take the risk of any loss caused by his having shipped an insufficient quantity of fuel; and also that the ship never was in such imminent peril of total loss as to fulfil the requisites of a case of general average.

This was an action brought by the plaintiff as owner of the ship *Champion of the Seas*, to recover from the defendants the sum of 95*l.* 8*s.* 10*d.*, as a contribution in general average due from them as owners of four boxes of gold, part of the cargo of the ship, on her voyage from Melbourne to London.

The defendants pleaded payment into court of the sum of 5*l.* 6*s.* as sufficient to cover the plaintiff's claim, and on this plea issue was joined.

The action came on for trial at the sittings at Nisi Prius, held at Guildhall on the 7th July, 1869, before the Lord Chief Baron of the Exchequer, when it was ordered that a verdict be entered for the plaintiff for the damages in the declaration, subject to a special case.

The following special case has been stated under the said order:—

1. The plaintiff is a ship owner, and was in the year 1868 owner of the British sailing ship *Champion of the Seas*, of 1946 tons registered measurement.

2. The defendants are bankers, carrying on business at Melbourne, in Australia, and also in the City of London.

3. In Feb. 1868, the ship was at Melbourne aforesaid, bound on a voyage from that port to London.

4. The defendants shipped four boxes of gold, to be conveyed by her to London, and a bill of lading, in the usual form, dated on or about the 25th Feb. 1868, was signed for the four boxes of gold, by Outridge, the master of the ship, for the voyage.

5. The ship sailed from Melbourne, on her voyage, on the 29th Feb. 1868, laden with a very valuable cargo of general merchandise and specie, being in every respect properly fitted and manned for the voyage, and having on board a sufficient quantity of coals for an ordinary voyage.

6. The ship was furnished with a donkey engine of eight-horse power. It was adapted for loading and discharging cargo, for hoisting sails and taking them in, and for pumping the ship. It was, according to the evidence of the captain, equivalent for the purpose of working the ship during the voyage to a crew of ten men, and had the donkey engine not been on board, the vessel would have required an additional crew of that number.

7. From the saving of labour and the reduction

of the number of the crew effected by the use of a donkey engine, it is sometimes called a steam crew.

8. It is usual for such a ship as the *Champion of the Seas*, on the voyage from Melbourne to England, to be furnished with a donkey engine which is used for pumping the ship when necessary.

9. The ship sailed from Melbourne on the 24th Feb. 1868, and up to 10th March experienced ordinary weather, and whatever pumping was necessary was done by the crew; on the 10th March the ship encountered a severe cyclone followed by very bad weather which caused her to strain and make much water. The water in the hold at times increased to five feet, and could only be kept down by constant pumping. At first the pumping was done by the engine during the day and by the crew during the night, but it afterwards became necessary to keep the donkey engine pumping constantly. With the donkey engine the pumps were got to suck now and then.

10. There was no sudden emergency rendered the cutting up of the spars wood, but it would have been impossible to have kept the ship afloat with the crew alone without working the donkey engine. After April 1st the weather moderated, but the vessel continued to leak; and about the 16th April the supply of coals was reduced to about one and a half tons, from the constant working of the engine. It was necessary to keep the engine at work, and the captain, after consultation with the first and second officers in order to obtain fuel, directed that some spare spars and wood, which was part of the ship's stores and not intended to be used as fuel, should be cut up to use with the coals.

11. Wood alone would not have sufficed to get up the steam necessary to work the engine, and the captain acted prudently and judiciously for the preservation of a ship and cargo in obtaining fuel by cutting up the spars and wood to use with the coals.

12. The fuel so procured was not sufficient to keep the engine at full work; and, notwithstanding the efforts of the crew, who were occasionally assisted by some passengers in working the pump, the water in the hold slowly increased.

13. On the 25th April it was discovered that a bolt under the port fire channels, and 6ft. or 7ft. below the water, had been started; whereupon the master of the said ship lowered a boat and stopped it with grease, and on the 27th caused a stage to be rigged, and by means of wedges and plugs succeeded in partially stopping the leak.

14. On the 5th May the ship fell in with the barque *Peru*, and obtained from her thirty-three bags of coals. With this supply the engine was put to full work, and the water in the hold greatly reduced.

15. In order to procure a further supply of coals the master determined to run into the port of Pernambuco, and the ship anchored at Pernambuco on the morning of the 10th May.

16. The ship could not have been repaired at Pernambuco, and the captain, having obtained a large supply of coals, viz., thirty tons, proceeded on the voyage. The captain in so doing acted prudently. The ship was exposed to no serious risk from the water she made while there was sufficient fuel on board to work the donkey engine.

17. The vessel continued to leak during the remainder of the voyage, and it was necessary to keep the engine constantly at work at the pump.

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When she arrived in the Thames, the coals had been exhausted. Without the aid of the donkey engine, the vessel could not have continued the voyage.

18. The ship arrived at her place of discharge in the docks on the 6th July. The engine broke down while she was coming up the river. The injury to the engine was the result of wear and tear from the constant working during the voyage.

The court is to be at liberty to draw such inferences of facts as a jury ought to draw.

The question for the opinion of the court is, whether the cost of the coals purchased from the Peru, and at Pernambuco, or the cutting up of the spars and ship's materials for fuel for the donkey engine, and the cost of the repairs of the donkey engine, can be charged to general average and recovered from the defendants.

If the court is of opinion in the affirmative, the case shall be referred back to the arbitrator to ascertain if the amount paid into court is or is not sufficient to cover the plaintiff's claim against the defendants. And if he shall find that such sum is not sufficient, then judgment shall be entered for the plaintiff for deficiency, together with costs of suit.

If the court shall be of opinion that none of the said items can be charged to general average, then the judgment shall be entered for the defendants, together with costs of suit.

The plaintiff's points for argument were: First, that the cost of coals purchased from the Peru and at Pernambuco were general average expenses, because they were extraordinary expenses incurred for the preservation of the ship and cargo; secondly, that the loss incurred by cutting up the spars and ship's material for fuel, was a general average loss, because it was a sacrifice voluntarily incurred for the preservation of the ship and cargo, and rendered necessary by extraordinary perils; thirdly, that the cost of the repairs to the donkey engine constitutes a general average expense, because the damage done to the donkey engine was occasioned by the employment of the donkey engine for an extraordinary purpose—for the purpose of saving the ship and her cargo.

May 30 and 31.—*H. James Q.C.* (with him was *A. Cohen*), for the plaintiff.—With regard to the question whether the cost of the supply of fuel, whether in the shape of extra coal or spare spars for the use of the donkey engine, under the circumstances stated in the case, be or be not the subject of "general average," so as to be or not to be recoverable in the present action, it is clear that such coal and spars were used for an extraordinary purpose, and one for which they were not originally intended. The vessel was a sailing vessel, and there was no contract of affreightment by which the donkey engine was to be used for the purpose of navigating her. Having through stress of weather sprung a dangerous leak, the captain was bound, in order to keep her afloat, and so to save the cargo, to work the donkey engine in pumping out the water she made through the leak, and it was not possible to do that without using the coal in the first instance, and when that was consumed, and no more was accessible, then having recourse to the spars. It was an exceptional case, and an exceptional use of these articles for the joint safety of both ship and cargo, and therefore it is submitted that they came clearly within the definition of "general

average" expenses. The ship here was thoroughly well fitted and furnished at starting on her voyage. The tempest she encountered was "an act of God," which no master could contend against. The obligation is only to have a ship sufficiently furnished and manned with a crew sufficient to enable her to meet, and to be navigated in, weather ordinarily to be expected. There is no authority which says that the peril must be imminent in the sense of being immediate in point of time, but only in the sense of being, as was the case here, morally certain in point of effect. Had the ship lost her rudder, or her masts, or, as she did do, sprung a leak, part of her timber might have been cut away to remedy the mischief, and that would have been within "general average." What distinction, then, can be drawn between that case and the present? It is only necessary, in order to found a claim coming within "general average," that what is done should be a prudent and necessary action in order to avoid the certainty of eventual loss. In *Arnold on Insurance* (2nd vol. p. 770, 3rd edition), the two classes of losses which give a claim to "general average," are thus defined; first, those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save the whole adventure from perishing, and, secondly, those which arise out of extraordinary expenses incurred for the joint benefit of both ship and cargo. It is there said that "if any part of the ship or her tackle be sacrificed or cut up for the rescue of the common adventure, and applied to some purpose different from its ordinary one, the loss thence arising is a general average loss." (1h. 4th edit. p. 771.) The plaintiff's claim seems clearly within that definition. Sacrifice and expenditure are, generally speaking, the two heads of general average. (See also 2 Phillips on Insurance (American), 5th edit. p. 61, sects. 1270, 1271.) If, as is clearly the case, the "hire of hands to pump the ship" be a "general average" claim (2 Phillips on Insurance, sect 1236, and Field on General Average, p. 78), what possible difference can there be between that and the cost of pumping the ship by means of the donkey engine? In many of the cases cited by Mr. Arnold there was no imminent peril, and yet the expenses claimed were held to be "general average" expenses. [*MARTIN, B.* referred to *Wilson and another v. The Bank of Victoria* (16 L. T. Rep. N. S. 9; L. Rep. 2 Q. B. 203; 36 L. J. 89, Q. B.)] That case, it is submitted, is really in the present plaintiff's favour. There was no danger there, and there was nothing to do but to bring the ship home: she had been driven out of her course, and to avoid the loss of time in a long sailing voyage the captain purchased coals to work the auxiliary screw, and that was held not to be the subject of "general average." The whole judgment there turned on the question of what was the cost of affreightment, and it was that the ship was to be partly worked by the auxiliary screw. But the judgment of the Court of Queen's Bench, as delivered by Blackburn, J. is favourable to the present plaintiff's view, for his Lordship, at the conclusion of it expressly says, "It is not similar to the case of the master hiring extra hands to pump when his crew are unable to keep the vessel afloat, or any other expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature." That is precisely the present case.

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If hiring a double set of men to pump the ship be "general average," then surely working the donkey engine a double number of hours for the like purpose is also "general average." The case finds that ten men, for whom the donkey engine was an equivalent, could not, working day and night, have done the work which the engine did, and by working which alone both ship and cargo were preserved. The case here is not the bringing to bear a greater amount of power of the same kind as, e.g., twenty men in lieu of ten, but the extra working of the donkey engine equalling the work of twenty extra men. The plaintiff was clearly entitled to recover. He cited also and referred to—

Birkley and others v. Freegrave, 1 East, 220;

Meredith's Emigration, pp. 283, 478;

Pothier, vol. 4 part 2, p. 421. edit. 1851;

Bailly on General Average, pp. 15, 17.

Chas. Pollock, Q.C. (Lodge with him.)—Both the case of *Plummer v. Wildman* (3 M. & S. 482) and *Birkley v. Freegrave* (1 East, 220) have been severely commented on. Scarcely a judgment is given in which they are not mentioned with the greatest dissatisfaction. The question in *Birkley v. Freegrave* was whether an action would lie for general average, Lord Kenyon there says, "A loss is incurred which the law declares shall be borne by certain persons in their several proportions, where a loss is to be repaired in damages, where else can they be recovered but in the courts of common law?" And wherever the law gives a right generally to demand payment of another, it raises an implied promise in that person to pay. All ordinary losses and damage sustained by the ship happening immediately from the storm or perils of the sea must be borne by the shipowner; but all those articles which were made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern and the other expenses incurred, must be paid proportionately by the defendant as general average. [CLEARY, B.—The definition of general average is the expense incurred for the whole cargo.]

In *Hallett and others v. Wigram and others* (9 C. B. 580), which was a claim to contribution for general average, where a part of the cargo had been sold to defray the expenses of repairing the ship in consequence of sea perils, Wilde C.J., says at page 602, "Where a ship went into port in distress, and wanted repairs, it became necessary to take out the cargo, and, there being no warehouses at hand, it was necessary to put it on board other vessels. Lord Stowell said that as the unloading of the goods was for the common benefit of all, it being necessary to unload the ship for the preservation of the cargo as well as for its own repair, the expense incurred by it must be considered as general average." It seems to result from these decisions that if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expense of port-charges, wages, and provisions, are to be considered as general average: (Abbott on Shipping, p. 497. In the case of *Oliford v. Hunter* (Mood. & M. 103), the captain of the ship was taken ill with several of his crew at the Mauritius. He sailed on, however, and finding himself worse, and none of the other officers able to undertake the command of the ship

to England, he started back to the Mauritius, and the ship was lost. Lord Tenterden said, "A ship certainly is not fit for a voyage unless she sails with a competent crew—a crew competent for the voyage, considering its length and the circumstances under which it is undertaken. Can a ship be said to be sufficiently manned, when, in the event of any accident to the captain, there is no one else on board to perform his duties?" If the contention of the plaintiff was right would he not be entitled to say, "This voyage is longer than usual, and I am entitled to charge the extra costs consumed as general average." If the plaintiff has burnt a more expensive fuel by not taking enough of the cheaper material, he cannot make that the subject of general average. He cited *Wilson v. Bank of Victoria* (L. Rep. 2 Q. B. 203; 16 L. T. Rep. N. S. 8).

Cohen in reply.—The burning of the spars being an extraordinary expenditure, through the leak, was the subject of general average. There must be an immediate and certain danger of the loss of the ship, and that danger was present, for if the ship had not been pumped she would have sunk.

Cur. adv. vult.

The court being divided in opinion the following judgments were delivered. The judgment of Kelly, C.B., and Bramwell, B., being delivered as follows by BRAMWELL, B.:—It seems to us this is a case of general average. The ship was well found, seaworthy, and with proper quantity of coal for the donkey engine. She sprung a leak, and through it she must, if the donkey engine ceased to work, have foundered in a few days or hours, unless some relief not to be foreseen or calculated on had arrived. The arbitrator finds that she had coal for a few hours only, that had she burnt her coal wood would not have sufficed to keep up the fire, but that by combining coal and wood the fire could be kept up for a much longer time. Accordingly the captain prudently and properly sacrificed some spare spars, and saved the ship and cargo. There seems to us here all the ingredients of a case of general average—perils of the sea—imminent, certain loss in a short time, unless something not to be anticipated should intervene, and a sacrifice of the property of one for the benefit of all. Suppose the wood had been cargo, and the captain had burnt it, would it have been a wrongful act in the captain? Would not the owner have had a good claim for general average? Would not the captain have failed in his duty unless he had burnt these spars, whether the property of his owners, or cargo? Suppose the donkey engine had been cargo, and had been fitted upon the springing of the leak, and the wood burned as now. It is said the danger was not imminent; that there was no emergency. We think there was, and that a certainty of destruction within a short time, unless prevented, is an emergency and imminent. Suppose a vessel ran for shelter into a river where no supplies could be obtained; suppose she would have to stay a fortnight unless she got out at the then spring tides; suppose her provisions would fail her in that time; suppose, to get out, she lightens herself by throwing some heavy cargo over, would not that be a case of emergency and imminent danger? We think it would; and that such is the result of all the authorities some of which may now be briefly considered. A

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general average loss has been defined to be "a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, for the joint benefit of ship and cargo." See per Lawrence, J., in *Birkley v. Pregraves* (1 East, 220, 225); *Wilson v. The Bank of Victoria* (2 L. Rep. 203, Q.B.), cited on behalf of the defendants, only shows that where steam power is substituted for sailing power, which from injury to the ship had been exhausted, the additional expense of fuel is not to be deemed an extraordinary expense within the meaning of the rule. But the present case is not one of substitution at all. It was necessary, in order to keep the ship afloat, that additional fuel should be found. The coals on board by themselves would have been insufficient, and, to feed the fires, a number of spars, the property of the owners part of the ship's stores, were cut up and used in addition to the coals as fuel. This was, we think, an extraordinary sacrifice, and necessary, as may be fairly inferred from the statement in the case, to save the ship from sinking. In principle, this seems to be within the case of *Plummer v. Willman* (3 M. & S. 482), where part of the rigging of the ship was cut away, and the expenses of returning to port to repair the damage, without which the ship could not have proceeded on her voyage, or safely kept the sea, was held to be the subject of general average. This case is supposed to have been shaken by the case of *Powen v. Whitmore*, shortly afterwards decided, and reported in 4 M. & S. 141, and so in *Hallett v. Wigram* (9 C. B. 580), where a part of the cargo had been sold to raise money at a port to which the ship had put back for the repair of damage incurred by the ordinary perils of the sea, it was held to be no case of general average; but the true principle, as applicable to all these cases, is well stated in *Abbott on Shipping*, 497, referred to in 9 C. B. 603, in these terms: "It seems to result from these decisions, that if a vessel goes into port in consequence of an injury, which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port charges, wages, and provisions during the stay, are to be considered as general average, but if the damage was incurred by mere violence of wind and weather, without sacrifice on the part of the owners for the benefit of all concerned, it falls with the expenses consequent upon it within the contract of the shipowner to keep his vessel tight, staunch and strong during the voyage for which she is hired." And the later case of *Kemp v. Halliday*, in the Exchequer Chamber (L. Rep. 1, Q.B. 520), is in strict conformity to the doctrine thus laid down by Lord Tenterden. Upon these grounds we are of opinion that, as regards the spars cut up and the ship's materials used for fuel, this is a case of general average; but not so the cost of the coals obtained from the *Peru*, or purchased at Parnamahu, or of the repairs of the donkey engine. Upon this point, therefore, we think the plaintiff entitled to the judgment of the court, and that the case must be referred back to the arbitrator.

MARTIN, B.—This is an action in which the question is whether the plaintiff is entitled to recover a sum of about 40*l.* for general average; and although the amount in dispute is not large, the question involved a matter of very great importance to the mercantile shipping interest of this country. The facts have been stated by an arbitrator in a special case.

The first four paragraphs state that the plaintiff is the owner of a ship called the *Champion of the Seas*, which, in Feb. 1868, was at Melbourne, bound on a voyage to London, and that the defendants shipped on board four boxes of gold, for which the master signed the ordinary bill of lading. The bill of lading is not set out, but it would state that the defendants had shipped on board the four boxes of gold, to be carried from Melbourne to London, and there delivered to the consignee upon payment of a certain ascertained sum for freight, unless prevented by the perils mentioned in the bill of lading. This is the only contract between the plaintiff and defendants, and it is clear that if the *Champion of the Seas* was the vessel which ever sailed, and if she departed from Melbourne only half manned and utterly unworthy, nevertheless if she had arrived in London, and the four boxes of gold had been there delivered to the consignee the plaintiff would have performed his contract, and would be entitled to his freight. The defendants would have no legal ground of complaint that the ship was half rotten; that she was half manned; that instead of sailors she had a donkey engine, and a quantity of fuel utterly insufficient to work it for the voyage. The answer of the ship-owners would be, "Your four boxes of gold have been safely delivered to you in London. I have performed my contract. The manner in which I have performed it is my business, not yours." The next question in the present case is whether the shipper (the merchant) is bound by law to pay to the shipowner for the performance of the services contracted in the bill of lading a sum of money beyond that stipulated for in the written contract between the parties. The facts upon which he relied to entitle him to the additional payment are the following, and are contained in paragraphs 5-14, inclusive, of the special case. On the 29th Feb. 1868, the ship sailed from Melbourne with a valuable cargo in every respect fitted and manned, and having on board a sufficient quantity of coal for an ordinary voyage, she had a donkey steam engine of 8-horse power adapted, amongst other purposes, for pumping the ship. It was equivalent to a crew of ten additional men, and, had it not been on board ten additional seamen would have been required, and it is usual for such a ship to have such an engine. Up to the 16th March the ship experienced ordinary weather, but upon that day a severe cyclone, followed by very bad weather, which caused her to strain and make much water, which could only be kept down by constant pumping, and at times it was necessary to keep the donkey engine constantly pumping. After 1st April the weather moderated, but the ship continued to leak, and on the 10th April the coal was reduced to about a ton and a half. It was necessary to keep the engine at work, and in order to obtain fuel the captain directed that some spare spars and wood, which was part of the ship's stores, and not intended to be used as fuel, should be cut up to use with the coals. The arbitrator found that the captain acted prudently and judiciously for the preservation of the ship and cargo, by cutting up the spars and wood to use with the coal. There was no immediate emergency which rendered the cutting up the spars and wood necessary, but it would have been impossible to have kept the ship afloat with the crew alone without working the donkey engine. The first claim made against the

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defendants is to contribute to pay the plaintiff the value of his spars and wood. On the 25th it was discovered that a bolt had started, and on the 27th the leak consequent upon it was partially stopped. On the 5th May the ship fell in with a barque, the *Perru*, at sea, and 33 bags of coal were bought from the master; and with them the engine was put to full work, and the water in the hold greatly reduced. Contribution to the price of this coal was the second claim against the defendants. There was a third claim which was abandoned. The result of the voyage was that the ship having put into Pernambuco arrived in London, and the four boxes of gold were safely delivered to the consignee, and the question is whether either of the above claims are general average, and I am of opinion that neither of them are. It seems in reason highly unjust that the merchants should be called upon to pay the two sums claimed. He had contracted with the shipowner to pay him a certain sum for the conveyance of his four boxes of gold from Melbourne to London. The shipowner was to provide the ship and seamen to perform the service, and he thought fit, instead of hiring ten additional seamen, to have a steam engine which in order to its being of any use necessarily required fuel; he did provide at Melbourne what he reasonably deemed sufficient, but it turned out he was in error, and that the supply was not sufficient. How in reason does this relieve him from the obligation of doing his best to remedy the short supply, and cast upon the merchant the obligation of contributing to the loss and expense which he incurred in consequence. There is no doubt, however, that long continued custom has created the claim called general average. This subject is treated of in the first chapter of the 6th part of Abbott on Shipping, 11th edit. 521. It is said by Lord Tenterden to be founded upon the *lex rhodia de jacta*, or in other words, the law of jettison, which is, "if for the sake of lightening the ship a jettison (jactus) is made of merchandise, that which is sacrificed for all should be made good by the constitution of all." His Lordship comments upon it, and proceeds to state its true principle—that it must be a voluntary sacrifice for the good of all, and made at a moment of imminent danger, which he instances by the ship being in danger of perishing by a hurricane or by the quantity of water that may have found its way into it, or by labouring upon a rock or a shallow upon which it may have been driven by a tempest, or when a pirate or enemy pursues, gains ground, and is ready to overtake, the loss arising from throwing merchandise overboard, under such circumstances, is to be made good in general average. He then proceeds to discuss cases in which, in analogy to the law of jettison, general average has been allowed, and, as it seems to me, is rather disposed to think they have gone too far, for the subject is discussed at great length by the learned editor, in the note, and I think he has, at the conclusion of note n, p. 537, expressed the true rule, viz., that to make expenses incurred by the shipowner general average, they must be expenses voluntarily and successfully incurred, or the necessary consequence of a resolution voluntarily and successfully taken by a person in charge of a sea adventure for the safety of life, ship and cargo, under the pressure of a danger of total loss or destruction imminent and common to them. In my opinion, in the present case, there was no imminent danger

of total loss when the spars and wood were cut up and burnt. The weather had moderated for the ten days previous; there was a ton and a half of coal remaining, which it was proper to husband, and the spars and wood were used to harn with the coal; there could clearly have been no jettison at the time, and, in my opinion, the shipowner must bear the loss of his timber being made use of to aid in making up for the deficient coal. For the same reason I think the price of the coal bought on the 5th May is not general average, and must be borne by the shipowner. In my opinion there was no present immediate peril imminent. The cases relied on on behalf of the plaintiff were *Birkley v. Presgrave* (1 East, 220), and *Plummer v. Wildman* (3 M. & S. 482). These cases were said by the learned counsel for the defendants to be, although perhaps apparently in favour of the plaintiff, yet in reality not so, and he relied upon *Powell v. Whitmore* (4 M. & S. 141), *Hallett v. Wigram* (9 C. B. 589), and *Wilson v. Bank of Victoria* (L. Rep. 2 Q. B. 204). In my opinion the two cases last mentioned were correctly decided, and are accurate exponents of the law. In addition to these cases I believe every text-book expression and dictum of French, German, American and English authorities which exist were cited, and in Mr. Arnold's book it is said that where a rudder had been carried away, and a spare spar was cut up to make one, it was decided to be general average. The circumstances of the case are not stated. I think the question in the present case is one of fact, and that the case does not show that at the time when the spars and wood were cut up to add to the coal, or at the time when the coal was bought from the barque, there was such imminent danger of the ship's sinking that the loss and expenses incurred by the shipowner ought to be contributed to by the merchant. I think that in reason and in accordance with his contract he ought to bear the loss and expense himself.

CLEARY, B.—I have read the judgment which my brother Martin has written, and I agree in that judgment. I will only add two remarks, first, I think the statement in the case does not afford sufficient materials for the conclusion that any sacrifice was made at a time of imminent danger. The captain would not have been justified in making a jettison of a portion of the cargo to diminish the leak, and so lessen the necessity for continuous use of the donkey. It was a proper and prudent thing in the captain to guard against the supply of fuel failing, and the possibility of his being unable to get a further supply in time. But this prudence is not sufficient to justify a jettison or any other sacrifice so as to lay a foundation for general average. It does not appear upon the case how long the coal would have lasted after the 10th April, when the captain began to use the spars, nor how much remained at the time when the fresh supply was obtained; but it does appear the spars were only used to eke out the coal, and that they lasted from the 10th April to the 5th May. The danger in reality is not of going to the bottom if nothing is done, but the improbability of meeting with a supply of fuel during the interval while the existing fuel is being consumed; and it appears to me that this not only is insufficient to establish such a case of imminent peril as is necessary to forward a claim for general average, but negatives it. The other remark is that some difficulty is created in this case by referring to American

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THE LIVIA.

[ADM.]

authorities on this subject, and Stevens on Average, and other works of a similar nature. The law in America does not in all respects agree with ours on the subject of general average (as will be pointed out shortly), and the other works referred to do not, in my opinion, correctly state the English law on the subject. We were pressed with many authorities to show the imminency of danger was not necessary to make the expenses incurred by a vessel in going into port to repair a subject of general average. It is undoubted that when some sacrifice has been made (for example, cutting away masts, &c.), the expenses consequent upon going into port after the danger is over to repair this loss is, in England, the subject of general average; because going into port, though there is no imminent danger at the time, yet being rendered necessary by the sacrifice made in imminent danger, stands upon the same footing as the sacrifice itself. But the expense attending the going into port to repair sea damage caused by a storm when no sacrifice has been voluntarily made do not, it is submitted, form items of general average according to English law, although they are regarded as doing so in America. See Kent's Commentaries, vol. 3, p. 329, and note at the end. The distinction is clearly pointed out in the judgment in *Powell v. Whitmore* (4 M. & S. 148). The case of *Plummer v. Wildman* (3 M. & S. 482), relied upon by the plaintiff, might appear to countenance the opinion that the expense consequent upon putting into port to repair sea damage for the benefit of all went into general average, but that case must always be taken with the explanation given by Lord Ellenborough in *Powell v. Whitmore* (4 M. & S. 141) the following year. He was the judge who presided when both cases were decided, and in the latter case he points out that in *Plummer v. Wildman* the master had cast away the rigging in order to preserve the ship, and afterwards put into port to repair that which he voluntarily sacrificed for the benefit of all. Now, according to paragraph 6, the donkey engine and coals were a part of the regular equipment of the ship and used for loading and unloading cargo, hoisting sails and taking them in, and pumping the ship. If then, from the unexpected length of the voyage and tempestuous weather, causing the vessel to strain and leak, and so making pumping indispensable for the safety of the ship, the supply of coals run short, and the ship made for the nearest coal depot to provide a further supply, without which the voyage could not be prosecuted with safety; could the expense of providing this further supply go into general average? would it not fall upon the owners as part of the necessary expenses of navigating the ship? Or, again, if from excessive use in any of the purposes for which the donkey engine was used it broke down, and it was necessary to go into port to repair it, would the expense of going into port fall into general average? In those States in America in which it has been held that the expenses of going into port to repair damage from tempest, this might be so, but it is submitted it would not be so here. Or suppose that there were no means of repairing the damage to the engine in the case last put, and therefore, instead of the engine and coals the captain ships an equivalent crew of ten men (see paragraph 6), could this expense go into general average? It is hardly necessary to point out the distinction between the several cases last put and

a case put in the argument, viz., that if a vessel with a full and complete crew was unable to keep down a leak, so that if nothing further was done the ship would go to the bottom, then the expenses of sending ashore and getting additional hands, or it may be a donkey engine to keep down the leak would go into general average. In that case the emergency was urgent and imminent, and the emergency was not caused by having coals on board, which are consumed by being used instead of a crew which is not so consumed.

The Court being divided in opinion, Cleasby, B., withdrew his judgment.

Judgment for the plaintiff.

Attorneys for plaintiff, Westall and Roberts.

Attorneys for defendant, Waltons, Bubb, and Walton.

COURT OF ADMIRALTY.

Reported by J. P. ARPINALL, Esq., Barrister-at-Law.

Friday, Jan. 26, 1872.

THE LIVIA.

Collision—Compulsory pilotage—Burden of proof—Several issues—Costs.

In a cause of damage by collision, where the defence relied upon is compulsory pilotage only, and the defendants prove that the vessel was in charge of a licensed pilot by compulsion of law, and that he gave orders for the purpose of avoiding the collision, and that those orders were obeyed, and here the plaintiffs seek to show that the collision was due to the defective steering power of the defendants' vessel, it lies upon the plaintiffs to prove such defective steering power by substantive evidence. (a)

Defendants in a cause of damage, who rely at the hearing upon the defence of compulsory pilotage only, and succeed in this point, but whose pleadings raise other issues which are not proved, are not entitled to their costs.

This was a cause of damage instituted on behalf of the owners of the schooner Lulea, and of her cargo, against the brig Livia. The petition was as follows:

1. The three-masted schooner Lulea, of 227 tons British register, was riding at anchor, in a fair and proper berth, in Falmouth Roads, at about 2.30 p.m. of the 14th Nov. 1871.

2. The weather at such time was rather thick, with slight rain. There was a strong breeze from the S.S.W. The tide was in the first quarter flood. The Lulea lay with her head about S. by W. half W. A good look out was being kept on board of her.

(a) It may be as well to point out here that some confusion seems to have existed as to the meaning to be attached to the words "and that those orders were obeyed." It is not the mere putting the helm to port in consequence of orders of the pilot that is evidence to orders, but the ship must have gone off under her port helm before the orders can be said to have been obeyed; the ship, and not the helmsman only, must have obeyed orders. If the learned judge meant, in his judgment, to say that, it having been shown that everything was done to cause the ship to go off under her port helm, he would not presume an exceptional state of circumstances, which prevented her from obeying her helm, without some positive proof of these circumstances, the decision is consistent with decided cases; but on the other hand it is submitted that it lies on those pleading compulsory pilotage to show clearly that they were not to blame, and if the ship did not obey orders they were bound to show why she did not.—Ed.

[ADM.]

THE LIVIA.

[ADM.]

3. In these circumstances the brig *Livia*, proceeded against in this case, was observed by those on board the *Lules*, about three cables' length off, and bearing about one and a half points on her port bow. In a very short time the *Livia* came into collision with the *Lules* with great violence, the port bow of the *Livia* by her cat-head striking the port midships of the *Lules*. Very serious damage was done to the *Lules* by the collision aforesaid, and much loss and injury has been in consequence suffered by the owners of the *Lules*, and her cargo.

4. The collision aforesaid, and the damage and loss arising therefrom are attributable to the default, neglect, or mismanagement of the *Livia*, or those on board of her.

5. No blame in respect of the said collision is attributable to the *Lules*, or to any one on board of her.

The answer filed on behalf of the owners of the *Livia* was as follows:

1. The *Livia* is an Italian brig, of 241 tons register, or thereabouts, navigated by Vincenzo Masella, her master, and a crew of ten hands.

2. On the 21st, July 1871, the *Livia*, navigated by her said master and crew, left Marianople with a cargo of rye, bound for Queenstown or Falmouth for orders.

3. At about 11 a.m. of the 14th Nov. following, the *Livia*, in the prosecution of her said voyage, arrived off the Lizard, and was boarded by a duly licensed pilot named John Collins, in charge of whom she afterwards proceeded for Falmouth.

4. Shortly before 2 p.m. on the said 14th Nov. the weather was a little thick, and there were passing showers, and the wind was blowing strong from the S.S.W., and the *Livia*, still in charge of the said John Collins, was proceeding upon Falmouth, under lower foretopmast, flying jib, and foretopmast staysail, and making about four knots an hour. A good look out was being kept from on board of her, and the said John Collins was also upon the forecabin looking out, and directing the navigation of the ship.

5. Whilst the *Livia* was thus proceeding, several vessels were seen at anchor in Falmouth Roads. One of such vessels, to wit, the *Lules*, whose owners are the plaintiffs in this case, was particularly observed by the said John Collins when at the distance of about one hundred fathoms from, and bearing about one point on, the port bow of the *Livia*, but no alteration was then made by the said John Collins in the course of the *Livia*. When, however, the *Livia* had approached to within a short distance of the *Lules*, the said John Collins gave orders for the helm of the *Livia* to be put hard a-port, and for her port jib-sheets to be hauled aft; but notwithstanding that those orders were immediately obeyed, the *Livia*, with the luff of her port bow, came into collision with the port side of the *Lules*, and damage was occasioned thereby as well to the *Lules* as to the *Livia*. The *Livia*, after clearing the *Lules*, was then, by direction of the said John Collins, brought to anchor.

6. Save as herein appears, the defendants deny the truth of the allegations contained in the petition.

7. The aforesaid collision was not in any way occasioned by any negligence or default of the master and crew of the *Livia*.

8. Before and at the time of the occurrence of the aforesaid collision, the *Livia* was navigated within a pilotage district, wherein, and under circumstances in which it was compulsory by law upon her and her master and owners that she should be in charge of a pilot duly licensed for such district; and the said John Collins was a pilot duly licensed for such district, and before, and at the time of the said collision, was in sole charge of the *Livia*, and directing her navigation; and if, and so far as the said collision was occasioned by any negligent or improper navigation of the *Livia*, it was wholly occasioned by the negligence or want of skill of the said John Collins, in whose charge the *Livia* then was by compulsion of law.

On this the plaintiffs concluded denying the allegations in the answer, save in so far as they agreed with the statements in the petition. At the hearing before the judge, assisted by Trinity Master, the facts alleged both in the petition and answer were substantially proved. The defendants' witnesses were first called, and from the evidence

of the master of the *Livia* it further appeared that the *Livia* steered well; that before this voyage she had been to Constantinople, and that whilst there that the ship's bottom had been thoroughly cleaned; that at Marianople, before starting on this voyage, she had been listed over and cleaned as far as possible; that the *Lules* was lying with her head out to sea; that there might have been an inch of barnacles and weeds on her bottom as far as he could see, but that this would not interfere with her steering. The pilot was not called on either side. From the evidence of a channel pilot, called for the defendants, it appeared that he had navigated the ship from Falmouth to Rotterdam, and that whilst on her voyage, and whilst being towed up the Helvetiains canal to Rotterdam, she steered well. From the defendants' evidence, it appeared that the *Livia*, whilst at Falmouth, had been examined by order of the commissioners of pilotage, and that she was thoroughly foul with barnacles and grass three inches and a half thick. The witness, a master of a merchant vessel, who gave this evidence, stated as his opinion that this would materially affect the ship's steering. Whilst at Falmouth the *Livia* was cleaned with scrapers fastened to handles four feet long. The carpenter of the *Lules* stated, that as the *Livia* approached she was yawing from side to side.

Milward, Q.C. (Clarkson with him) for the defendants.—We have shown that the vessel steered reasonably well, and that is sufficient. As long as she was in ordinary safe trim, although she might have been in handier trim, the owners are not responsible: (*The Argo*, Swab. 460.) We have proved that the pilot's orders were given and obeyed (*The Scheutbe*, Lush. 239), and we are not bound to call the pilot.

Butt, Q.C. (Phillimore with him) for the plaintiffs.—The *Livia* would not steer. The *Lules* was about one point on the port bow of the *Livia*, and struck the *Livia* on the port bow, and this shows that the *Livia* did not answer her port helm but came to. If anyone is bound to call the pilot, the defendants are, and not the plaintiffs: (*The Carrier Dove*, Bro. & Lush. 113). It is sufficient for the plaintiffs to show that the vessel did not answer her helm. The defendants must prove by whose fault it did not. The evidence raises a presumption that the steering was bad, and if it was bad we are entitled to a verdict. Owners are responsible for bad steering occasioned by an inherent defect in a ship: (*The Peru*, Pritchard's Digest, 440, (a)). If she was more than ordinarily unable to steer, the owners are liable.

Milward, Q.C. in reply.—We have shown all that we are required under the defence of compulsory pilotage, and the onus of proving that the vessel could not be steered lies upon the plaintiffs. There is no positive evidence given by the plaintiffs to show that the vessel steered badly, so as to bring this case within the principle laid down in *The Peru* (sup.).

Sir R. PHILLIMORE.—This is a case in which a collision took place between the brig *Livia* and the three-masted schooner *Lules*. The *Lules*, a Swedish vessel, was riding in a fair and proper berth in Falmouth Roads at about 2.30 p.m. on the 14th Nov. 1871. The Italian brig *Livia* was coming

(a) Cited in the argument from reports of Admiralty decisions in the *Shipping and Mercantile Gazette*, out from that paper and preserved in the Registry.

into Falmouth Roads for orders. She had taken a duly licensed pilot on board off the Lizard, and whilst she was running up the harbour, she came into collision with the *Lulea*, and inflicted on the latter vessel serious damage. It is not denied by the defendants that the *Livia* was alone to blame for the collision. The only question that I have now to decide in this case is, whether the defence set up, namely, that the *Livia*, at the time of the collision was in charge of a pilot by compulsion of law, is sufficient excuse. The evidence produced before us to-day has proved that the vessel was in charge of a pilot; that he gave orders for the purpose of avoiding the collision; that those orders were obeyed, but that the collision, nevertheless, took place. But it is said on the part of the plaintiffs that the collision was due to circumstances, which appears on the face of the case, that clearly shows that the *Livia*, at the time of the collision, was in such a condition that she was incapable of steering, and that her owners are therefore responsible. The plaintiffs, to prove this proposition, have brought forward evidence to show that the *Livia* was foul with barnacles and grass. Now, if it were proved to the satisfaction of the court that the vessel was so foul as not to obey her helm, then, no doubt the injury sustained would be due to the vessel and not to the pilot, as he would have given the necessary orders in ignorance of her condition. Such a fact as this, however, ought not to be proved by presumptions to be deduced from the plaintiffs' or the defendants' case, but by positive evidence of the clearest character. Now, what is the evidence of the defendants, on this point. The vessel was cleaned at Constantinople, and afterwards partially at Marianople, and then she made this voyage. Her master said she steered well all the time. After the collision she went to Rotterdam under the charge of a channel pilot. He sailed in her on the 10th Dec., the collision having taken place on the 14th Nov., and he found no fault with her steering, and he had to steer her whilst being towed up the Helvetius canal, in which place a vessel must answer her helm reasonably well to be safe. On the part of the plaintiffs, the court is asked to presume that the vessel did not steer well from the fact of her being covered with barnacles. The evidence given is quite sufficient to discharge the owners of the *Livia* from proof of the condition of their vessel. They have shown that the pilot's orders were obeyed, and if the plaintiffs intended to show that the *Livia*, and not the pilot was to blame, that ought to have been proved by substantive evidence; the burden of proof is removed to the plaintiffs, and they must show that the *Livia* is to blame. There may be cases, no doubt, in which the evidence adduced by the defendants appears sufficient to warrant the court in finding on that evidence alone that the ship and not the pilot is to blame; but this is not such a case. The presumption in such a case would have to be very strong before the court would act upon it. The opinion of the Elder Brethren of the Trinity House—and with this opinion I entirely concur—is that if the order given by the pilot to keep her away had been given sooner this collision would not have taken place; and they think that the pilot did not, when he first saw the ship, make sufficient allowance for the flood tide running into the harbour. The *Livia* could have had very little steerage way on her. Holding this opinion, I

must find in this case that the pilot alone, and not the *Livia*, is responsible for this collision, and I accordingly dismiss the suit. The cases cited (*The Carrier Dove* (sup.), and *The Schwalbe* (sup.), with reference to calling the pilot, establish the proposition that sufficient evidence must be given to show that the collision was occasioned by the default of the pilot, and that the necessary facts must be strictly proved; but they are not authorities for saying that, where the fact that the pilot has given orders, and those orders have been obeyed has already been proved, the owners are bound to call him in support of their case.

Mileard, Q.C., for the defendants, applied for costs, and cited the *Royal Charter* (L. Rep. 2 Adm. 362; 20 L. T. Rep. N. S. 109; 3 Mar. Law Cas.; O. S. 262) (a).

Clarkson, on the same side, contended that the defence in this case as shown by the answer amounted to that of compulsory pilotage only. The only defence the defendants relied on was that of compulsory pilotage. [Sir R. PHILLIMORE.—The 8th paragraph of the answer surely raises the question whether there was negligence on the part of the *Livia*. The real test in this case is whether as counsel, you would advise, on the pleadings as they now stand, that witnesses should be called on the question of compulsory pilotage only.] Certainly I should. There are only three defences that we could have raised, first, that the *Lulea* was to blame; secondly, that the pilot was to blame; or thirdly, that the collision was an inevitable accident. We could only raise the defence of compulsory pilotage in this case, and that was our defence. The plaintiffs tried to prove facts as to our ship's steering, and they have failed. They were not bound to bring this action. They should have ascertained the facts clearly before coming here: (*The London*, 9 L. T. Rep. N. S. 348; 1 Mar. Law Cas. O. S. 398; Bro. & Lush 82.)

Butt, Q.C. contra.—Is it distinctly admitted on the face of the answer that the only defence is compulsory pilotage? That is the only question. Could we safely bring witnesses as to compulsory pilotage only? Parag. 5 of the petition raises a distinct issue and is traversed in the answer.

Sir R. PHILLIMORE.—In the case of the *Royal Charter*, I said, "Looking to all the circumstances of this case, and the present state of the law with respect to compulsory pilotage, I am of opinion that the defendants are entitled to their costs," and if the present case could be brought within the principle that I acted on in that case, I should follow it. There was an agreement as to facts, and it was confined to the sole question of compulsory pilotage, and it admitted that that was the only defence. It is impossible to read the answer in this case, and to suppose that such an admission is made. Such an admission should be made in language of the most distinct character, and should not be left to be drawn by ingenious inference from the words of the answer. I am of

(a) The judge sent for the documents in the *Royal Charter* (sup.) from the registry, and it appeared that in that case there were no pleadings, but a statement in nature of a special case agreed upon between counsel, which clearly and distinctly raised the one question in the case, viz., that the defence was compulsory pilotage, and that only.

[ADM.]

THE FRANKLAND—THE THRACIAN.

[ADM.]

opinion that as the defence was not limited by the pleadings to the question whether the defendants were exempted by law in consequence of having on board a licensed pilot by compulsion of law, they are not entitled to their costs.

Proctors for the plaintiffs, *Dyke and Stokes*.

Solicitors for the defendants, *Thomas Cooper*.

Wednesday, Jan. 31, 1872.

THE FRANKLAND.

Collision—Preliminary act—Amendment—Practice
The Court will not, at the hearing, allow the amendment of the preliminary act in a cause of damage by collision.

THIS was a cause of damage, instituted on behalf of the owners of the steamship *Kestrel* against the steamship *Frankland*. The *Frankland* was on a voyage from Sunderland to London, and was, at the time of the collision, according to the answer filed on her behalf, off the coast of Norfolk, and was proceeding on her voyage in a thick fog at the rate of about two knots an hour, and the collision took place two hours after she had passed the Dudgeon light. The plaintiffs alleged in their petition that the *Frankland* was proceeding too fast. The preliminary act filed in her behalf alleged that the collision took place "about four miles southward of the Dudgeon light vessel," and the answer contained the same allegation. The cause now came on for hearing, and before the opening of the plaintiff's case, and without offering any proof of the fact—

Milward, Q.C. (Clarkson with him) for the defendants, applied for leave to amend their preliminary act and their answer, by altering "four miles southward of the Dudgeon light," to "six or eight miles southward of the Dudgeon light," on the ground that, in calculating the distance they had passed the light, they had not made allowance for the tide, which was running in their favor at the rate of about a mile and a half. In relation to our speed it is important to fix the place of collision.

Butt, Q.C. (Pritchard with him) for the plaintiffs, objected, on the ground that the object of a preliminary act was to obtain a statement from the party making it immediately after the institution of the cause, with a view to accuracy whilst the facts are still fresh, and that if amendments were allowed at the trial that object would be defeated. The court holds parties strictly to the statements in their preliminary acts.

Sir R. Phillimore.—I am of opinion that the application to amend the preliminary act cannot be granted. The object of the preliminary act is to commit the parties to statements of the facts, at a time when they are fresh in their recollection, and this object would be entirely defeated if I allowed the act to be amended at the hearing of the cause. The same objection does not apply to the amendment of the answer, as the defendants have applied before the evidence has been taken. The answer may therefore be amended, but it will of course, be competent to counsel for the plaintiffs to comment upon the discrepancy between the answer and the preliminary act.

Proctors for the plaintiffs, *Pritchard and Sons*.

Solicitor for the defendants, *Thomas Cooper*.

Tuesday, Feb. 13, 1872.

THE THRACIAN.

Tender—Costs—Practice.

A tender must be made with costs, or the ground for refusing costs must appear on the face of it.

THIS was a cause of salvage instituted against the *Thracian*, in which the defendants had tendered 300*l*. The tender was as follows:—

IN THE HIGH COURT OF ADMIRALTY.

No. 5070.

The Thracian.

Take notice, that I have this day paid into the Bank of England, to the credit of the registrar of this honourable court, the sum of 300*l*., which amount I tender to the plaintiffs in full satisfaction for the services proceeded for, exclusive of costs, the defendants reserving to themselves the right of contending that the plaintiffs ought to be condemned in the costs of the suit, or ought not to have their costs.

Dated this 18th Jan. 1872.

THOMAS COOPER, Defendants' Solicitor,
 To Messrs. Lowless, Nelson, and Jones, Plaintiffs' Solicitors.

On 1st Feb. 1872, the defendant's solicitor served a notice of motion on the plaintiffs' solicitors that he would, "on the 6th day of February, move the judge in chambers to direct the plaintiffs to declare forthwith whether they accept or reject the tender made in this cause." Accordingly, the respective solicitors appeared before the judge in chambers on 6th Feb. and it there appeared that the tender was made in the form set out above, in order to raise the question whether, if the 300*l*. were accepted, the plaintiffs were or were not entitled to their costs, under the County Courts Admiralty Jurisdiction Act, 1868, whereupon the learned judge adjourned the motion into Court.

Clarkson now moved in the terms of the motion.

Webster, contra.—We are entitled to know the ground on which the defendants refuse to pay costs, and they should set out the ground in the tender: (*The Hickman*, L. Rep. 3 Adv. & Ecc. 15; 21 L. T. Rep. N. S. 472.)

Clarkson, in reply.—We are only bound to let the plaintiffs know that we object to pay the costs.

Sir R. Phillimore.—I think it desirable that the practice, as laid down in *The Hickman* (sup.), should be adhered to, and that a defendant, in making a tender, should either tender with costs, or should show distinctly the ground on which he refuses costs. Parties have a right to be apprised of the ground on which costs are refused. In this case the tender should be altered, after the words "exclusive of costs," so as to read, "and I contend that the plaintiffs ought to be condemned in costs, or ought not to be allowed their costs, on the ground that the suit ought to have been brought in the County Court (Admiralty Jurisdiction)," leaving out the words "the defendants reserving &c." down to the end of the tender. The motion will therefore be dismissed, but without costs.

Solicitors for the plaintiffs, *Lowless, Nelson, and Jones*.

Solicitor for the defendant, *Thomas Cooper*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Reported by J. F. ASPIWALL, Esq., Barrister-at-Law.

Thursday, Feb. 1, 1872.

(Present: the Right HON. Sir JAMES W. COLVILLE,
Sir JOSEPH NAPIER, MELLISH, L.J., and Sir
M. E. SMITH.)

THE TWO ELLENS.

*Necessaries—Material men—Mortgagees—Priority
—Maritime lien—Admiralty Court act 1861, s. 5
—3 & 4 Viet. c. 65, s. 6.*

*Material men supplying necessities in England to a
British or British-colonial vessel do not, under the
Admiralty Court Act 1861 (24 Viet. c. 10), s. 5,
acquire a maritime lien upon the ship. The ship
does not become chargeable with the necessities
supplied until actually arrested by the Court of
Admiralty.*

*All valid charges on the ship, to which any person,
other than the owner of the ship personally liable
for the necessities, is entitled, take precedence over
claims for necessities.*

*A mortgagee, therefore, is entitled to priority over
material men.*

*Semble, a British ship in the hands of third parties,
to whom she has been duly sold by the owner, who
is liable for the necessities supplied, cannot be
made chargeable for those necessities under this
section.*

*Semble, a maritime lien is given by 3 & 4 Viet. c. 65,
s. 6, for necessities supplied in England to foreign
ships.*

THIS was an appeal from the High Court of Admiralty of England in a cause instituted in rem, by Donald Johnson and others, the appellants, to recover a debt of 3051 3s., together with interest thereon, from the 19th Feb. 1868, for equipping, repairing, and supplying necessities to the British-colonial vessel the *Two Ellens*. The facts in the court below were mainly raised on a special case, from which it appeared that the respondent, John Alexander Black, was the transferee of a registered mortgage on the vessel, dated 9th March 1867. The transfer was dated 16th July 1868, but was not registered. In Feb. 1868, the appellants supplied certain necessities to the ship in the port of London at the request of a part owner, who was also her master, and parted with the possession of her, and afterwards, the vessel being then in the port of Liverpool, the respondent took possession of her on behalf of the mortgagees and sold her. She was bought in by the mortgagees. The vessel was arrested in this suit on 26th Dec. 1868. Her value was insufficient to satisfy both claims. On 15th Feb. 1871 the Judge of the Admiralty Court held, following *The Pacific* (Bro. & Lush, 243; 10 L. T. Rep. N. S. 541), but doubting that decision, that material men have no maritime lien upon a British ship for necessities under 24 Viet. c. 10, s. 5, and therefore that the mortgagees (the respondent) had priority; and that a transferee, though the transfer be not registered, had a *locus standi* to defend the suit. The report of the case in the court below will be found 24 L. T. Rep. N. S. 592; ante, p. 40.

From this judgment the material men appealed, on the grounds, as stated in the case on appeal, first, because the respondent had no *locus standi*

entitling him to maintain the said cause in the Admiralty Court; secondly, because the respondent, or those whom he represented, was estopped from denying that he or they authorised the master to give the appellants the orders in respect of which their claim arose; thirdly, because the respondent, or those whom he represented, had received the benefit of the work, supplies, and necessities, in respect of which the appellants' claim accrued; fourthly, because the appellants acquired a maritime lien in respect of their claim.

The respondent's case on appeal submitted that the decree ought to be upheld, first, because the appellants had not any right to proceed against the ship except under the 4th or 5th section of the Admiralty Court Act 1861; secondly, because the ship not having been under the arrest of the court at the time of the institution of the suit, the appellants had no right of action under the 4th section of the said Act; thirdly, because, before the passing of the Act, a mortgagee of a British or British colonial ship was not in any way liable in respect of or affected by a claim for repairs or necessities done or supplied to such ship unless upon his authority and credit, and the respondent did not authorise these repairs and necessities; fourthly, because neither the 4th nor the 5th section of the Act gave a maritime lien; fifthly, because, even if those sections do confer a maritime lien, the 11th section of the Act equally gives a registered mortgagee a maritime lien; sixthly, because the 11th section of the Act does not alter the relative positions of material men and mortgagees; seventhly, because the mortgagee was under the Act entitled to priority.

The 6th section of 3 & 4 Viet. c. 65, and the 4th and 5th sections of 24 Viet. c. 10, are set out in the judgment. Sects. 11 and 35 of the latter Act are as follows:

Sect. 11. The High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act 1854, whether the ship or the proceeds thereof be under arrest of the said court or not.

Sect. 35. The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam.

The *Admiralty Advocate* (Dr. Deane, Q.C.) for the appellants.—The first question is, whether the respondent has a *locus standi* in this suit; but the real question is, whether the appellants, as material men, have a maritime lien, and thence a right of priority over other debts. Down to the time of Charles II., the Admiralty Court exercised jurisdiction over the claims of material men, and repairs and necessities were held to form a lien upon the ship itself, but at that time the jurisdiction was put an end to by prohibition.

Abbott on Shipping, 11th edit. p. 123, note (i);

The Zodiac, 1 Hagg. 330, 325.

Sir J. Nicholl tried to revive the jurisdiction in A.D. 1835, in *The Neptune* (3 Hagg. 129), but this decision was overruled by the Privy Council (3 Knapp's P. C. C. 94). In 1840 the 3 & 4 Viet. c. 65, became law, and gave, by sect. 4, jurisdiction to the Court of Admiralty to decide all claims for necessities supplied to any foreign ship. On this statute, Dr. Lushington held in *The West Friesland* (Swabey, 454), that the lien for necessities continues after the ship has changed owners. A maritime lien is a claim upon a thing to be carried into effect by legal process: *The Bold Buccleugh* (7 Moo. P. C. 267, 284), and exists from the

moment the claim arises. The lien necessarily pre-exists to the institution of the cause.

The General Smith, 4. Wheaton Rep., 438, 443;
The St. Jago de Cuba, 9 Wheaton Rep., 469, 417;
 3 Kent's Commentaries, 11th edit., p. 229, 230.

The 3 & 4 Vict. c. 65, s. 6 was intended to remedy the hardships arising from supplying vessels which did not come into port, and gave a maritime lien on foreign vessels: (*The Ella A. Clark*, Br. & Lash. 32.) The Admiralty Court Act 1861 (24 Vict. c. 10) s. 5, extends the jurisdiction of the Admiralty Court to necessities supplied to any ship, and I submit that it also creates a maritime lien. The words in the two statutes are similar, and the latter limits the jurisdiction in certain cases, but does not make any change in the nature of the remedy. The words, in 24 Vict. c. 10, s. 5, "unless, &c., any owner or part owner is domiciled in England, &c.," refer to the owner, at whose orders the goods were supplied, and the lien is not affected by a transfer. (MELLISH, L. J.—Is it intended by the statute to affect the security of mortgagees, *ex post facto*, by giving a lien to material men for goods supplied after the mortgagees have advanced their money?) The mortgagees gets the greater security of the increased value of the ship by reason of the repairs done to it. "Domiciled" must be taken in its legal sense: (*The Pacific*, Br. & Lash. 243; 10 L. T. Rep. N. S. 541; 2 Mar. Law Cas. O. S. 21), and neither owners nor mortgagees were domiciled in England or Wales. If the claim is enforceable upon the *res* by process of law, then there exists a maritime lien. (MELLISH, L. J.—Then the 35th sect. (24 Vict. c. 10) has given maritime liens in all cases triable in the Admiralty Court?) The Legislature must be taken to have known the effect of that section. (MELLISH, L. J.—Then why did not the Legislature regulate priorities?) There is at any rate a lien in the case of necessities supplied: *The brig Nestor* (1 Smnner, 73.) The material man benefits the property in whose-
 ever hands it may be.

Cohen follows on the same side.—The material men are entitled to the ship as security (*Rich v. Coe*, Cowper, 636), and wherever the Admiralty Court has jurisdiction there is *prima facie* a maritime lien. When we find that the Admiralty Court exercised jurisdiction over the claims of, and enforced the liens of material men until prohibited, as shown by Abbott on Shipping, p. 122, 11th edit., and that the same jurisdiction is now exercised by foreign courts of admiralty under the maritime law, it is a fair inference that the Legislature intended, when they enacted this section to give a maritime lien. This section does not apply to foreign ships (*The India*, 9 Jur. 419; 9 L. T. Rep. N. S. 234; 1 Mar. Law Cas. O. S. 390), but only extends the jurisdiction over foreign ships given by 3 & 4 Vict. c. 65, s. 6 to British ships. This is a statute *in pari materia*, and the jurisdiction given by it must be presumed to be that of all admiralty courts. The 3 & 4 Vict. c. 65, s. 6, gave a maritime lien in foreign ships, and it is reasonable to suppose that a statute *in pari materia* passed a few years after, gave the same remedy against all other ships in the same position as foreign ships. (MELLISH, L. J.—My difficulty is to see how the statute gives a lien. It seems to me that it merely relates to procedure, and cannot give a lien without express enactment. Such a statute as this could not give a lien by

conferring jurisdiction on the common law courts.] The statute necessarily empowers the Admiralty Court to exercise its jurisdiction according to its own laws and traditions. Anything that tends to preserve the *res* ought to have priority. In the absence of strong reasons to the contrary, where a proceeding *in rem* is given in the Admiralty Court, a maritime lien is created, and this is not effected by mortgagees not having a lien on the face of the statutes. The 3 & 4 Vict. c. 65, s. 3, only gave jurisdiction over the claims of mortgagees when the ship was under arrest, or the proceeds in court, and the 24 Vict. c. 10, s. 11, in extending the jurisdiction, says nothing which would create a lien. There was no jurisdiction over mortgage claims before these statutes. In the case of necessities the first statute does create a maritime lien for necessities in case of a foreign ship, and the second extends this lien to British ships. *The Ella A. Clark* (*sup.*) was against a purchaser after the necessities were supplied. Here the mortgagee buys the ship, and takes the benefit of the repairs:

Williams v. Alsop, 30 L. J., N. S., 353 C. P.; 4 L. T. Rep. N. S. 559;
Bristow v. Whitmore, 41 L. J. 467 Ch.; 4 L. T. Rep. N. S. 622.

He must take subject to the maritime lien to which I contend a material man is entitled. Dr. Lushington in *The Pacific* (*sup.*) held the contrary only because of the limitations in sect. 5.

Bull, Q.C. for the respondents.—There are two questions; first, is there a maritime lien given by the 4th or 5th sections of the Admiralty Court Act 1861? secondly, does not the 11th section give a mortgagee an equal right to a mortgagor? If this were a case of building or repairing under the 4th section there could be no seizure of the ship, as the court has no jurisdiction unless some other person than the builder has instituted proceedings, and the proceeds of a ship are in court. If no one takes proceedings the claim may never become enforceable against the ship, and there is therefore no lien. This applies equally to proceedings under the 5th section, as the material man may never be able to proceed if the owner is domiciled in this country. The definition of maritime liens in *The Bold Buccleugh* (*sup.*) must be taken to have had reference to cases where such liens existed independently of statute law. It is admitted that in some cases the right to proceed *in rem* exists where there is no maritime lien, and this admission shows that *The Bold Buccleugh* (*sup.*) is not to be applied in all such cases. The mortgagee is at least in as good a position as the material man. It may be contended that the mortgagee, under sect. 11, has a maritime lien whilst a material man has none; because the jurisdiction of the court does not depend upon extraneous circumstances, as in the case of necessities supplied to a British ship, but the moment the mortgage is registered the court has jurisdiction, and the lien might attach, whereas the claim of a material man does not attach, if the owner be domiciled in this country. It cannot be said that the 3 & 4 Vict. c. 65, and the Admiralty Court Act 1861 are *in pari materia*, because the former statute relates to matters in which maritime liens existed, except in the case of necessities supplied to a foreign ship, apart from the statute; whereas the latter statute deals only with such claims as are not enforceable *in rem* except by that statute. With-

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out express words, the statute cannot create a maritime lien.

Clarkson follows on the same side.—Before the 24 Vict. c. 10, a mortgagee had priority over all other creditors: (*Dickenson v. Kitchen*, 8 El. & Bl. 789). There is nothing in this statute which puts the mortgagee in a worse position or alters the relative positions of material men and mortgagees. If the statute gives a maritime lien to material men, then a shipbuilder having built and sold a ship to a man who resells to several as co-owners, and becomes insolvent before payment, would be entitled, under sect. 4, on a suit being instituted between the co-owners, to come to the court and claim precedence over the co-owners, although a builder cannot proceed in the first instance. The fair construction is, that where there is a mortgagee the claim of the material man is against the equity of redemption only.

The *Admiralty Advocate* in reply.—It must be admitted that 24 Vict. c. 10, s. 4, gives no lien. The 24 Vict. c. 10 was passed after the decision of the Court of Admiralty in *The West Friesland* (Swab. 454), decided in 1859, and the Legislature used the same words in this statute as in the 3 & 4 Vict. c. 65, and must be taken to have given the same lien in British ships. They have revived an old jurisdiction and must be taken to have provided that it should be exercised by the laws and the procedure peculiar to the Admiralty Court. In the case of mortgagees the jurisdiction conferred was entirely new and had never been exercised before by the Admiralty Court.

The judgment of the Court was delivered by Lord Justice MILLER.—This is a suit by a plaintiff, who performed necessary repairs to a ship, to obtain payment by the sale of the ship, under the 54th section of the Admiralty Court Act 1861. The question to be determined is, whether his right to be paid out of the proceeds of the ship takes precedence of a previous mortgage. The mortgage had been assigned to the defendant in the suit, but it is admitted that that makes no difference in the rights of the parties. There have been several cases in the Court of Admiralty on this point, and the decisions are to a certain extent conflicting. Dr. Lushington appears in the first instance to have determined the question in accordance with the decisions which had been come to under the previous Act respecting necessities supplied to foreign ships, viz., that a maritime lien was created from the time that the supplies were furnished, and that therefore, having such maritime lien, the man who supplied the necessities took precedence of the mortgage. But in the case of the *Pacific* (sup.), after giving full attention to the case, and reconsidering his former decision, Dr. Lushington came to a contrary opinion, and determined that no lien was created until the suit was commenced, and that accordingly the mortgage took precedence. Dr. Lushington again affirmed, in the case of the *Troubadour* (L. Rep., 1 Adm. 306; 16 L. T. Rep. N. S. 156; 2 Mar. Law Cas. O. S. 475), the decision he had arrived at in the *Pacific* (sup.). In the present case the learned judge of the Court of Admiralty thought he was bound by the previous decisions of Dr. Lushington; but in his judgment he acknowledged that if the matter has been *res nova*, and he had not been bound by the previous decisions, he should himself have come to a contrary conclusion. Therefore the

question has to be determined by their Lordships, and it may be said, perhaps, that as far as authority is concerned the authorities are very equally balanced. It is clear that previous to the passing of the 3 & 4 Vict. the Court of Admiralty had no jurisdiction in the case of necessities supplied to a ship, and that the supply of such necessities did not give any maritime lien upon a ship. It is perfectly true that for many years prior to the time of Charles II. the Court of Admiralty had claimed, and to a considerable extent exercised such a jurisdiction; but the courts of common law in the time of Charles II. and subsequently had prohibited them from exercising that jurisdiction on the ground that they never possessed it. Subsequently, in the case of the *Neptune*, it was decided by the Privy Council that there was no such jurisdiction. Therefore, notwithstanding this jurisdiction was practically exercised for years, it must be taken now to be conclusively the law that the Court of Admiralty, by the law of England, never had jurisdiction over necessities supplied to a ship, and that necessities supplied to a ship do not give any maritime lien upon a ship. The first Act which altered this state of the law was the 3 & 4 Vict. c. 65. The 6th section of that Act is in these terms: "Be it enacted, that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage or for necessities supplied to any foreign ship or sea-going vessel, and to enforce payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the services were rendered or damage received or necessities furnished in respect of which such claim is made." In the construction of this section it has been held in several cases in the Court of Admiralty that there is a maritime lien in the case of supplies and necessities furnished to a foreign ship; and their Lordships do not mean to intimate any doubts as to the validity of those decisions. But they are of opinion that those decisions may be supported upon the ground that, though it is perfectly true that the only words used in the section are "that the High Court of Admiralty shall have jurisdiction,"—which words seem hardly sufficient in themselves to create a maritime lien—yet, looking at the subject matter to which that section relates, it appears designed to enlarge the jurisdiction which the Court of Admiralty already had in matters forming the subject of a maritime lien. These are strong grounds for holding that as respects salvage and as respects collision, which already gave a maritime lien when they occurred on the high seas, it was intended that they should also when they occurred in the body of a county equally give a maritime lien, and that being so as to salvage and as to collision, it might be well said that, necessities immediately following, it was intended that the same rule should apply in the case of necessities. That being so, the case then comes to the decision of the statute in question; and it may be observed that the mortgage of ships is a security which is well known and which has existed in this country for many years. It is quite clear that, according to the decisions of the courts of common law and according to the express provisions of the Merchant Shipping Act,

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which say that a mortgagee is not to be deemed an owner except for the purpose of enforcing his security, a mortgagee was never liable at common law for supplies furnished to the mortgagor while the mortgagor continued in possession of the ship. Then the question is, did the Legislature intend to alter that rule, and to say that, in certain cases specified in this section, instead of the mortgagee having precedence over the material man who had furnished supplies to the ship on the credit of the mortgagor remaining in possession, that rule should be altered, and that the material man should take precedence? Now, in order that the rights of different classes, the subjects of the Queen, should be altered, one certainly would expect that such an alteration should be expressed in tolerably clear terms. The 4th section, which begins this subject, says this: "The High Court of Admiralty shall have jurisdiction over any claim for building, equipping, or repairing of any ship if at the time of the institution of the cause the ship or the proceeds thereof are under the arrest of the court." Now, it is admitted by Dr. Deane, and their Lordships think it is quite clear, that that 4th section does not give any maritime lien, because it only gives jurisdiction in respect of "any claim for building, equipping, or repairing of a ship if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the court." Now, it certainly would be absurd to say that the question whether the mortgagee is or is not to take precedence over a person who had either built or repaired or equipped a ship should depend upon the accidental circumstance whether some third person had happened to commence a suit in the Court of Admiralty and arrest the ship. That would certainly be a most irrational construction, and therefore it seems clear that that section at any rate does not give any maritime lien, but merely entitles the person who has done the repairs or built the ship to be paid out of the proceeds, in preference at any rate to the owner, to whom the proceeds would otherwise be given up. The 5th section, which immediately follows, is: "The High Court of Admiralty shall have jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." The question is, does that give a maritime lien? Dr. Lushington, in the case of *The Pacific* and in the case of *The Troubadour*, has decided that it does not, for a reason which appears to their Lordships to itself to be amply sufficient, namely, that the jurisdiction of the Court of Admiralty is not made by this section to depend upon what is the state of things at the time when the supply is furnished, but is made to depend upon what is the state of things at the time when the suit is instituted; namely, whether there is at that time an owner of the ship domiciled in England. It is contended on the part of the appellants that the maritime lien attaches directly the supplies are furnished. But suppose that there is an owner at the time domiciled in England, then it is clear that the Court of Admiralty has no jurisdiction; and how can the maritime lien attach if things had not happened which gave the Court of Admiralty any jurisdiction over the matter at all? How can it be said that there is something inherent in the ship which

constitutes a charge on the ship when there is actually no mode of enforcing it at all, and the ship is perfectly free from it? Therefore in that case it does not attach. Suppose either the owner leaves England and becomes domiciled elsewhere, does it then attach? And suppose he comes back again, does it cease to attach? It appears to their Lordships that it is altogether inconsistent that a maritime lien should exist on Monday and should not exist on Tuesday, and should then come back again on Wednesday. A maritime lien must be something which adheres to the ship from the time that the facts happened which gave the maritime lien, and then continues binding on the ship until it is discharged, either by being satisfied or from the laches of the owner, or in any other way by which by law it may be discharged. It commences and there it continues binding on the ship until it comes to an end. It would involve this absurdity that the rights of all other parties would be shifted according as this maritime lien existed or not, as in the instance which has been put during the argument, if goods were sold to a shipowner who was an Englishman, and domiciled and resident in England, then of course the man who so repaired or furnished supplies for the ship has no remedy at all by law except a personal action against the owner. Suppose that man becomes bankrupt, then he has no remedy except to prove against his estate. The trustee sells his ship, as he must do under the bankruptcy. If he sells it to a man who is also an Englishman living in England, then no right accrues, and he is left solely to his remedy against the bankrupt. But if at any time, within six years I presume, when it may be barred by the Statute of Limitations, and I do not know whether that would make any difference, yet if at any future time that ship becomes the property of a man who happens to be domiciled in the colonies, then it is said the right is to attach to it, and it may be seized against anybody, and all the interests of the real owners of the ship at that time may be sacrificed for the purpose of paying the man who had simply furnished his supplies on the credit of an owner who became bankrupt. Therefore their Lordships think it is quite sufficient to say that, according to the true construction of this section, the *res*, the ship, does not become chargeable with the debt for necessities until the suit is actually instituted, and that all valid charges on the ship to which any person other than the owner of the ship who is liable for the necessities is entitled must take precedence. Their Lordships, therefore, will humbly recommend Her Majesty that this appeal be dismissed, with costs.

Solicitors for the appellants, *Westall and Roberts*.
Proctors for the respondents, *Dyke and Stokes*.

Feb. 8, 9, and 20, 1872.

(Present: The Right Hon. Sir JAMES W. COLVILLE, JAMES and MELLISH, L.J.J., and Sir MONTAGUE SMITH).

THE GAUNTLET.

HER MAJESTY'S PROCURATOR-GENERAL (app.), v. ELLIOT AND OTHERS (resps.)

Naval service—Towing prize of war—Warlike naval operation—Construction of penal statute—Foreign Enlistment Act 1870 (33 & 34 Vict. c. 90).

The detaching a prize crew after capture to take charge of and to bring a prize and its native crew as prisoners of war safely to a port of the captors, is essentially a warlike naval operation.

A merchantman, on lawful capture by a belligerent vessel, and whilst held by a naval prize crew detached from that vessel, is in the actual possession of the Government of her captors. Her prize crew are still part of the crew of the belligerent vessel, share in captures made by that vessel, and may make lawful captures whilst on board the prize. The prize, therefore, ceases to be a merchantman, and becomes a vessel engaged in the naval operations of her captors.

A British steam tug was sent by her owners, Her Majesty being neutral, to tow such a vessel from British waters to the waters of her captors, the tug owners knowing that she was a prize; the tug performed the towing service:

Held (reversing the judgment of the Admiralty Court), that the towing was assisting in a warlike naval operation, and that the sending the tug for that purpose was a despatching for the purpose of taking part in the naval service of a belligerent within the meaning of the Foreign Enlistment Act 1870 (33 & 34 Vict. c. 90), s. 8, subsec. 4, and that the tug was therefore forfeited to the Crown. Where an offence is brought within the words and within the spirit of a penal statute, that statute must be construed like any other instrument, according to the fair common sense meaning of the language used; and a court is not to find any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found in the same language in any other instrument.

Quære, can the Crown be condemned in or receive costs in such a suit?

THIS was an appeal by the Queen's Proctor in a suit instituted on behalf of the Crown, against the steaming *Gauntlet*, in the High Court of Admiralty, for an offence against the provisions of the Foreign Enlistment Act 1870 (33 & 34 Vict. c. 90). The owners of the *Gauntlet* were charged with having on the 27th Nov. 1870, despatched that vessel with intent and knowledge, and having reasonable cause to believe that she would be employed in the naval service of France, then at war with Germany, both nations being at peace with Her Majesty. *La Provence*, a French man-of-war, brought, on Nov. 24th, a German merchantman, called the *Lord Brougham*, into the Downs, as a prize of war. The *Lord Brougham* had on board a prize crew and some of the German sailors, as prisoners of war. *La Provence* left the Downs, and the *Gauntlet* was engaged by the French consul, at Dover, to tow the *Lord Brougham* to Dunkirk, and on Nov. 27th she did so tow her to Dunkirk. The *Gauntlet* was arrested by the order of the Government and the suit instituted for her condemnation. The learned judge in the court below held that there was no naval service, and dismissed the suit with costs. The facts, which were chiefly admitted, the pleadings, and the judgment, will be found 25 L. T. Rep. N. S. 69; ante, p. 86.

From this judgment the Crown appealed, on the grounds, as stated in their case on appeal—First, because the towing a prize of war was a naval service; secondly, because such towing was against the Foreign Enlistment Act 1870, and rendered the *Gauntlet* liable to condemnation; thirdly, because the Foreign Enlistment Act 1870 conferred no

power on the Court of Admiralty, under the circumstances of the present case, to give costs against the Crown. The respondent's case on appeal submitted that the judgment ought to be upheld—First, because the *Gauntlet* was not employed in the naval service of France, within the meaning of the Foreign Enlistment Act 1870; secondly and thirdly, because the petition and facts proved and admitted, showed no offence against that Act; fourthly because the Crown failed to prove their case, as alleged in the petition; fifthly, because the *Gauntlet* was only engaged in the ordinary course of her employment; sixthly, because the removal of the *Lord Brougham* from the Downs was ordered by Her Majesty's collector of customs, and it was impossible to remove her without the assistance of a steaming tug.

The Solicitor-General (Sir G. Jessel, Q.C.), the Queen's Advocate (Sir Travers Twiss, Q.C.), and Archibald, for the Crown (the appellants).—The sole question is whether this was a naval service. Pilotage on board a belligerent vessel is by the interpretation clause a naval service, and this service was in the nature of pilotage. The interpretation clause of the Act says that naval service shall "include" certain things, and must there be taken to imply that all similar acts are offences against the Act. An interpretation clause does not narrow the meaning of an Act, but extends it: (*Ex parte Ferguson and Hutchinson*, L. Rep. 6, Q. B. 280; 24 L. T. Rep. N. S. 96; ante, p. 8.) The word "include" gives a still more extensive meaning to the Act than the word "mean," which is generally used in such clauses. It is unnecessary to consider whether the prize had passed into the possession of the French Government. She was a ship of war to all purposes, and in rendering service to her the tug rendered a naval service. The prize crew were entitled to make lawful captures, and were for that purpose still part of the crew of the French man-of-war *La Provence*. The crew of *La Provence* would have been entitled to share in any captures, so made: (*The Frederic and Mary Anne*, 6 C. Rob. 213.) Part of the German crew were on board the prize as prisoners of war, and the prize crew were there to guard them and the prize. No commission was necessary to make her a ship of war any more than it would have been in a boat belonging to *La Provence*. By towing this prize the tug released *La Provence* from the duty of towing the prize into French waters, and so put her in a position to commit other belligerent acts. The defendants had knowledge that this was a French prize; and, even if the parties acted in ignorance or forgetfulness of the law, there was an actual "despatch" within the meaning of the Act. The question of the enforcement of the penalties is for the consideration of the Crown. The object of the Act is to prevent British territory from being made a place of hostile operation. The judgment in the court below assumes that the prize was an ordinary merchantman. This could not be so, as she was in the possession of a prize crew before condemnation, and even after condemnation she would not be an ordinary merchantman until sold and used as such. To vest the property in the captors there must be condemnation; and before condemnation the property is in the general owners: (*Goss v. Withers* 2 Bur. 683.) A French prize does not pass until after condemnation: (*Pistoyer et Dunverdy, Traitée des Prises Maritimes*, 173, 176, 225, 229.) She was

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the property of the French Government, and was being used in their naval operations. With respect to costs, the Crown can neither recover nor be condemned in costs:

Atkinson v. H. M. Proctor, L. Rep. 2 P. & D. 255;
Wilson v. Wilson, L. Rep. 1 P. & D. 180; 14 L. T. Rep. N. S. 674;

The Leader, Bro. & Lush, 19;
Reg. v. Beadle, 7 E. & B. 492.

The 19th section of this Act is not applicable in such a case as this.

The *Admiralty Advocate* (Dr. Deane, Q.C.) and *Edwyn Jones* for the defendants (the respondents).—The words in the interpretation clause, "when engaged in naval or military service," imply that a pilot may, under some circumstances, be lawfully employed by a belligerent vessel, and consequently a tug may be lawfully employed also. The meaning of "naval service" is shown by 59 Geo. 3, c. 69, s. 2. It must be employment in a warlike operation or employment coincident with warlike operation. *Reg. v. Carlin, The Salvador*, (L. Rep. 3 P. C. 231; 23 L. T. Rep. N. S. 203; 3 Mar. Law Cas. O. S. 479) shows there must be aggression "against any prince." [MILLER, L.J.—Those words are omitted in the present Act.] The service must be undoubtedly for some warlike purpose, and not such service as may be construed either as peaceful or warlike:

The International, L. Rep. 3 Ad. & Ec. 321; 23 L. T. Rep. N. S. 787; 3 Mar. Law Cas. O. S. 523; Wheaton's *International Law*, by Dana, 8th edit., 438 et seq.

The prize was not a ship of war. She was not entitled to the protection of the French naval flag, but only to the protection accorded to a French merchant vessel. [JAMES, L. J.—If there had been an attempt by the German crew to recapture her, and the prize crew had killed a German in British waters, would they have been triable for murder in this country?] Their being here was against orders, and they would have been responsible for any acts done here. To have towed the vessel out of British waters would have been no offence, and the continuing the towage to Dunkirk cannot be said to be any more a naval service. The vessel was removed at the order of the collector of customs, and could not have been removed without a steam tug. The Crown have not shown in their petition, nor on the facts, proved any offence against the Act. The interpretation clause shows what offences are included in the meaning of the words "naval service," and what ships can be so used. A steam tug is not included.

The *Solicitor-General* in reply.

Cur. adv. vult.

Feb. 20.—The judgment of the court was delivered by—

Lord Justice JAMES.—In this case the Crown sought the condemnation of the respondents' ship the *Gauntlet*, for a violation of the Foreign Enlistment Act. The learned judge of the Court of Admiralty found that there was no such violation, and dismissed the petition of the Queen's Proctor with costs. The Crown, by the present appeal, complains of the finding and dismissal; and further, that if, the judgment and order in this respect were well founded, the Court of Admiralty had no jurisdiction to award costs against the Crown. The facts of the case are not in dispute, and may be briefly summarised. The respondent's steam-tug, under an agreement with the French consul,

made by one of her owners and the master, left its anchorage near the Ryde Pier to go to a vessel called the *Lord Brougham*, lying a few miles off in British waters, for the purpose of towing her across to Donkirk Roads, and did accordingly so tow her. The *Lord Brougham* was, and was (as their Lordships have no doubt) well known to all parties concerned to be a German merchant ship which had been captured by a French cruiser, and then was French prize of war. She had on board a French officer and a French prize crew, with some of the original crew as prisoners. The Crown contends that sending an English steam-tug expressly for the purpose of towing a prize to the captor's waters is despatching a ship from the United Kingdom for the purpose of taking part in the naval service of the belligerent power, and is therefore within the words and plain meaning of the prohibition. On the part of the respondent it is urged that, at all events, there was no conscious violation of the law; that the ship engaged in the transaction in the ordinary course of business, just as it would have towed any other ship across, and for the ordinary remuneration for such service; and that, in truth, the immediate cause of the hiring of the tug was the pressure of an English authority who insisted on the prize no longer remaining in British waters. The *Solicitor-General*, on behalf of the Crown, did not contest what may be called the moral innocence of the respondents, but insisted—and in their Lordships' opinion unanswerably—that parties knowing the facts constituting their act a legal offence, cannot be heard in a court of law to allege that they were ignorant of, or had forgotten, or, what is more probable here, never thought of the law. These are matters for the indulgent consideration of the Crown, but not matters which the Court of Admiralty or this board has any jurisdiction to deal with. It was much pressed in the court below, and again before their lordships, that the statute being a penal, or as it was phrased, a highly penal one, it was to be construed strictly. It appears to their Lordships necessary to say a few words as to this topic, which is so often pressed in argument. No doubt, all penal statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common sense meaning of the language used; and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument. It was contended in the court below, but without success, that the words in the prohibitory clause were to be restricted by the words in the definition clauses, and that contention has been repeated here. In the court below that argument was used in support of a contention that "steam-tug" was not within the definition. Here, in support of the contention, that the *uses* are

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limited to the ones specifically mentioned in the definition. The words, however (as was pointed out by the learned judge), are not "shall mean," but "shall include." In some of the same clauses in the same Act the other words "shall mean" are used, and in the other clauses in which the words "shall include" are used, the most absurd consequences would follow if the words "shall include" were construed as equivalent to "shall mean," e.g., the clause as to what shall be included under the words "United Kingdom." Indeed, as to this particular clause itself, consequences no less absurd would follow if the things included were to be considered as an exhaustive enumeration, and so as to be the only things comprised. Their Lordships have therefore no hesitation in concurring with the learned judge that the words in the definition can have no effect in restricting the meaning to be put on the words of the prohibitory section. And the whole question is really what is the meaning of the words in that section "naval service." In the court below a good deal of the argument appears to have turned on, and a good deal of the judgment deals with the question as to how far it is essential to the legal completion of a captor's title by formal judicial condemnation, that the prize should be brought *infra præsidia* to give the prize court jurisdiction to pronounce such condemnation. It does not appear material to their Lordships to consider that question. It appears to have been considered that if it had been made out that it was essential, then the act of the steaming in going to tow the prize into French waters, and so *infra præsidia*, would be an act done in the naval service of the captor power. But it appears to have been overlooked that that is not the only way in which, nor the only object for which, service can be rendered to a belligerent in connection with a prize. It would seem to be quite as important, to say the least, to complete a capture *de facto* by lodging it in a place of safety, as to complete it *de jure*, by bringing it within the jurisdiction of the captor's prize court. What was the position of the *Lord Brougham* when the defendant's vessel undertook the towing of her to French waters? She had (subject to the possibility of escape or recapture) ceased to be a German merchantman. She certainly had not become a French merchantman. She was in the actual possession of the French Government. She was under the command of a French naval officer, with a crew of sailors of the French navy, temporarily detached from the French ship of war for that purpose. The officer and crew were still part of the ship's crew—entitled to share in any fresh prize made by the latter—bound to share any prizes which they themselves might have made, as they lawfully might, of any German ship coming in their way. They had in our waters the right of a French man-of-war, as against any action of our municipal law, in respect either of their prisoners or their booty. Their Lordships agree, therefore, with the contention on the part of the Crown that it is impossible to distinguish such a ship, because it had been a prize, from the case of a tender or a pinnace detached for any purpose from a ship of war, or any other vessel taken up by or for the belligerent power in the course of its naval operations. The counsel for the respondents contended that naval service must mean service in or directly connected with some warlike naval operation. In their Lordships' opinion the detaching a prize crew after

capture to take charge of the prize, and to bring it and the prisoners safely home is essentially a warlike operation—as much and as important a warlike operation as the chase before the capture. Their Lordships therefore have no doubt that sending an English steaming for the express purpose of taking the detached prize crew, its prisoners and booty, speedily and safely to French waters, where the prisoners, prize, and booty would be taken charge of by the French authorities, and the prize crew set free to rejoin and strengthen their own ship, was despatching a ship for the purpose of taking part in the naval service of the belligerent, within the plain meaning, the words and the spirit of the Act of Parliament. Their Lordships will, therefore, humbly recommend that the decision of the Court of Admiralty be reversed, and that, in lieu thereof, an order of condemnation be made as prayed by the Queen's Proctor. On the subject of costs it is no longer the interest of the respondent to contest the proposition of the Solicitor-General, who admits that his principle is to apply as well against as in favour of the Crown, and their Lordships have therefore not had the assistance of the arguments on the other side which they would have desired to hear if it had been necessary to pronounce any decision on the point.

Appeal allowed.

Proctor for the Crown, *The Queen's Proctor*.
Solicitors for the respondents, *Lowless, Nelson, and Jones*.

Feb. 2, 3, 6, 7, 8, and 21, 1872.

(Present: The Right Hons. Sir JAMES W. COLVILLE;
Lord JUSTICE MELLISH; Sir MONTAGUE SMITH;
and Sir R. P. COLLIER.)

THE TEUTONIA; DUNCAN AND OTHERS (apps.) v.
KÖSTER (resp.)

*Non-delivery of cargo—Deviation—Reasonable delay—
Outbreak of war—Port named unsafe—Duty
of consignees to name another port—Construction
of charter-party—Payment of freight.*

*War may exist de facto without a declaration, but
only where there is an actual commencement of
hostilities.*

*A master, on receipt of the credible information that
his vessel will be exposed to imminent peril by con-
tinuing his voyage, is justified in deviating or
pausing for a reasonable time to avoid that peril,
or to make inquiries.*

*To justify a master in so pausing or deviating it is
not necessary that the ship and cargo should run a
common risk from the peril.*

*Where a charter-party stipulates that a cargo is to
be delivered at one of several safe ports as ordered
by the consignees, and it becomes impossible, by
the outbreak of war, after an order is given, to
deliver at the port named, and the master, without
committing a breach of contract, puts into another
port within the charter, he is entitled to a new
order, and is not bound to deliver there without
payment of full freight. (a)*

(a) In *Oyden v. Graham*, cited both in the argument and in the judgment, Blackburn, J. expresses an opinion that, if a port becomes closed after an order is given, the owners of the goods are not bound to give another order, and the shipowner must deliver without freight, but this was not necessary to the decision of that case and the present decision is directly contrary where there are several possible ports of discharge named in the

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A Prussian vessel shipped a cargo of nitrate of soda (contraband of war) under a charter-party by which she was to proceed to C. O. or F. for orders, at the option of the master, where he was to receive orders to proceed to any one safe port in Great Britain, or on the continent between Havre and Hamburg, both included, and there deliver the cargo. The vessel duly called at F. on July 10th; the master received orders on July 11th for Dunkirk, a French port, for which he at once set sail. On July 16th, off Dunkirk he was informed by a French pilot in official uniform that war had been declared. The master thereupon put back to the Downs to make inquiries, and arrived there on July 17th, a Sunday, and could get no further information; he was ordered by his owner not to go to Dunkirk, and on July 19th put into Dover. On July 19th war was actually declared by the French against Prussia. On July 23rd, the master refused to go to Dunkirk. On August 1st, the consignees demanded the cargo of Dover without offering freight, but the master refused unless paid freight.

Held (affirming the decision of the Admiralty Court) that, as it would have been illegal and dangerous to go into Dunkirk if war had actually existed, the master was upon the information received, justified in putting back to the Downs to make inquiries, and that the time occupied before the declaration in making those inquiries was a rea-

sonable time, and that upon the declaration of war, the master was not bound to proceed to Dunkirk.

Held also, that, as there was no improper deviation or delay in putting into Dunkirk in the first instance, the case was the same as if war had broken out when the vessel first arrived off Dunkirk, and, there being no breach in putting into Dover, the contract was not, under this charter-party, impossible of performance, or dissolved by the outbreak of war, but was capable of being substantially performed; that the consignees, as they had demanded possession at Dover (a port within the charter), were not entitled to delivery except on payment of full freight.

THIS was an appeal from a judgment of the High Court of Admiralty, in a cause instituted under the 6th section of the Admiralty Court Act 1861, on behalf of the consignees of a bill of lading of the cargo of the *Teutonia*, against that vessel, and her freight, and her owners intervening to recover damages for breach of contract in not delivering the cargo at Dunkirk, according to the terms of the charter-party, and for not delivering the cargo to the consignees at Dover, after the refusal to proceed to Dunkirk, the master refusing to deliver except on payment of freight. The Admiralty Court dismissed the suit with costs, whereupon the consignees appealed. The facts will be found set out in the judgment of their Lordships, and in the report of the case below: (see 24 L. T. Rep. N. S. 521; 1 ante, p. 32.)

Feb. 2, 3, and 6.—*Butt, Q.C.*, for the appellants.—This question must be decided on English law, as the German law was neither pleaded nor proved. We admit that it is illegal to trade with the enemies of our sovereign. We also admit that nitrate of soda is contraband of war. The master of the *Teutonia* has not performed his contract, and it lies upon the defendants to show good excuse for that non-performance. There was no actual war before the declaration. The telegram from Bismarck to Bernstorff, quoted in the judgment below, is no proof of the existence of hostilities. It is true that to constitute a state of war there need be no declaration, but there must be some act of war. The mere mobilization of an army, or even the moving of that army to the frontier to await orders is not an act of hostility. We contend that the master was bound to put into Dunkirk on July 16th, or before the 19th, and that having refused to do so, he was bound to deliver the cargo to the consignees at Dover without payment of any freight. By his refusal to proceed to Dunkirk, he lost his lien on the cargo for freight. [MELLISH, L.J.—Has it ever been decided that, where a charter-party names several ports to which the ship may be ordered at the port of call, the naming of one particular port by the consignees makes the charter-party read as if that port only had been originally inserted in the charter?] There is no such case. The master was not prevented from proceeding to Dunkirk by any of the excepted perils, and we are therefore entitled to judgment unless the defendants can show that they were not bound to proceed. The defendants say that war actually existed, and that even if it did not exist the master received such intelligence off Dunkirk that he was justified in putting back to make inquiries. I contend that even if he was justified in putting

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back he could have made the inquiries on July 17th, and would then have found that no war existed, and could have proceeded to Dunkirk on July 18th. The evidence used by the Judge in the court below, as to the existence of war on July 16th, ought not to have been used at all. Documents laid before Parliament are no evidence of the existence of war. Moreover, those documents do not show that war did exist on that date. The information received by the master from the French pilot was not accurate. To entitle the master to put back there ought to have been some peremptory cause, or an actual change of relations between France and Germany: (*Atkinson v. Ritchie* 10 East, 530.) (MELLISH, L.J.—Was he not entitled to put back to get information to show what he had heard to be true or false? It is not enough to show that they heard of war existing; they must show that something did actually exist, and that the information received justified his act. The cases, cited in the judgment for the proposition that war may exist *de facto* before a declaration, show open acts of hostility:

The Navajo, 4 C. Rob. 251;

The Eliza Anne, 1 Dode. 244.

On 19th July, even if there was no breach before, the outbreak of war absolutely dissolved and put an end to the contract, and annulled all obligations.

Abbott on Shipping, 11th edit. p. 453;

1 Parsons on Shipping, 329;

Esposito v. Bouden, 7 E. & B. 763; 27 L. J. 17 Q. B.

The plaintiffs were, therefore, at once entitled to their goods. The cases cited in the judgment as to the dissolution of the contract are no authority against the appellants. *Pole v. Cetecovich* (3 L. T. Rep. N. S. 438; 9 C. B. N. S. 430; 30 L. J. 102, C. P.) only decides that under the circumstances there shown the master was entitled to wait for further orders, and moreover in that case both the shipowners and charterers ran a common risk, whilst here there was risk only to the shipowner. Unless a shipowner carries the goods to their destination, or so deals with them as to satisfy the consignee, he can have no claim for freight. Where the original contract is ended, the acts of the parties must raise an implied contract before freight can become due. *Osgood v. Groning* (2 Camp. 466; Abbott on Shipping, 11th edit., pp. 401, 402), cited in the judgment below, shows an implied contract, for the Lord Chancellor ordered the consignee to accept the goods in London if a jury should find that it was not reasonable that the master should proceed to Rotterdam. *The Soblomaten* (L. Rep. 1 Adm. 293; 15 L. T. Rep., N. S. 393; 2 Mar. Law Cas. O. S. 436) also proceeded on the ground of an implied contract, by acceptance of the goods at a port short of their destination. *Wilson v. Bennet* (15 Fac. Coll. 251) also shows an implied contract by abandonment by the owner to the underwriters. *The Friends* (Edwards' Adm. Rep. 246), was a case in the prize court, and if Lord Stowell exercised equitable jurisdiction there, and gave *pro rata* freight, that is no authority for saying that the Instance Court of Admiralty has an equitable jurisdiction, particularly under the Admiralty Court Act 1861, s. 6, which rather gives that of the common law courts. Lord Tenterden (Abbott on Shipping, 11th edit., p. 402), does not seem to have noticed this distinction. *Morgan v. Insurance Company of North America* (4 Dallas Rep. 421), shows that the cargo was placed in such a position that it was

considered to have been delivered to the consignee. Common law could give no right to *pro rata* freight. The power of equity to give it depends upon *Osgood Groning* (sup.) and the Admiralty Court does not exercise an equitable jurisdiction under sect. 6 of the Admiralty Jurisdiction Act 1861:

The St. Cloud, Br. & Lush. 4; 8 L. T. Rep. N. S. 54;

1 Mar. Law Cas. 369.

Feb. 6.—*Clarkson* follows on the same side.—The terms of the charter-party show that Dunkirk, once named by the consignees, must be considered as if it were the only port mentioned in the charter-party. Can the master be said to have acted reasonably in the interests of both ship and cargo? (*Pole v. Cetecovich*, 2 F. & F. 104.) If there was a breach of contract in not proceeding to Dunkirk, the appellants are entitled to their goods without paying freight, and even if there was no breach, they are entitled to possession: (*Tindall v. Taylor*, 4 E. & B. 219.) There was no consent to accept the goods short of destination, therefore no freight due:

Laddard v. Lopez, 10 East, 325;

Hunter v. Prinsap, id. 378.

The fact of this suit being brought in the Court of Admiralty cannot affect the question. The court administers common law only, when exercising jurisdiction by statute similar to that of the common law courts. In *The Dom Francisco* (Lush. 468; 5 L. T. Rep. N. S. 460; 1 Mar. Law Cas. O. S. 169), Dr. Lushington held that under this section he was bound to proceed on principles of law, and that the power of the Admiralty Court to administer equity was limited. The 6th section was passed to remedy evils arising from short delivery and damage to cargo by foreign ships which, by leaving this country, took away from the owners of cargo their remedy. The court has no power to deal with freight under the section. Before freight is due there must be an acceptance: (*The Newport*, Swaby, 335.) *The Friends* (sup.) is distinguishable; Lord Stowell there says that the court does not make contracts any more than the courts of common law; the ground of the decision was that the loss was common to both parties, both were affected by the blockade; here only one party is affected. Where the goods are not carried to their destination, owing to the incapacity of the ship, no freight is due: (*The Fortuna*, Edwards' Adm. Rep. 56.) That was a case in the prize court, but this case is much stronger, as it is a mere question of contract.

Milward, Q. C. for the respondents (the shipowners).—I contend that the documents before the learned judge, and cited in the judgment, were sufficient proof of the existence of a state of war on 16th July. Even if war did not then exist, the master, upon the information he received from the pilot, was justified in putting back to the Downs for information. Apprehension of danger, if founded upon reasonable evidence, justifies deviation or delay; no doubt the danger must be obvious, and it was so here.

2 Parsons on Marit. Law, 299, 300.

1 Phillips on Insurance, No. 1023;

1 Arnold on Marine Insurance, 470, 4th edit.

Driscoll v. Passmore 1 B. & P. 200;

Driscoll v. Bovill, ib. 313;

Post v. Phœnix Insurance Company, 10 Johnson' (N. Y. Supreme Court) Reps. 78;

A reasonable delay is justifiable, and there was

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no breach before the performance of the contract became illegal:

Pole v. Cetovitch (sup.);

Avery v. Bowden, 5 E. & B. 714; 6 E. & B. 953.

Is freight due or not? Before this Act there was no practical means of bringing this suit, and the Act gives the necessary jurisdiction to the Admiralty Court, and therefore it must be supposed that the Legislature intends that the jurisdiction shall be exercised according to the principles usually applied in that court. That the Admiralty Court has a jurisdiction peculiar to itself, is shown in the argument of Lord Stowell in *Smart v. Wolff* (3 T. R. 623, 932). The jurisdiction is of advantage to plaintiffs, and if they adopt it, they must take it subject to existing rules. I contend that the court is a court of equity. A court of equity treats as done what ought to be done, as in the case of *Ugwood v. Groning (sup.)*, where the Lord Chancellor ordered the goods to be accepted if it was reasonable that the master should stay in the port of London. [Sir M. E. SMITH.—Is it not the rule that a party to a contract who is to be paid upon completion, cannot claim payment when only part is performed? *Appleby v. Myers* (L. Rep. 2 C. P. 651; 36 L. J. 331, C. P.; 16 L. T. Rep. N. S. 669).] The Court of Admiralty, as a court of equity, will say that these goods should have been accepted at Dover, and therefore will consider them as having been so accepted, and the contract as complete.

The Friends (sup.);

The Dom Francisco (sup.).

By the terms of the charter-party the master was entitled to be sent to a safe port. The contract is not that the port shall be safe when the ship sails, but when the order is given, and when she arrives off the port of destination: (*Ogden v. Graham*, 1 B. & S. 773; 31 L. J. 26 Q. B.). If the order to go to Dunkirk was bad there was substantially no order, and the master is entitled to put into any port within the charter: (*Sieeking v. Maes*, 6 E. & B. 670). The appellants were bound to substitute another order. Freight is due even when the master has lost some of the goods by his own negligence: (*The Norway*, Br. & Lush. 377, 404; 13 L. T. Rep. N. S. 57; 13 L. T. Rep. N. S. 50; 2 Mar. Law Cas. O. S. 168, 254.) An implied contract may be founded upon meritorious service rendered by the ship to the owners of cargo.

MacLachlan on Shipping, 395, 396;

Mitchell v. Darthes, 2 Bing. N. C. 555;

Abbot on Shipping, 11th edit. pp. 385, et seq.;

Lutwidge v. Grey (there reported, p. 389).

[MELLISH, L. J.—In the case you cite the contract was capable of being performed, but the strong point against you is that it is contended that the contract was dissolved by the war.] If a voyage be interrupted there may be a claim for *pro rata* freight.

Curling v. Long, 1 B. & P. 634;

Luke v. Lyde, 2 Barr. 882.

Cook v. Jennings (7 T. Rep. 586), was upon an express covenant to deliver, and is distinguished by the judges who decided it, from *Luke v. Lyde (sup.)*, which was in *assumpsit*. *Liddard v. Lopes (sup.)* is distinguishable because in that case there was an absolute refusal to accept the goods, whilst here the appellants were willing to accept, but refused freight. *Hunter v. Prinssep (sup.)* proceeded on the ground that the master unwarrantably sold the

cargo. *The Friends (sup.)* was rather a case of salvage than prize. [MELLISH, L. J.—That decision distinctly goes upon the ground that the incapacity to proceed was common to both ship and cargo.] In *The Hoop* (1 C. Rob. 180) freight was given, although the contract was illegal and dissolved. He cited also:

The Fortuna (sup.);

Vlierboom v. Chapman, 13 M. & W. 230;

Notara v. Henderson, L. Rep. 5 Q. B. 346; 22 L. T.

Rep. N. S. 577; 3 Mar. Law Cas. O. S. 419;

The Solbomsten (et sup.).

Damages against us would be merely nominal, as the appellants get as much benefit from delivery here as in Dunkirk.

Feb. 7.—Cohen followed on the same side.—There was no contract to proceed direct to the port of destination, but only a contract to deliver within a reasonable time. A master is justified in deviating under circumstances which would not justify non-delivery. None of the cases cited on questions of contract draw any distinction between the ship and cargo, but treat them as one common adventure. The information received was such as a reasonable man would act upon. The contract was not thrown up at once by the master, as in the case of *Atkinson v. Ritchie (sup.)*. In this charter-party there are several ports to which the ship might have been ordered, and I contend that if the consignee have ordered her to a port which became unsafe before her arrival there, they are not entitled to the cargo without payment of freight. Where a contract, of which there has been no breach, is put an end to without the fault of either party, and one party is substantially benefited, I contend that he is bound to pay a quantum meruit. Again, I contend that this contract never was dissolved so as to put an end to all obligations under it. It has never been broken by the master, as he was always ready to deliver, and I submit that he has substantially performed his contract. The consignees were bound to name another port, and as they did not the law will say that they should have received at Dover, and have paid freight: (*The Norway, sup.*) In *Española v. Bowden (sup.)* the contract was held to be absolutely dissolved. If the contract is not dissolved the shipowner is not bound to deliver without freight. As to the question of *pro rata* freight, the law will imply a contract where it is equitable to do so. Implied contracts are not such as arise merely from the acts and intentions of the parties, but also such as the law presumes the parties ought to have intended. The law creates fictitious contracts; as in the case of the obligation of a surety to refund to his co-surety his proportion of the whole debt paid. A benefit has been received here and there is therefore an equitable right to freight or a quantum meruit.

Bell's Principles of the Law of Scotland, sects. 426, 428;

Leake on Contracts, p. 31.

In *Appleby v. Myers (sup.)* the contract was incapable of being performed.

Feb. 8.—Butt, Q.C., in reply.—The deviation was for the benefit of the ship only. The insurance cases on questions of deviation show that where masters deviate to avoid a peril for which the underwriters are liable by the policy, the owners may recover, but not where he deviates to avoid a peril not covered by the policy. The

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question in such cases really is, was the deviation for the benefit of both ship and underwriters.

O'Reilly v. Royal Exchange Assurance, 4 Camp. 246;
O'Reilly v. Gonne, 4 Camp. 240.

The same principle applies in this case. The contract was dissolved as the consignees, having given a definite order to go to Dunkirk, could only change that order by consent, which would have raised a new contract; no new order was given. The order was good as the port was safe at the time it was given, and the fact that it became afterwards unsafe does not make it an improper order. [Per BLACKBURN, J. in *Ogden v. Graham* (sup.)] There has been no acceptance of the goods, and, therefore, no implied contract. We are entitled to substantial damages as we are liable for breach of contract in not delivering at Dunkirk.

Cur. adv. vult.

Feb. 21.—The Judgment of the court was delivered by Lord Justice MELLISH.—This is an appeal in a cause instituted under the 6th section of the Admiralty Court Act 1861, on behalf of Messrs. Duncan, Fox, and Co., the consignees of a bill of lading of the cargo laden on board the ship *Teutonia*, against that ship and her freight, and against the owner of the vessel. The *Teutonia* was a Prussian brig, subject to the laws of Prussia, and her master and crew were subjects of the King of Prussia. The bill of lading, dated the 5th April 1870, was as follows: "Shipped in good order and well-conditioned by Sawers, Duncan, and Co., of Valparaiso, upon the ship *Teutonia*, whereof Köster is master for this present voyage, and now lying in the port of Pinaque, and bound for Cork, Cowes, or Falmouth for orders, 2742 bags, being nitrate of soda, to be delivered in the like good order and well conditioned at the port of discharge, the Act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever excepted, unto Messrs. Duncan, Fox, and Co., or assigns. Freight for the said goods to be paid as per charter-party." And by the charter-party referred to in the bill of lading it was agreed that, "after receiving on board the said cargo, the said vessel shall proceed either to Cork, Cowes, or Falmouth, at the option of the master, where he shall receive orders from charterer's agents within three days after his arrival to proceed to any one safe port in Great Britain or on the continent between Havre and Hamburg, both included, and there, according to bills of lading and charter-party, deliver the cargo. Freight to be paid in manner herein mentioned on a true and right delivery of the cargo in the port of discharge at and after the rate of 45s. British sterling per ton." The vessel arrived at Falmouth on the 10th July, and the master, whilst there, heard rumours that war was probable between France and Prussia. On the 11th July the master received orders from the consignees to discharge the cargo at Dunkirk, and he at once set sail for Dunkirk, and arrived at a distance of about fourteen miles off that port, at twelve o'clock at night of the 16th, which was a Saturday: and the master says that, after laying-to for about two hours, a regular pilot, in official uniform, came on board; that he asked the pilot about the war; that the pilot told him it had been declared two days ago; that he asked the pilot where he could bring-to in safety, so that he might ascertain whether war was declared or not; that the pilot offered to take him to Flushing, or the

Downs, or wherever he liked. The master elected to go to the Downs, and he anchored there on Sunday morning, the 17th, at ten o'clock. He says that on that day he could obtain no advice or information; that on the Monday, the 18th, he was on shore at Deal, and the German consul told him that war had broken out. He telegraphed to the owner, who was his father, and received an answer, forbidding him to go to Dunkirk, and on Tuesday, the 19th, he took the ship into Dover, as the nearest port. On the same 19th July the French declaration of war was delivered to the Prussian Government at Berlin, which was known the same day by telegraph in England. On the 23rd July an agent of the plaintiffs went to Dover, and required the master to proceed to Dunkirk, which he refused to do. Afterwards, on the 1st Aug., the plaintiffs required the master to deliver them the cargo at Dover, which he refused to do, unless he was paid his freight. Under these circumstances, the plaintiffs allege, that the master has committed two breaches of contract or duty; first, in refusing to proceed to, and deliver the cargo at, Dunkirk; and, secondly, they complain that, when the performance of the contract became impossible, and the contract was, as they allege, dissolved by the war, the master was not justified in refusing to deliver the cargo to the plaintiffs at Dover without payment of freight. The first question to be considered is, whether the master was bound to have entered the port of Dunkirk on the 17th July, and on that question the learned judge in the court below has found that, on the 16th July, the *Teutonia* could not have entered the port of Dunkirk with her cargo without being exposed to the penalties of trading with the enemy of her country; but that, if this was an erroneous application of the law to the facts at that date, the circumstances justified the master in pausing and making further inquiries as to the existing relations between his own country and France, and that he did not exceed the limits of a reasonable time in making the inquiry. Their Lordships have great difficulty in agreeing with the learned judge that the *Teutonia* could not have entered Dunkirk without being exposed to the penalties of trading with the enemy of its country on the 16th July. There does not appear to their Lordships to be any satisfactory evidence that a state of war existed between France and Prussia prior to the 19th July. Their Lordships do not think that either the declaration made by the French Minister to the French Chambers on the 16th July, or the telegram sent by Count Bismarck to the Prussian Ambassador in London, in which he states that that declaration appears to be equal to a declaration of war, amounts to an actual declaration of war. And though it is true, as stated by the learned judge, that a war may exist *de facto* without a declaration of war, yet it appears to their Lordships that this can only be effected by an actual commencement of hostilities, which, in this case, is not alleged. It is, however, unnecessary further to consider this part of the case, because their Lordships agree with the learned judge that the master of the *Teutonia*, when he was informed, on his arrival off Dunkirk, by the pilot, although incorrectly, that war had been actually declared two days before, was entitled to pause and to take a reasonable time to make further inquiries, and that he did not exceed the limits of a reasonable time in making inquiries

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If the master had entered Dunkirk, and it had turned out that war had been previously declared he would have entered it with notice, that he was entering an enemy's port, and this would have obviously exposed his ship to condemnation and might have exposed himself to severe penalties when he returned to his own country. It seems obvious that, if a master receives credible information that, if he continues in the direct course of his voyage, his ship will be exposed to some imminent peril, as, for instance, that there are pirates in his course, or icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger. And their Lordships agree, if authority was wanting, that the case of *Pole v. Cetkovitch (sup.)*, is an authority in point. It was argued, however, on the part of the appellants, that, to justify this course, both ship and cargo must be exposed to a common peril, whilst in the present case the cargo, being the property of a neutral owner, would have been in no danger from being carried into a French port, and it was argued that though a master might be justified in deviating from the direct course of the voyage for the purpose of avoiding a danger to which both ship and cargo were exposed, although it might afterwards turn out that the information upon which the master acted was incorrect, yet that if the reported danger was a danger to the ship alone, the master would commit a breach of contract by deviating from the direct course of the voyage unless the danger actually existed, and the master could allege that he was prevented by one of the perils excepted in the bill of lading from pursuing his voyage in the direct course. It appears to their Lordships, however, that there is no sound ground for this distinction; if the cargo had been a Prussian cargo it would have been exposed to the same danger as the ship from entering the port of Dunkirk, and it appears to their lordships that when an English merchant ships goods on board a foreign ship, he cannot expect that the master will act in any respect differently towards his cargo than he would towards a cargo shipped by one of his own country, and that it cannot be contended that the master is deprived of the right of taking reasonable and prudent steps for the preservation of his ship because from the accident of the cargo not belonging to his own nation, the cargo is not exposed to the same danger as the ship. On the whole, therefore, their lordships are of opinion, on this part of the case, that the master was justified in going to the Downs for the purpose of ascertaining whether war had actually been declared; and they also entirely agree with the opinion of the learned judge that the master was guilty of no unreasonable delay in not returning to Dunkirk before war was actually declared on the 19th July. The next question to be determined is, whether the owner of the ship is liable in damages because the master did not deliver the goods to the plaintiffs at Dover, and this depends on the further question, whether the master was bound to deliver the cargo at Dover without any payment in respect of freight. As neither party has relied on the law of Prussia in his pleadings, or given any evidence respecting that law, the question must be decided according to the law of England. The learned judge came to the conclusion that, although the

cargo had not been carried to or delivered at the port of destination, and although, therefore, the shipowner was not entitled to the freight agreed to be paid by the bill of lading and the charter-party, nevertheless, that he was entitled to some payment of freight, either *pro rata itineris*, or by way of compensation for the carriage of the goods from Piasqua to Dover. It was argued, however, before us on the part of the respondent, that, under the circumstances, the shipowner was entitled to be paid the freight which, according to the bill of lading and the charter-party, was to be paid on a delivery at Dover. The argument for the appellants assumes that the breaking out of the war rendered the performance of the charter-party illegal, and that, therefore, the contract between the parties was dissolved; and there can be no doubt that the breaking out of the war did render it illegal for the *Teutonia* to enter any French port, but the question is, whether, under the terms of this charter-party, the contract might not still have legally been performed by the delivery of the cargo at some of the other ports mentioned in the charter-party as ports at which the cargo might be delivered. The substance of the contract between the parties is that the cargo may be delivered at any one of a great number of ports; that the consignee is to have the selection of the particular port, but that he is bound to select a safe port—that is, a port at which the master can deliver the cargo, and earn his freight; and the question is, whether that contract is completely performed by the naming of a port at which it turns out in the event to be impossible to deliver. In *Ogden v. Graham (sup.)* it was held by the Court of Queen's Bench that the charterer, under a charter framed like this, committed a breach of contract by naming a port which was closed by the order of the Government of the country at the time he named it; and this case is a direct authority that, if the war had broken out before the consignee gave orders for the master to proceed to Dunkirk, the consignee would have been bound to name some other port than a French port as the port of discharge. It was, indeed, argued that, as it was known at the time when the orders were given at Falmouth, that there was great danger of war breaking out between France and Germany, Dunkirk was not even then a safe port, and that the charterer had no right to order the master to proceed there. Their Lordships, however, are not of that opinion; they think that, until the war was actually declared, the consignee was entitled to require the master to proceed to Dunkirk; and it is to be observed that the master, when he received the orders, made no objection to them, but proceeded on his voyage to Dunkirk. The question to be determined is, what is the effect of the named port becoming a closed port by reason of war breaking out between the time when the orders are given, and the time when the ship arrives? As their Lordships have already given their opinion that the master was guilty of no improper deviation or unreasonable delay in proceeding to Dunkirk, they think the case, as to this branch of it, is exactly the same as if the war had already broken out when the vessel first arrived off Dunkirk. Now, on the one side it is contended that, when once the consignee has named a port, which is an open and proper port at the time he names it, the bill of lading and charter-party are to be read exactly as if this was the only

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port of discharge named in them; on the other side, it is contended that, assuming the consignee committed no breach of contract in giving orders to the master at Falmouth to proceed to Dunkirk, yet, nevertheless, as in the event it turned out to be impossible for the master to deliver at Dunkirk, the consignee had not completely performed his part of the contract to name a port at which the cargo could be delivered, and that he was bound to select another port from among those named in the charter-party. There is no authority on the proper construction of the charter-party in this respect, but their Lordships are of opinion that they ought not to hold that the contract between the parties has become impossible of performance, and is therefore to be treated as dissolved, if by any reasonable construction it can be treated as still capable in substance of being performed. Although it is true that the court ought not to make a contract for the parties which they have not made themselves, yet a mercantile contract, which is usually expressed shortly, and leaves much to be understood, ought to be construed fairly and liberally for the purpose of carrying out the object of the parties, and it would seem very unjust to hold, because the consignee has named a port at which, without any fault on the part of the shipowner, it is impossible for the cargo to be delivered, that therefore the consignee is entitled to the possession of the cargo at the nearest neighbouring port, which in a charter framed like this, must necessarily be one of the ports named in the charter, without paying for the cargo any freight whatever. The ship, without any breach of contract on the part of the shipowner, has arrived at Dover; the consignee has required the master to deliver him the cargo there, and he has not required the master to proceed to any other port except Dunkirk, where it was impossible for him to go. The charter provides what freight is to be paid if the cargo is delivered at Dover, and how it is to be paid; and therefore it appears to their Lordships that they ought to hold that the contract was not dissolved by the impossibility of delivering the cargo at Dunkirk, and that the shipowner had not lost his chartered freight, nor his lien for it, at the time when the cargo was demanded at Dover. Their Lordships having come to the conclusion that the shipowner had still a lien for the full freight, it becomes unnecessary to consider whether, if Dunkirk had been the only port of discharge, the shipowner would have been entitled either to freight *pro rata itineris*, or to a sum by way of compensation for the carriage of the goods from Falmouth to Dover, and they wish to be understood as giving no opinion on these questions, which no doubt are questions of great difficulty and importance. On the whole, their Lordships will recommend to Her Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Hillier and Fenwick*.
Solicitors for the respondents, *Thomas and Hollams*.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING, H. F. POOLEY, and R. A. KINOLAH, Esqrs., Barristers-at-Law.

Monday, Jan. 15, 1872.

ANDERSON AND OTHERS v. THE PACIFIC FIRE AND MARINE INSURANCE COMPANY.

Marine Insurance—Misrepresentation of material fact—Honest expression of erroneous opinion honestly formed.

In a policy of marine insurance the safety of a particular place as an anchorage was a material fact. The assured knew nothing about the place. The assured also knew nothing about it, except that he had received a letter from the captain of the ship proposed to be insured, in which the captain expressed it as his opinion and that of the local pilot, that the place was a good and safe anchorage. This letter was, at the time of the making of the policy, communicated to the assured. In point of fact the place was not a good and safe anchorage, and the ship was lost there in consequence. The jury found that the captain honestly entertained the opinion he had expressed:

Held, that this was not such a misrepresentation by the assured as to vitiate the policy.

THIS was an action on a policy of insurance on the ship *Clarendon*, from Belize to Rendezvous Point, in the island of Turneffe, back to Belize, thence to other ports, and finally to London.

At the trial before Brett, J., at the sittings in London after Michaelmas term, it was proved that on or about the 28th Dec. 1870, plaintiffs' clerk, one Bruce, went to defendants' offices, where he saw one Drummond, defendants' manager, with respect to effecting a policy on the ship *Clarendon*. A conflict of evidence took place as to what was done on this occasion. Bruce stated that he told Drummond that the plaintiffs knew nothing about Rendezvous Point, further than this, that they had that day received a letter from the captain of the ship. Bruce alleged that he then read this letter to Drummond, in which the captain said of Rendezvous Point, "It is considered by the pilot here as good and safe anchorage, and well sheltered. I have been out and seen the place, and consider it quite safe." Drummond denied that Bruce had shown or read him this letter, and said that, without reading the letter, he had told him as a matter of fact that the place was a good and safe anchorage. Neither the parties themselves nor Bruce nor Drummond had any previous knowledge of the place as an anchorage. Drummond took a day to consider of it, and then the policy was effected, at an extra 1 per cent. beyond the ordinary rate from Belize being charged by way of premium. No bad faith was charged against the plaintiffs or their clerk. It appeared that the *Clarendon* was going out to Rendezvous Point to recover a cargo of mahogany, the cargo of another ship—the *Gibraltar*—which had been lost there a short time previously. So little was known by either party about the place, that it was called in the policy "Rendennis Point." The anchorage at Rendezvous Point was well protected by a reef from the violence of the waves, but it was not protected against the northerly winds, which blow very strong in that part of the world at certain seasons of the year. A gale arose while the *Clarendon* was at Rendezvous Point; the ship's anchor did not hold, and

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she was driven against the reef and totally lost. The defendants adduced strong evidence to show that Rendezvous Point was not a good or safe anchorage, but a very dangerous place; and they contended that, assuming Mr. Bruce's version of what took place between him and Drummond to be true, that amounted to a representation by the plaintiff that Rendezvous Point was a good and safe anchorage, and that as it was not such an anchorage, that was a misrepresentation so as to vitiate the policy. The learned judge left two questions to the jury: First, was the captain's letter read by Bruce to Drummond? Secondly, was the representation in that letter true? The jury answered both questions in the affirmative, and the learned judge thereupon directed a verdict for the plaintiffs.

Prentice, Q.C. (Murphy with him) moved for a new trial, on the ground of misdirection and of the verdict being against the weight of evidence. After the verdict of the jury, it must be conceded that the captain's letter was read by the plaintiff's clerk to the defendants' manager; but the learned judge ought to have directed the jury that, assuming that to be the case, the reading of that letter was tantamount to a statement by the plaintiffs that in point of fact Rendezvous Point was a good and safe anchorage and well sheltered. The only question for the jury would then have been, whether the place answered that description or not, and there was abundant evidence to show that it did not. *Jonides v. Pacific Insurance Company* (25 L. T. Rep. N. S. 490; L. Rep. 6 Q. B. 674) is an authority directly in favour of the plaintiffs to show that that was the effect of the reading by the plaintiff's clerk of the captain's letter. Blackburn, J., in delivering the judgment of the court, there says: "It was argued that a representation, if only as to an expectation or belief, is substantially complied with if the assured really had honestly entertained that expectation on sufficient grounds, and that the representation that he thought the ship a Norwegian ship was literally true. We think this expression tantamount to an assertion that she was the Norwegian." Moreover, the verdict was against the weight of evidence, as it was so abundantly proved that Rendezvous Point was notoriously a very dangerous place, that the jury ought to have found that the captain could not honestly have considered it a safe place and well sheltered.

WILLIAMS, J.—The defendants in this case seek to get rid of their liability under a policy of insurance on the ground of an alleged misrepresentation by the assured of a material fact. There is no doubt that such a misrepresentation, though made perfectly bona fide, will vitiate a policy, if intended at the time to be acted on by the insurer. The rule as to good faith in matters of insurance is so strict, that the assured is bound to communicate to the insurer any material circumstance within his knowledge that is not within the ordinary common knowledge of an underwriter. Moreover, if it turns out that in effecting the policy the insurer had misstated or concealed a material fact, the policy is void, without its being necessary to show any bad faith on the part of the insurer. In this case there does not appear to have been any concealment on the part of the plaintiffs. The jury have found as a fact that the plaintiff's clerk read to the defendants' manager the letter that the plaintiffs had received from the captain of the ship, in

which the captain had said of Rendezvous Point, "It is considered by the pilot here as good and safe anchorage, and well sheltered. I have been out and seen the place, and consider it quite safe." On the part of the defendants it is contended that that is a misrepresentation such as to vitiate the policy, as it was abundantly proved that Rendezvous Point was not a good and safe anchorage. If then we take the letter to be a statement by the master that, as a matter of fact, Rendezvous Point was a good and safe anchorage, the plaintiffs, no doubt, would be bound by his misrepresentation. But the question arises, whether the expressions contained in the captain's letter amounted to an absolute statement of a fact, or were only an expression of opinion. If the letter were only an expression of opinion and the jury had found that, in the state of the facts, the captain could not have honestly formed or entertained the opinion, it seems to me that the plaintiffs would be bound by it. But the jury have found that the opinion was honestly formed. Then, do the words amount to an absolute statement of a fact? I do not think they do; nor do I think that the defendants' manager could have so understood them at the time of effecting the policy. Neither the plaintiff's clerk nor the defendants' manager appear to have known much about the place. All the information that the plaintiffs had was laid before the defendants. That was found as a fact by the jury. The plaintiffs had no other information about the place, beyond the captain's letter, and that contains merely an expression of his opinion—an opinion which the jury have found to have been honestly formed. I think, then, that the direction was right, and that as to the misdirection there must be no rule. With regard to the verdict being against the weight of evidence, the facts appear to have been fairly laid before the jury, and as the learned judge does not appear to be dissatisfied with the verdict, there will be no rule on that point either.

BYLES, J.—I am of the same opinion. The captain's letter does not contain the statement that Rendezvous Point was a safe and good anchorage, but that he and the pilot considered it so. As the jury have found that the captain really and honestly entertained the opinion which he thus expressed, I do not think there is any ground for charging the plaintiffs with misrepresentation.

GROVE, J.—I am of the same opinion. We are asked by the defendants' counsel to say that the captain's letter contained a statement false in fact, on the faith of the truth of which the policy was effected. But as I regard the captain's letter as containing only an expression of his opinion, I cannot regard his statement as false in fact, unless I come to the conclusion that the captain did not entertain the opinion he expressed. But the jury have expressly negatived that. With regard to the case cited by Mr. Prentice, I do not think it has any bearing on the present case. The question there was as to the identity of the vessel—whether the ship to be insured was the Norwegian ship *Socrate*, a new vessel, or the old French ship, *Socrate*. All that the representation here amounts to is, that the captain had formed an opinion, based partly on the report of the pilot and partly on his own observation, that the place was a safe anchorage.

BRETT, J.—I think my direction was right. I left four questions to the jury: First, "Did the

plaintiffs communicate to the defendants the captain's letter? Secondly, is the representation in that letter true? Thirdly, did plaintiffs' clerk omit to read the captain's letter, and state that in point of fact *Rendezvous Point* was a good and safe anchorage? Fourthly, if so, was the place in point of fact a good and safe anchorage? The jury answered the first two questions in the affirmative, and accordingly I did not press for an answer to the third and fourth questions, and directed a verdict for the plaintiffs. The great question at the trial was as to the matter of fact whether the letter had been read or not, and that was decided by the jury in favour of the plaintiffs. The insurer's manager knew that the risk was an unusual one, and an extra premium was charged in consequence. I expressed my opinion to the jury that the captain's letter expressed only his own opinion, and the jury concurred with me. I saw no reason to doubt that the opinion was honestly formed; as, though the reef did not protect the ship from the wind, it gave sufficient protection from the sea. The captain might, then, very fairly form the opinion which he had expressed.

Rule refused.

Attorney for defendants, *Holmer, Robinson, and Stoneham.*

EXCHEQUER CHAMBER.

Reported by J. SHORR, Esq., Barrister-at-Law.

Monday, Nov. 27, 1871.

(Before KELLY, C.B., WILLEN and KEATING, JJ.,
CHANNEL, PIGOTT, and CLEASBY, BB.)

SMITH v. MYERS AND ANOTHER.

Contract—*Said note*—*Sale of Cargo* "expected to arrive" by a particular ship.

Defendants, merchants at Liverpool, purchased 600 tons of nitrate of soda, through their agents at Valparaiso, who chartered the vessel Precursor, to bring it to England, and informed the defendants of this by letter. The defendants then entered into the following contract with the plaintiff:

"We have this day sold to you about 600 tons, more or less, being the entire parcel of nitrate of soda expected to arrive at port of call, per *Precursor*, at 12s. 9d. per cwt. . . . Should any circumstances or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void." The greater part of the nitrate of soda had been, in the meantime, whilst lying at the port of loading, destroyed by an inundation caused by an earthquake, and the charter of the *Precursor* cancelled by the defendants' agents at Valparaiso. These agents, on hearing from the defendants of their contract with the plaintiffs, subsequently purchased another 600 tons of nitrate of soda, obtained a transfer of a fresh charter of the *Precursor*, and sent the nitrate of soda to England. On its arrival, the plaintiff claimed this cargo, which the defendants refused to deliver, having previously sold it to other purchasers, whereupon the plaintiff brought an action on the above contract:

Held (affirming the judgment of the *Queen's Bench*), that the plaintiff was not entitled under his contract to claim the nitrate of soda which arrived by the *Precursor*.

This was an appeal from a decision of the Court

of *Queen's Bench*, making absolute a rule to enter a verdict for the defendants in the action: (23 L.T. Rep. N. S. 240; 3 Mar. Law Cas. O. S. 495.)

The action was for not delivering 600 tons of nitrate of soda expected to arrive per *Precursor*, pursuant to a contract of sale.

The defendants pleaded (besides denial of the contract as alleged and other pleas) that the shipment of the nitrate of soda was prevented by circumstances and accidents within the true intent of the contract, viz., by the soda being destroyed by an inundation caused by an earthquake at the port of loading, and that no parcel of nitrate of soda within the true intent and meaning of the contract arrived as alleged. On these pleas issue was joined.

At the trial of the cause, which took place before *Hayes, J.*, at the *Liverpool Summer Assizes 1868*, it appeared that the plaintiff was a merchant at Bristol, and defendants were merchants at Liverpool, carrying on business under the name of *Myers, Sons, and Co.*, and also partners in the firm of *Myers, Bland and Co.*, of Valparaiso.

Myers, Bland and Co., on the 15th July 1868, purchased from *Messrs. Cross and Co.*, pursuant to orders from the defendants, 600 tons of nitrate of soda, and on the following day chartered a vessel called the *Precursor* to convey the nitrate of soda to England.

On the 13th Aug. 1868 the greater part of the nitrate of soda so purchased, whilst lying at Iquique, the port of loading, was destroyed by an inundation caused by an earthquake. A dispute having arisen as to whether *Messrs. Cross and Co.* were bound to supply other nitrate of soda under their contract, it was decided by arbitration (according to the terms of the contract), on the 1st Sept. 1868, that they were not so bound, whereupon *Myers, Bland and Co.*, on the 2nd Sept. 1868, cancelled the charter of the *Precursor*, by an agreement with the captain of that vessel.

In the meantime the defendants, who had received advice from *Myers, Bland and Co.* of the purchase of the nitrate of soda, and of the *Precursor* having been chartered to convey it to England, sold, by means of their brokers, to the plaintiff the nitrate of soda, of the purchase of which they had been advised. The sale note was in the following terms:—

Liverpool, Sept. 1868.

Messrs. William Smith and Co.

We have this day sold to you, on account of *Messrs. Myers, Sons and Co.*, about 600 tons (say 600 more or less, being the entire parcel of nitrate of soda expected to arrive at port of call, per *Precursor*, at 12s. 9d. per cwt. from the quay. . . . Should any circumstances or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void. Buyers to have the option of sending the vessel into any safe port in the United Kingdom.

The defendants informed *Myers, Bland, and Co.* by letter, that they had sold to the plaintiff the nitrate to arrive, whereupon *Myers, Bland, and Co.*, on the 29th Oct. 1868, bought of *Messrs. Cross and Co.*, on account of the defendants, at a price beyond the limit given by the defendants, another parcel of 600 tons of nitrate of soda, and on the 30th Oct. obtained from *Messrs. Cross and Co.* a transfer of a fresh charter of the *Precursor* entered into by *Messrs. Cross and Co.*, after the cancellation of the former charter. The parcel of nitrate of soda so purchased was shipped under this charter to England, consigned to the defendants, *Myers, Bland, and Co.*, on the 30th Oct. 1868.

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wrote to the defendants, advising them of the intended shipment of this second parcel of nitrate of soda, and hoping that it might enable them to fulfil their contract with the plaintiff, if obliged to do so, or if not so obliged, to sell at a profit.

After the receipt of a letter from Myers, Bland, and Co., written on the 2nd Sept. 1868, announcing the destruction of the first parcel of soda and the cancellation of the charter, the defendants, on the 15th Oct. 1868, wrote to the brokers of the plaintiff, telling them of the destruction of the soda and the cancellation of the charter of the *Precursor*, and informing them that the contract with the plaintiff was consequently void. The brokers of the plaintiff replied, on the 21st Oct. 1868, saying that they expected a fulfilment of the contract, and that they were not concerned with any nitrate of soda which might have been destroyed by the earthquake, as that had nothing to do with their contract.

Upon the arrival of the *Precursor* at Queenstown on the 8th May 1869, with the second parcel of nitrate of soda, the plaintiff claimed the cargo, but the defendants refused to deliver it, on the ground that the contract with the plaintiff was terminated by the destruction of the nitrate of soda just purchased. An action was then commenced by the plaintiff.

A verdict was entered for the plaintiff for 960*l.*, being the difference between the contract price, 12*s.* 9*d.*, and the market price, 1*s.* 6*d.*, at the time of the arrival of the *Precursor*. Leave was reserved to move to enter a verdict for the defendants or a nonsuit, the court to have power to draw inferences of fact.

A rule nisi having been obtained on the ground that the cargo which arrived was not the cargo agreed to be sold, the Court of Queen's Bench (Cockburn, C.J., Mellor and Lush, JJ.), made absolute the rule, on the ground that the contract, though not for a specific lot of nitrate of soda, was for a specific adventure or voyage, which both parties contemplated as about to take place, and that the second lot of nitrate of soda was not within the contract.

E. G. Williams (with him *Quain*, Q.C.), for the plaintiff, argued that the plaintiff was entitled to maintain his verdict, and that the judgment of the Court of Queen's Bench should be reversed. The contract was not one for the sale of any specific quantity or parcel of nitrate of soda. The delivery of any quantity of 600 tons arriving by the *Precursor* would be a fulfilment of the contract with the plaintiff. It might well be that at the date of the contract the defendants had not purchased any particular parcel of nitrate of soda; and in that case the plaintiff would be compellable to take the cargo which did arrive by the *Precursor*. If so, he is equally entitled to the delivery of it to him. As to the words, "should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void," it is submitted that they are simply superfluous. The effect of the contract would have been the same had those words been omitted. In *Johnson and another v. Macdonald* (9 M. & W. 600), the defendant by a bought and sold note agreed to sell the plaintiffs "100 tons of nitrate of soda, at 1*s.* 6*d.* per cwt., to arrive ex *Daniel Grant*, to be taken from the quay at landing weights," &c.; and below the signature of the brokers a memorandum

was inserted, "Should the vessel be lost, this contract to be void." It was contended on the part of the plaintiff that the contract was to be put an end to only on the loss of the vessel, and that shipment on board the vessel was not necessary, but Parke, B., said: "This is a contract not passing any property in any existing chattel on board the vessel at the time it was entered into, but merely an agreement for the sale and delivery of a portion of her cargo at a future period, namely, when the vessel should arrive—in short, that the goods are to be delivered at the quay out of the vessel if she should arrive; in order to fulfil which condition a double event must take place, namely, the arrival of the vessel with the nitrate of soda on board. . . . That being so, the short question remaining for our consideration is this: Is that construction altered or interfered with by the short memorandum inserted at the end of the bought and sold note, namely, 'should the vessel be lost, this contract to be void.' It is a very loose memorandum, and although the parties might possibly have thought it fully expressed their meaning, I think we cannot attribute to it the efficacy of altering the original contract, and that it must be understood as confined solely to this, that if the vessel is lost, the contract is to be altogether void. It is, as I have said before, a loose memorandum, and ought not to be allowed to alter the meaning of a contract which clearly contains within itself a double condition for its performance." The judgment of the court below proceeds, in one respect at least, on a misconception of the facts of the case. Cockburn, C.J., said: "In this case it appears that the intended cargo perished; but it happened that some nitrate of soda was afterwards to be had, and the defendants' agents purchased it, but not to satisfy this contract, and without any intention that the nitrate of soda so purchased should come home in the *Precursor* at all. It is a mere accident that it came home in the *Precursor*." That cannot properly be called an accident which was intentionally done for the purpose of enabling the defendants to fulfil their contract with the plaintiff.

Milward, Q.C. (with him *Baylie*), for the defendants, were not called upon.

KELLY, C.B.—The real question is, whether the contract before us, of the 8th Sept. 1868, relates to the specific quantity of nitrate of soda which was purchased by the defendants, and which is, in fact, referred to in the letter of the 16th July, or whether it relates to any quantity of nitrate of soda which might, at any subsequent time, have been purchased and ultimately sent to England by the ship *Precursor*. Now, I am clearly of opinion that the contract relates to the quantity of nitrate of soda which is referred to in the letter of the 16th July, a quantity which had been actually purchased, and at the date of that letter was within the terms and express language of the contract of the 8th Sept., a specific quantity intended to be conveyed to England and expected to arrive by the *Precursor*. There can be no doubt, when we look to the facts of the case, that a specific quantity of 600 tons of nitrate of soda had been purchased by the agents of the defendant, and that the letter of the 16th July informed the defendants of that purchase, and also of the fact that the ship *Precursor* had been chartered in order to convey that specific quantity to this country. There can be no

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don't that when the contract was entered into by the defendants with the plaintiff, they meant, and meant nothing else than a specific quantity of nitrate of soda mentioned in the letter of the 16th July, which they believed had at that time been actually shipped, or was lying at Valparaiso ready to be shipped, on board the vessel. There can be no question, therefore, that the defendants intended that specific quantity alone. The question for us to determine is, whether the mere accident that that letter had not been communicated to the plaintiff by the defendants altered the meaning and legal effect of the contract entered into, and converts the specific quantity intended by the defendants into any quantity, which might or might not have been purchased at the time, but which should afterwards be sent to this country by the *Precursor*. I think it does not, and that the parties clearly referred to some specific quantity to which the description in the contract directly and exclusively applies. The words of the contract are, "We have this day sold to you about 600 tons, more or less." If it had stopped there it might mean any 600 tons of nitrate of soda; but the contract goes on to give this precise description of the 600 tons, "being the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor*, at 12s. 9d. per cwt." Does not this, as plainly as words can speak, say to the plaintiff, "There is a certain quantity, about 600 tons, of nitrate of soda expected to arrive at the port of call, and it is one entire parcel." I think, without any communication of the letter of the 16th July to the plaintiff, the plaintiff was apprised by the terms of the contract that it related to one entire parcel of nitrate of soda expected by the defendants to arrive by the ship *Precursor*. If the question had been asked, "What is the quantity you expect to arrive by the *Precursor*?" is it purchased?" the answer would be, "There is a specific entire quantity, amounting to about 600 tons, which we expect to arrive by that vessel." And that was the quantity which, according to the terms of the contract, is described in the words to which I have referred. Then the language of the subsequent portion of the contract seems to me to put the case beyond all doubt: "Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void." This attaches a proviso to the contract, that the contract was to become void in case of any accident happening to prevent the shipment. The contract having reference to a particular quantity of nitrate of soda, and an accident having prevented the shipment, the defendants contend that the contract is at an end. It is true that this accident occurred before the date of the contract, and was unknown to the parties at the time they entered into the contract; but this accident did in fact prevent the shipment of the nitrate. I say nothing at present as to the award made at Valparaiso, which might probably have the same effect. Let us suppose that the nitrate of soda had not been destroyed by the earthquake, and that whilst lying on the wharf an embargo had prevented its being shipped, and that the *Precursor* had to sail away without it; let us suppose further that the *Precursor* had on board another quantity of nitrate of soda amounting to 600 tons consigned to some other house, could the plaintiff have claimed that quantity on its arrival in England? There would be, in the case I put, a quantity

of 600 tons, as mentioned in the contract; but it is clear that the plaintiff could not claim it. The defendants might answer: "We undertook to sell you a quantity of nitrate of soda, to arrive by the *Precursor*, but we referred to a particular quantity, the shipment of which has been prevented by an accident; therefore, by the terms of the contract itself the contract is at an end." It seems to me, therefore, whether we look at the language of the early part of the contract and the words "being the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor*," or whether we regard the subsequent provision in the contract that "should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void," the contract must be held to refer to a specific quantity—to that specific quantity of which the defendants had notice in the letter of the 16th July. Otherwise this conclusion would follow, that an accident having prevented the shipment of the nitrate, as provided for in the terms of the contract, the defendants were unable to perform the contract; and if, by any accident they were unable to purchase any other quantity of nitrate for him, but a quantity belonging to another person had nevertheless arrived here by the *Precursor*, they would be bound to deliver it to the plaintiff. It appears to me, then, the specific quantity of nitrate of soda agreed to be sold by the defendants to the plaintiff was that mentioned in the letter of the 16th July, and the shipment of that having been prevented by an accident, the contract between the parties, under the express proviso contained in it, became void, and the judgment of the court below must therefore be affirmed.

WILLES, J.—I should like to say that I entirely agree in the judgment delivered by the Lord Chief Baron; but I wish to reserve my judgment on the hypothetical case put, of several persons claiming the 600 tons under the contract. My notion is, that the parties to this contract meant that if by any circumstance or accident the nitrate should be prevented from being shipped, the contract was to be void, and I am of opinion that the earthquake was a circumstance or accident within the meaning of the contract which did prevent the shipment.

CHANNELL, B.—I am of the same opinion.

KEATINGE, J.—I am of the same opinion.

PIGOTT, B.—I agree, and for the reasons given by the Court of Queen's Bench.

CLEASBY, B.—I am of the same opinion. I wish only to say that the cargo which arrived in May was not the cargo which was expected to arrive in September.

Judgment affirmed.

Attorneys for plaintiff, Jones, Blackland, and Son, for Abbot and Leonard, Bristol.

Attorneys for defendants, Walker and Sons, for Ellis and Field, Liverpool.

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CORY v. PATTON.

[Q. B.]

COURT OF QUEEN'S BENCH.Reported by J. SHERATT, M. W. MCCLELLAN, ESQ'S.,
Barristers-at-Law.

Nov. 27, 1871; Jan. 24, 1872.

CORY v. PATTON.

Marine assurance—Concealment—Knowledge of assurer only after agreement to assure.

In an action upon a policy of marine insurance, the plaintiffs replied to a plea of the concealment of a material fact that, before they had knowledge of the fact, their agent had entered into an agreement with the defendant to effect this insurance, and that if they had communicated the fact to the defendant when they first knew it, he would still in honour, conscience, and good faith have been bound to subscribe his name to the policy sued upon.

Held, upon the authority of the decision of this court in *Ionides v. The Pacific Insurance Company* (L. Rep. 6 Q. B. 674: ante, p. 141), that if the practice of merchants were as alleged, the replication was a good answer to the plea.

THIS was a demurrer to a replication.

The declaration, which set out a policy of marine insurance upon the ship *Oeydon*, averred a total loss by perils insured against.

The sixth plea stated that at the time of the making of the said policy of insurance as in the declaration mentioned, the plaintiffs concealed from the defendant a fact then known to the plaintiffs, and not known to the defendant, and material to the said risk, that is to say, that the said ship having set sail and departed on the said voyage with the said goods on board, had met with an accident and misfortune whilst proceeding on the said voyage.

The second replication to the sixth plea stated that before the plaintiffs had any knowledge of the material fact, they, being at a distance from the defendant, by a letter written by them to their agent, instructed their said agent to effect the said insurance, and the plaintiffs said that they had no knowledge of the said material fact until after the lapse of a reasonable time for their agents to agree with an underwriter or underwriters to insure the said goods, and to settle with him or them the terms and premium on and for which the said insurance should be effected: and the plaintiffs said that in the ordinary course of business their said agent ought to have agreed and settled as aforesaid, before they, the plaintiffs, knew of the said material fact; and the plaintiffs said that before they knew the said fact the said agent did apply to the defendant as such underwriter as aforesaid to insure the said goods and settled and arranged with the defendant the terms and premium on and for which the defendant would insure the same; and the defendant made a binding agreement with the said agent to insure the same on those terms, and for that premium, and became in honour, conscience, and good faith, though not in law, bound to submit a policy for insuring the said goods on those terms and for that premium; and the plaintiffs said that if the said material fact and plaintiffs' said knowledge of it and the premises aforesaid had afterwards been made known to the defendant, he would still in honour, conscience, and good faith, have been bound to subscribe himself to the plaintiffs for such a policy as aforesaid; and the plaintiffs said that the policy in the declara-

tion mentioned was the policy which the defendant was so bound to subscribe as aforesaid; and the plaintiffs said that they, the plaintiffs, knowing as the fact was, that in due course of business at the time when they first had knowledge of the said material fact, either a policy for insuring the said goods in pursuance of their instructions would be effected or that such an agreement would be made by some underwriter or underwriters which would in honour, conscience, and good faith bind him or them to subscribe a policy for effecting the said insurance, did in good faith abstain from communicating the said material fact to their said agent, or to the defendant, which is the concealment in the sixth plea mentioned.

Watkin Williams, for defendant, supported the demurrer.

Butt, Q. C. (with Shield), contra.

The arguments sufficiently appear from the considered judgment of the court.

Cur. adv. vult.

Jan. 24.—BLACKBURN, J. delivered the judgment of the court (Blackburn, Mellor, and Lush, JJ.). The declaration in this case was on a marine policy of insurance. The sixth plea was that at the time of the making of the policy the plaintiffs concealed from the defendant a material fact then known by the plaintiffs, and not known to the defendant. There is a second replication to this plea, to which there is a demurrer, which was argued in the sittings after last term before my brothers Mellor and Lush, and myself, by Mr. W. Williams for the defendants, and Mr. Butt for the plaintiff. From the statement of the counsel we learn that the replication was intended to confess the plea, and assert by way of avoiding it that the plaintiffs had no knowledge of the material fact till after the ship was initialised, and to aver as a fact what was assumed in the judgment of this court in *Ionides v. The Pacific Insurance Company* (L. Rep. 6 Q. B. 674: ante, p. 141), that the ship is in practice, and, according to the understanding of those engaged in marine insurance, the complete and final contract between the parties, fixing the terms of the insurance and the premium, and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of faith, though for fiscal purposes the Legislature have enacted that this contract shall not be enforceable at law or in equity. Some doubt was entertained whether the replication did really raise the question, and leave was offered to the plaintiffs to amend on the usual terms, of which, however, they declined to avail themselves. We think that the replication, as it stands, would be proved by proof of the facts which we have just stated. The practice and understanding of merchants are not matters of law, and it is open to the defendants at the trial to contend on the traverse of this replication that the practice and understanding are not such as averred, but on this demurrer we must take it to be truly stated; and that being assumed, the question must be determined whether this excuses the concealment of a fact which came to the knowledge of the plaintiffs after the execution of the ship, and before the policy was made. Mr. Williams quoted authorities to show that the assured must use due diligence to make his agents, who are negotiating a policy, aware of all material facts which freshly came to his knowledge preceding the negotiation, nor do

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we at all question this doctrine. On the other hand it is quite clear that there is no obligation to disclose any matter which first comes to the knowledge of the assured after the policy is made, and we cannot doubt that if there was a complete contract to execute a policy enforceable in a court of equity, which the slip in America appears to be (1 Duer, 107), the court of equity would compel the party to execute the policy as of the date when he was bound to have executed it, notwithstanding any intervening facts, on the principle that in equity the thing is considered as done when it ought to have been done. (See as to a subsequent fire *Paine v. Mellor*, 6 Ves. 349). The non-disclosure of a fact after the policy was made in equity could have no more effect than a similar non-disclosure after it was made in law. The present is an intermediate case, and the question which must now be determined seems to us to be whether after the negotiation is complete and the contract made in fact, and in good faith, and the underwriter is under a moral obligation to execute a formal policy, the insured is bound by good faith to give information to the assurer of a matter which would make him aware that his bargain was a bad one,—information which ought to have no effect on him, but would expose him to a temptation to break his contract, which as far as the law is concerned he may do with impunity, because, for fiscal purposes the Legislature has forbidden the court either of law or equity to enforce the contract. To the question thus stated, the answer seems obvious, that he is not bound to lead his neighbour into temptation. Until lately no question of this sort could be raised in any court, for the rules of evidence required that the contract being written should be proved by the production of the writing, i. e., the slip, and Lord Ellenborough, in *Warwick v. Slade*, 3 Camp. 127, accurately expressed the effect of the statutes then in force, when he said: "The revenue laws forbid me to look to what is called the slip," and such continued to be the law down to and after the time when *Xenos v. Wickham* (L. Rep. 2 E. & Ir. App. 296; 16 L. T. Rep. N. S. 800; 2 Mar. Law Cas. O. S. 537) was argued in the House of Lords, and the judges who (on the 8th May 1867) gave their opinions in the House of Lords, used language showing that they thought that the law was as stated by Lord Ellenborough; and so it was. These passages were quoted and relied on in the argument before us. But in that very year, on the 31st May 1867, the 30th Vict. c. 23, received the royal assent. This statute was not brought to the notice of James, V.C., in *Coulson v. Mackenzie* (L. Rep. 8 Eq. 368.) According to the construction put upon it by this court in *Ionides v. Pacific Insurance Company*, that Act completely changed the law and repealed all those Acts which had ordered that the slip was not so much as to be looked at in a court of justice, and put it on a footing very similar to that of an assigned memorandum of a contract within the Statute of Frauds, or a lease for more than three years not under seal, viz., that it was void, and not enforceable at law or in equity, but might be given in evidence wherever, though not valid, it was material. It is open to the plaintiffs in a court of error to question the accuracy of the reasoning on which the judgment in *Ionides v. Pacific Insurance Company* proceeded, but we think that whilst it stands unreversed, it leads irresistibly to the conclusion that

the judgment in the present case should be for the plaintiffs.

Judgment for the plaintiffs.

Attorney for plaintiffs, J. McDiarmid.

Attorneys for defendant, Ingledew, Ince and Greening.

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs.,
Barristers-at-Law.

Saturday, Jan. 27, 1872.

JAMES V. THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

Prohibition to the Court of Admiralty—Collision at sea—Limitation of liability—Power of Admiralty Court to stay actions—Jurisdiction—Action for negligence.

The High Court of Admiralty is not created by the statutes extending its jurisdiction to a Superior Court so as to take away from the Superior Courts at Westminster the power, which they undoubtedly possessed before those statutes, of issuing a prohibition to the court.

Smith v. Brown, ante p. 56, approved of.

By sect. 514 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) it is enacted that in cases where any liability has been incurred by any owner in respect of loss of life or loss for damage to ships, boats, or goods, several claims are made or apprehended in respect of such liability, then it shall be lawful for the Court of Chancery to entertain proceedings at the suit of the shipowner for determining the amount of such liability and for the distribution of such amount rateably amongst the several claimants, with power for such court to stop all actions and suits pending in any other court in relation to the same subject matter.

By sect. 54 of the Merchant Shipping Acts Amendment Act 1852 (25 & 26 Vict. c. 63) substituted for the Merchant Shipping Act 1854, sect. 50, it is enacted that the owners of any ship are not liable for loss of life, whether alone or together, with loss of or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding 15l. per ton on the ship's tonnage. By the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 13, it is enacted that "whenever any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty, the said court shall have the same powers as are conferred upon the High Court of Chancery in England by the ninth part of the Merchant Shipping Act 1854."

To give the Admiralty Court jurisdiction to entertain a suit for limitation of liability, the ship or the proceeds thereof, or at least an equivalent for the value of the ship, must be under arrest of the Admiralty Court.

The payment into court in a collision suit of a sum of money equal to the amount in which the suit is instituted in lieu of bail, the ship having been totally lost in the collision, is not such an equivalent as will give the Admiralty Court jurisdiction to entertain a suit by the shipowner for limitation of liability.

Even the payment into court after the institution of the limitation suit of an aggregate amount of 15l. per ton on the ship's tonnage will not give the court jurisdiction in such a case.

Before the Court of Admiralty can have jurisdiction to entertain a suit for, and to declare persons en-

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titled to, limited liability, the plaintiffs in that suit must make an absolute and unqualified admission of their liability, but (per Kelly, C.B.) as the Court of Admiralty has jurisdiction to hear causes of collision and to decide the liability of the persons claiming limitation, and as the exact period of the suit when such admission must be made is rather a question of procedure, such admission need not be made at the institution of the suit, but must be made before a decree can be given.

The plaintiff took a ticket of the London and South-Western Railway Company, to be conveyed by them from London to Guernsey, and when on his journey in the company's vessel, the *Normandy*, between Southampton and Guernsey, a collision took place between this vessel and a vessel called the *Mary*, in consequence of which the plaintiff lost his luggage, and the *Normandy* sank to the bottom of the sea. Cross-suits were then instituted in the Court of Admiralty by the owners of both the *Normandy* and *Mary*, each alleging negligence, the owners of the *Normandy* paying into court 5000*l.*, the sum in which the suit against them was instituted, in lieu of bail; and an action was commenced in this court (*Eschequer*) by the present plaintiff against the defendants, as owners of the *Normandy*, and other actions by other passengers were also commenced against them for losses sustained by the collision. The owners of the *Normandy* instituted a suit for limitation of liability, and, in their proceedings in the Court of Admiralty, undertook that if the court should find the *Normandy* solely to blame, or find both the *Normandy* and the *Mary* to blame for the collision, they would in the other actions admit liability to such plaintiffs as might prove their title to sue, and they prayed the court to pronounce that the plaintiffs, if liable, were not liable to an aggregate tonnage of the *Normandy*, and that they might be at liberty to pay into court that sum with interest, and that all further proceedings in the said actions should be stayed, &c. Thereupon the Court of Admiralty, after hearing the counsel of the parties in the suits in that court, ordered that all actions should be stayed, the owners of the *Normandy* undertaking to admit liability in all such actions, as soon as the court should have pronounced for the damages proceeded for in the suit before it. The decree pronounced by the court stated that the court had jurisdiction to entertain the cause, and that the owners of the *Normandy* were entitled to limited liability, according to the provisions of the Merchant Shipping Act 1854 and the Merchant Shipping Act 1862, and that if answerable, they were only so in damages to an amount not exceeding 6376*l.*, being at the rate of 1*l.* for each ton of the registered tonnage, and the owners were ordered to pay into court that sum, together with interest. The court also decreed the *Normandy* to have been solely to blame for the collision. The defendants accordingly paid into court the said sum of 6376*l.*

The plaintiff in the action in this court having applied for a rule to prohibit the Court of Admiralty from further proceeding in the suit and from further proceeding to enforce and issue any injunction to restrain the plaintiff from prosecuting his action in this court, the court directed him to declare in prohibition, which he accordingly did, and the foregoing facts having been set out

in the declaration and the defendants' plea, the plaintiff demurred to such plea.

Held, first, that a prohibition would lie from this court to the Court of Admiralty; secondly, That as neither the vessel nor the proceeds thereof was or were under arrest of the Court of Admiralty, as enacted by sect. 13 of the 24 Viet. c. 10, the Court of Admiralty had no jurisdiction.

Per Kelly, C.B.—That had an equivalent for the ship been brought into court, that would have given the Court of Admiralty jurisdiction, but that a payment into court of 5000*l.* in lieu of bail could not be taken as an equivalent for the value of the ship. If at the time of the institution of the suit a sum equal to 1*l.* per ton on the ship's tonnage had been in court, that might have been an equivalent. Also that the admission of liability should be an absolute and not a qualified admission.

Per Martin, B.—That the suit of limited liability should be a simple one of itself, and that the plaintiff in the present action should have been a party to it.

Quære, Whether the Court of Admiralty had any jurisdiction over such a cause of action.

In a former term a rule had been obtained by the plaintiff calling upon the defendants and the judge of the High Court of Admiralty to show cause why they should not be prohibited from further proceeding in a certain suit in the said court called the *Normandy*, and numbered 5386, to the injury of the said plaintiff, and why they should not be prohibited from further proceeding to enforce and issue any injunction to restrain the said plaintiff from prosecuting a certain action in this court in which the said plaintiff is the plaintiff and the said company are the defendants, on the ground that such suit and proceedings are without jurisdiction, or in excess of jurisdiction, and why the said company should not pay the costs of and occasioned by this rule.

Upon the argument of that rule, the court directed the plaintiff to declare in prohibition, which he accordingly did as follows.

The declaration in prohibition stated that the defendants were common carriers of passengers with their luggage from London to Guernsey, and the plaintiff became a passenger with his luggage to be conveyed from London to Guernsey, and that afterwards the plaintiff was safely conveyed to Southampton for a portion of his journey, but that whilst the plaintiff was being carried by the defendants in and upon a certain steam vessel called the *Normandy*, the said vessel, by and through the negligence, misconduct, and actual default of the defendants, came into collision with a certain other steam vessel called the *Mary*, whereby the said steam vessel the *Normandy* was so damaged that it sank, and by reason of the premises the plaintiff was cast into the water and injured, and his luggage was lost, &c.; and that afterwards he brought an action in the *Exchequer* of Pleas against the defendants to recover damages in respect of the premises, and declared against the defendants in the said action. The declaration in prohibition then set out the declaration in the action, which was in substance the same as above, claiming as damages 200*l.* To the declaration in the action the defendants pleaded first, not guilty; secondly, that the luggage delivered to them was received subject to the condition that they should be exempt from liability for any loss

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or damages which might arise during the carriage of such luggage by sea from the act of God, the Queen's enemies, fire, accidents from machinery, boilers and steam, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, and that the loss of the said luggage arose during the carriage of the same by sea, from dangers and accidents of the sea and navigation within the meaning of the above condition. To which plea the plaintiff replied, taking and joining issue and giving notice of trial. The declaration in prohibition further stated that afterwards, on the 9th June 1870, the defendants commenced a certain suit of limitation of liability in the High Court of Admiralty, which suit was named the *Normandy*, No. 5366, against Edward Jordan Hough and others, the owners of the said steamship the *Mary*, and against the owners of the cargo of the said steamship, and against all and every other person or persons interested in the said steam vessels the *Mary* and the *Normandy*, or having any right, claim, or interest whatsoever with reference to or arising out of the collision aforesaid, and that the defendants afterwards presented and filed a petition in the said suit (see 3 Mar. Law Cas. O. S. 519.) The declaration in prohibition then set out such petition, which stated, amongst other facts, that the defendants were owners of the said vessel called the *Normandy*, of the tonnage of 425.05 tons without deduction being made on account of engine room; that at midnight on the 16th March 1870 the *Normandy*, laden with a cargo of general merchandise and carrying Her Majesty's mails and with about thirty persons as passengers on board left Southampton for Jersey, and that on the morning of the 17th the *Normandy* came into collision with the *Mary* and sank, and that in consequence the master and many of the passengers and crew of the *Normandy*, and their luggage and effects, were lost, and also that the *Mary* was damaged, and her cargo, in fact, lost; that the said collision occurred without the actual fault or privity of the plaintiffs—the owners of the *Normandy*; that on the 13th April 1870, a caveat warrant against the arrest of the *Mary* was filed in the Court of Admiralty by the owners of the *Mary*, they undertaking to give bail; that on the 7th May 1870, a cause of damage, No. 5347, was instituted in the said Court of Admiralty against the *Mary* by the plaintiffs, the owners of the *Normandy*; and that on the 21st May a cause of damage, No. 5359, was instituted in the Court of Admiralty against the owners of the *Normandy*, on behalf of the owners of the *Mary* and the owners of her cargo, to recover damages by reason of the said collision, and on the 30th May an appearance was entered in the latter suit by the defendants, and the sum of 5000*l.*, the amount in which such suit had been instituted, was paid into court in lieu of bail; that actions have been brought against the plaintiffs, the owners of the *Normandy*, in respect of loss of and damage to goods on board the *Normandy* at the time of the said collision, and they have reason to believe that other actions and suits will be brought and instituted against them for the recovery of damages in respect of loss of life of persons on board the *Normandy*, and loss and damage to goods on board the *Normandy*, and goods on board the *Mary* at the time of the collision; that the value of the *Normandy* at the time of the said collision at 15*l.* sterling for every ton of the gross registered tonnage is pre-

sumed to be insufficient to answer the claims in the said suits or actions; that the plaintiffs, the said owners of the *Normandy*, undertake that if the Court of Admiralty should, in the said suit, No. 5359, find the *Normandy* solely to blame, or find both the *Normandy* and the *Mary* to blame for the aforesaid collision, they will, in the said other actions and suits, admit liability to such plaintiffs as may prove their title to sue in such other actions and suits. The petition then prayed the judge of the Admiralty Court to pronounce that the plaintiffs, if liable, are not liable in damages in respect of loss or damage to ships, goods, merchandise, or other things, or in respect of loss of life or personal injury, to an aggregate amount exceeding 15*l.* for each ton of the gross registered tonnage of the *Normandy*, and that the plaintiffs may be at liberty to pay into the registry of the court such aggregate amount, together with interest, at 4 per cent., from the date of the collision to the day of the payment into court, and that all further proceedings in the said suits and actions, with the exception of the said suits numbered respectively 5347 and 5359, be stayed, &c. The declaration in prohibition then set out the answer of the owners of the *Mary*, denying all blame on their parts, and denying the jurisdiction of the Court of Admiralty to grant the prayer of the petition. The declaration further stated that on the 4th June, 1870, the judge of the Court of Admiralty, having heard counsel for the plaintiffs and defendants in the foregoing suits, ordered that all actions and suits pending in any other court in relation to the subject matter of that suit—*to-wit*, the liability of the owners of the vessel *Normandy*, the plaintiffs in this suit, in respect of the loss of life, or personal injury, or loss or damage to ships, goods, merchandise, or other things, on the occasion of a collision which occurred on or about the 17th March, 1870, between the said vessel *Normandy* and a vessel called the *Mary*—be stopped; the plaintiffs, by their counsel, undertaking to admit their liability in all such actions and suits as soon as the court shall have pronounced for the damage proceeded for in the cause pending in this court, entitled *The Normandy* (5359), or for a moiety of such damage; and that afterwards, on the 14th July 1870, the judge made a decree or order in the said suit, which was set out (see 3 Mar. Law Cas. O. S. 519). The decree stated that the judge pronounced that the court had jurisdiction to entertain the cause and that the owners of the *Normandy* are entitled to limited liability according to the provisions of the Merchant Shipping Act 1854, and the Merchant Shipping Act Amendment Act 1862; and that, in respect of the loss occasioned by the collision, the owners of the *Normandy*, if answerable, are only so in damages to an amount not exceeding 6376*l.*, being at the rate of 15*l.* for each ton of the registered tonnage; and he ordered the owners to pay into court that sum, together with interest thereon at the rate of 4 per cent., and he condemned the plaintiffs in the costs of the suit. The declaration in prohibition then set forth that the defendants in the present action afterwards applied to the Court of Admiralty, and took proceedings, and are continuing to take proceedings, to induce the said court to issue a further injunction directed to the plaintiff to restrain him from proceeding with the

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said action in the said Court of Exchequer of Pleas, and have not ceased to prosecute the said application, and that at the several times of the commencement of the said suit in the said court, and of the said order and decree and application, the said ship, the *Normandy*, was not, nor were any proceeds thereof, under the arrest of the said court, nor were the said *Normandy*, or any proceeds thereof since the commencement of such suit, under such arrest, and that the plaintiff was not ever the plaintiff or defendant in any suit in the said court, and that the citation in the said suit was not served on the plaintiff, nor any other process of the said court, previously to the service of or other than the said order of the 4th June 1870, and that according to the law of England the cognisance of the said suit called *The Normandy*, No. 5386, belongs not to the High Court of Admiralty, and that the said court has no power or authority to sustain the petition of the plaintiffs in such suit, or the said application, or for an injunction, or to make any such order as is hereinbefore stated, or any order or injunction in the said suit in the said High Court of Admiralty, or otherwise to restrain the plaintiff prosecuting his said action in the said Court of Exchequer of Pleas, &c. The declaration concluded by praying for a writ of prohibition to the judge of the Court of Admiralty to prohibit him from enforcing or issuing any injunction to restrain the said plaintiff, or further to hold plea before him in anywise touching the premises aforesaid, or proceed further on the said petition or in the said suit in anywise against or to the detriment, loss, or damage of the plaintiff.

To this declaration in prohibition the defendants pleaded, admitting all the introductory averments of the plaintiff, and alleging that on the 29th July 1870, the before-mentioned two causes of damage having come on for hearing, the Court of Admiralty gave judgment against the defendants, and decreed the defendants' said vessel *Normandy* solely to blame for the said collision, and on the 4th Aug. the defendants paid into court, in the said suit of limitation of liability, the sum of £473l. 11s., being the sum of £376l. together with proper interest, for distribution ratably among the several claimants, and thereupon admitted their liability in pursuance of the undertaking of their counsel, as stated in the said order of the 4th June 1870. The plea then set out the various proceedings which were afterwards taken in the suit of limited liability. It further stated that on the 22nd Nov. 1870 the defendants moved the Court of Admiralty to restrain the plaintiff from prosecuting his said action at law against the defendants, and the court, having heard the plaintiff by his counsel, took time to deliberate; and that the motion for the present prohibition having subsequently, on the 24th Nov., been made, and a rule nisi having been granted, the judge of the Admiralty Court declined to make any order on the said motion pending the proceedings of prohibition in this court. The plea concluded by averring jurisdiction in the said Court of Admiralty.

To this plea the plaintiff demurred.

The plaintiff's points of argument:—1. The plea does not show any jurisdiction in the Court of Admiralty to entertain the suit in that court, or to make any injunction staying the plaintiff's action for damages. The Court of Admiralty has no jurisdiction to entertain the suit for limitation of liability, for the following reasons. 2. The

jurisdiction of the court *quoad hoc* is entirely founded on the 24 Vict. c. 10, s. 13, and unless the ship or its proceeds were under the arrest of the court it could have no jurisdiction. The ship, being at the bottom of the sea, could not be under arrest, and, as there never were any proceeds of it, the Court of Admiralty could not have jurisdiction. 3. The court could not, by ordering a sum of money to be paid into court to represent the ship, thereby give itself jurisdiction, for, at the time it made the order, and at the time the suit in which the order was made was instituted it had, by hypothesis, no jurisdiction, and the jurisdiction must exist at the commencement of the suit. 4. To hold that the court has jurisdiction would be to defeat the object of the statute, which was to prevent two suits, and make it unnecessary for the shipowner to pay the value of his ship into court when it was already under arrest. Further, the court has no jurisdiction to grant an injunction. 5. The court has no jurisdiction to interfere with an action on contract made on land to carry goods partly by land and partly by water. 6. The liability of the shipowner causing damage upon his contracts is not limited by the Merchant Shipping Acts. 7. The action in the Exchequer is not an action in another court relating to the same subject-matter as the suit in the Court of Admiralty. 8. The pleadings in the Admiralty Court do not allege or show, as they ought in order to found the jurisdiction, that the damage in question was not caused by the actual fault or privity of the defendants, and, on the whole, the contrary appears to have been the case. 9. The defendants dispute their liability, which ought to be tried at common law, the Court of Admiralty being only authorised to distribute the proceeds of the ship in cases of undisputed liability, and to do all things incidental to such distribution. 10. Under any circumstances, the Court of Admiralty would only have jurisdiction to stay the judgment in the action, and not the trial of the issues joined, which it is itself incompetent to try. As to prohibition lying to the Court of Admiralty,—11. It has been so decided: *Jennings v. Audley* (2 Brownlow, 30); *Grant v. Gould* (2 H. Bl. 69, 100); *Vilthasen v. Ormsley* (3 T. R. 315); *The Admiralty Case* (12 Co. 73); *Smith v. Brown* (ante, p. 56; 40 L. J., Q. B. 214; 24 L. T. Rep. N. S. 808.) 12. Independently of authority, it lies, for the Court of Admiralty is an inferior court. 13. Even though it should be for some purposes a Superior Court, prohibition would lie to it for various reasons; first, because it proceeds contrary to the course of the common law; secondly, because the court of appeal from it is different from the court of appeal of the common law courts; thirdly, from the necessity of the case, for otherwise there would be no means of causing the common law to be respected and observed where the rights of parties are brought in question in the Admiralty Court. 14. The Admiralty Court Act makes no difference in this respect, for the right of the common law courts to prohibit the Court of Admiralty before that statute could not be taken away except by express enactment, and there is none such.

The defendants' points of argument: 1. That under the circumstances stated in the plea, taken in conjunction with the statutory powers of the Court of Admiralty conferred by (among other statutes) the 24 Vict. c. 10, s. 13, the 17 & 18 Vict. c. 104,

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c. 14, the Merchant Shipping Act Amendment Act 1862, s. 54, the said Court of Admiralty has jurisdiction to entertain the suit for limitation of liability, and to grant an injunction to stop the plaintiff's action for damages. 2. That where a ship, or the proceeds thereof, are under arrest of the High Court of Admiralty, the said court has, by virtue of the provisions of the Admiralty Court Act 1861, all those powers which are conferred on the Court of Chancery, the Merchant Shipping Act 1854, sect. 514, and that the pleadings do not show that the Court of Admiralty has exceeded the said powers, and it in effect appears that they have not exceeded them. 3. That the sums paid into court under the order of the 14th July 1870 represent and are virtually the "proceeds" within the meaning of the 24 Vict. c. 10, s. 13. 4. That the words "under arrest of the court" were virtually satisfied by the prayer and readiness of the defendants to be permitted to bring the "proceeds" into court, and by the order of the said court of the 14th July 1870 being made conditional thereon. 5. That in order under the 24 Vict. c. 10, s. 13, to give the Court of Admiralty the power conferred on the Court of Chancery by the Merchant Shipping Act 1854, s. 514, it is not necessary that at the time of the institution of the cause the ship or "proceeds thereof" should be under arrest of the Court of Admiralty. 6. That the mere fact of a ship going to the bottom, or being otherwise wholly lost, does not oust the Court of Admiralty from jurisdiction over the claims of the parties arising from her loss: (*The Amalia*, Br. & Lub. 151; 32 L. J. 191, P. M. & A.) 7. That to hold that this court could prohibit the Court of Admiralty from proceeding in this case would be to deprive the defendants of the right to have their liability limited intended to be conferred on shipowners by the 24 Vict. c. 10, s. 13. 8. That from the circumstances stated in the plea the plaintiff is estopped from denying the jurisdiction of the Court of Admiralty in the said cause, and has otherwise disenthralled himself to a prohibition. 9. That a prohibition does not lie in this case to the High Court of Admiralty, more especially since the passing of the following Acts, 3 & 4 Vict. c. 65, ss. 11, 13, and 19; 24 Vict. c. 10, ss. 12, 13, 14, 15, 16, 17, and 23; 31 & 32 Vict. c. 71, ss. 9 and 26; 34 & 35 Vict. c. 91, s. 2; and see *Ricketts v. Bodenham*, 4 A. & E. 433. 10. That even if the order of the Court of Admiralty of the 4th June 1870 cannot be supported, yet, that at any time after the payment into court under the order of the 14th July 1870, the Court of Admiralty had and now has power to grant an injunction to stop the plaintiff's action under the 24 Vict. c. 10, s. 13, and so the writ prayed for is too large, and cannot be granted. 11. That the pleadings do not disclose a valid cause for prohibition, or any valid power in the court to grant the same. 12. That the contract in the declaration mentioned is within the Merchant Shipping Act Amendment Act 1862, s. 54, on this (among other grounds): The effect of such contract to carry partly by land and partly by water, is to give the defendants the protection of any statute limiting the liability of carriers by land as to so much of the journey as is to be performed on land, and the protection of any statute limiting the liability of carriers by water as to so much of the journey as is to be performed by water, and not to put them out of the protection of either Act: (*See Le Conteur v. The London and*

South-Western Railway Company, L. Rep. 4 Q. B. 244.) 13. That the defendants having paid into the Court of Admiralty an amount to the full extent of their liability in respect of the collision, to be there distributed according to law, this court will not interfere to harass them with proceedings in other courts with respect to the same subject-matter: (*See Potts v. Place*, 8 Ex. 905; 5 H. of L. Cas. 388.) The proceedings in the case of *The Normandy* in the Court of Admiralty will be found 3 Mar. Law Cas. O.S. 519; L. Rep. 3 A. & E. 152; 23 L. T. Rep. N. S. 631.(a)

Sir J. Karslake, Q.C. and C. Wood appeared for the defendants in support of the plea.

Manisty, Q.C. and W. E. Harrison, for the plaintiff, appeared in support of the demurrer.

The arguments and cases are so fully referred to in the very elaborate and exhaustive judgments of the learned judges, that it is unnecessary to repeat them here.

KELLY, C. B.—In this case of *James v. The London and South-Western Railway Company*, it is with very great regret that I feel myself compelled to hold that the plaintiff is entitled to the judgment of the Court. I say it is with very great regret, because I think it is manifest, that upon the facts, the justice and the merits of the case are altogether with the defendants in prohibition, whom—in order to avoid confusion—I will hereafter call "the company;" for they have been made enjoinable, by reason of this most unfortunate collision—as to which the shareholders,

(a) By sect. 514 of the Merchant Shipping Act 1854, 17 & 18 Vict. c. 104 (ninth part) it is enacted: That in cases where any liability has been incurred by any owner in respect of loss or damage to goods, &c., and several claims are made or apprehended in respect of such liability, then it shall be lawful for the High Court of Chancery . . . to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability . . . and for the distribution of such amount rateably amongst the several claimants, with power for any such court to stop all actions and suits pending in any other court in relation to the same subject matter, &c.

By the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63) s. 54—The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say:—First, where any loss of life or personal injury is caused to any person carried in such ship; secondly, where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board such ship; thirdly, where any loss of life, or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat; fourthly, where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other thing whatsoever on board any other ship or boat: be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, &c. . . to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage, without deduction on account of engine room.

By the 24 Vict. c. 10 (The Admiralty Court Act 1861) s. 13, it is enacted that—Whenever any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty, the said court shall have the same powers as are conferred upon the High Court of Chancery in England by the ninth part of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104).

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who are the parties really liable, are altogether blameless—to a claim to a very large amount indeed, in respect of which, now they have at last admitted their liability, they are clearly entitled to the benefit of those statutes with regard to what is called “limited liability.” But, looking at the facts of this case and the proceedings in the Court of Admiralty, I am clearly of opinion that this writ of prohibition ought to go, on the ground that the Court of Admiralty was proceeding at the time when the motion was made, and at the time of the declaration in prohibition, without jurisdiction. At a very early period of the argument we intimated our opinion that if the Court of Admiralty be really proceeding in the suit without jurisdiction, the writ of prohibition will lie in this or in any of the Superior Courts of law, without any reference to the nature of the constitution of the court, and consequently the only question is, was there or was there not jurisdiction to entertain this suit at the time when the application for a prohibition was made, or rather at the time of the declaration in prohibition? Now, the objection to these proceedings in the Court of Admiralty is made upon two grounds; first, upon the ground that there is a want of jurisdiction by reason of the company not having admitted their liability; and, secondly, upon the ground that the condition upon which alone the jurisdiction is conferred upon the Court of Admiralty to entertain a suit of this nature did not attach, namely, that a cause had not occurred in which at the time of the suit being instituted any ship or vessel, or the proceeds thereof, were under arrest of the High Court of Admiralty. Now, it is necessary first to consider the ground which was originally principally argued at the Bar: the question of the want of any allegation, or rather the absence of any admission, of liability on the part of the company. And really upon this point the question is not whether an admission of liability is indispensably and absolutely necessary in order to entitle the plaintiffs in such a suit to a decree of limited liability; but whether that was not a matter arising or which might arise and might be disposed of in the course of the suit, and was not in itself an original *sine qua non* to enable the plaintiff to institute the suit at all. It was certainly argued at the Bar that no admission of liability was necessary at all in a suit of this nature, and the high authority of Dr. Lushington was quoted to establish that proposition; but I shall deal with that point, which has arisen incidentally in this case, hereafter. With regard to the question of whether in the first place it was essentially necessary that there should be an admission of liability, before we proceed to consider the question at what period of the suit it was absolutely necessary that the admission should appear and constitute a part—and an irrevocable part—of the proceedings in the suit, we must look to the statute to see what really is the jurisdiction conferred first upon the Court of Chancery, and afterwards, though upon a different condition and under somewhat different circumstances, upon the Court of Admiralty, to entertain a suit of this description. Now, it is only necessary to look at the words of the Act of Parliament, in the 514th section of the 17 and 18 Vict. c. 104, to see that it is absolutely necessary that there should be an admission of liability, not merely to authorise the Court of Chancery to entertain the suit, but to

enable the Court of Chancery to take that proceeding in the suit, and ultimately to pronounce that decree, which it was the very object of the statute to enable the court to pronounce—a relief of the shipowner who had been made subject to these claims. The words of the Act are: “In case where any liability has been or is alleged to have been incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, then, subject to the right hereinafter given to the Board of Trade of recovering damages in the United Kingdom in respect of loss of life or personal injury, it shall be lawful in England or Ireland for the High Court of Chancery”—now see what follows—“to entertain proceedings at the suit of any owner for the purpose”—for what purpose? For the purpose of ascertaining whether the shipowner is liable for these claims or any of them, or not? No such power is conferred—no such proceeding or inquiry is at all referred to or mentioned in this clause; but it is only “for the purpose of determining the amount of such liability, subject as aforesaid, and for the distribution of such amount rateably amongst the several claimants,” and so forth. Here then it is quite clear that the functions of the High Court of Chancery are precise and defined. It is not to inquire into whether the shipowner is liable or not, and in case he should be found liable, or in case he should admit his liability, then to proceed to ascertain the amount and to apportion the same in court, but it is only and solely to entertain proceedings at the suit of any “owner” for the purpose of determining the amount of such liability, subject as aforesaid, and for the distribution of such amount rateably amongst the several claimants out of the fund in court. I do not therefore see how it can possibly be contended that, without such liability either altogether proved or admitted on the record, admitted in some way or other, it was irrevocably binding on the party so admitting—upon the shipowner who claims the relief to which he may be entitled under the statute. I do not see how anything more, any greater or other power, is conferred upon the court than to simply ascertain the amount, and then to apportion that amount among the different claimants. The absence of any other provision in this section raises the all-important question whether the Court of Chancery has any jurisdiction or power at all to entertain originally a suit, or incidentally to determine a suit already raised, for the purpose of determining the question of liability under Lord Campbell’s Act, or even liability for a personal injury sustained by reason of the collision? I need hardly say that if a bill in the Court of Chancery were filed by the executors of one deceased under Lord Campbell’s Act, charging that the death had been occasioned by the negligence of the shipowner in question, the company, by reason of the collision complained of, to recover damages by reason of that loss, it would be open to demur, and the bill would be at once dismissed. Lord Campbell’s Act gives the power to the executors of the deceased, under such circumstances, and having such a claim, to enforce that claim by an action at law, to recover damages in a mode, and by a certain course of procedure, and with certain results familiar to us all. But no such power is conferred upon the Court of Chancery, and I am at a loss to under-

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stand upon what ground it can be contended that the Court of Chancery—at all events the original court upon which this jurisdiction was first conferred by the Act of Parliament—possesses any power in such a suit to determine the question of liability; and if it has no such power, how is the question of liability to be determined? How can justice be done, or a decree effectually made under this Act of Parliament, in relief of the owners of the ship lost? Whether there has been a collision occasioning damage, under the circumstances of this case how is it to be ascertained, except by admission of the parties in any suit in Chancery which may be preferred under this Act of Parliament? Then comes the question, is there any difference in the Court of Admiralty? Now, when we look to the 13th section of the 24 Vict. c. 10, we find that the word "jurisdiction" is not introduced, but it is included and comprehended in the word "powers?" We find that, under circumstances mentioned in the condition specified, the said court shall have the same powers as are conferred upon the High Court of Chancery by the Act of 1854. Now, if no such power is conferred by the Act of 1854 on the Court of Chancery, and no such power can pass under this later Act of Parliament to the Court of Admiralty, then it is quite true, as argued at the bar on behalf of the Company, that the Court of Admiralty possesses and inherits original and independent jurisdiction in cases of damage by reason of collisions between ships. That is true; and if that original jurisdiction comprehended a case of this nature, no doubt there would be a difference between the law as applicable to it in the Court of Admiralty and that same law as applicable to a case in the Court of Chancery. But although the Court of Admiralty possesses jurisdiction, and, indeed, although it possessed it before, it is further conferred upon it under the 7th section of this same Act of the 24th Vict., that it shall have jurisdiction over any claim for damage done by any ship. Although, therefore, the court had an original jurisdiction, and for aught I know—I say nothing upon that point—that jurisdiction may be somewhat enlarged by this 7th section of the 24th Vict., still I think it cannot be successfully contended that the Court of Admiralty ever did possess, either originally by its ancient constitution or under the provisions of this Act of Parliament, any jurisdiction to entertain an original suit claiming compensation, either under Lord Campbell's Act or for a mere personal injury. As far as authority goes the case of *Smith v. Brown* (sup.) in the Queen's Bench is decisive. It may be that having a concurrent jurisdiction, and this being a new case, the first or rather the second case only that has arisen on this point under these Acts of Parliament, we might, without any disrespect towards the Court of Queen's Bench, entertain a different opinion and pronounce a judgment at variance with the decision in that case, and more especially so as in the course of the argument in that case, I may say of the judgment or the opinions delivered by the learned judges, differences appear to have been entertained, and, indeed, have been recognised and held in that case between the Court of Queen's Bench, and not merely the Court of Admiralty but the Privy Council. I, however, speaking independently and without reference to authority, either to the authorities referred to in the Court of Admiralty or afterwards

upon appeal before the Privy Council, am myself clearly of opinion that there is nothing in either of these two Acts of Parliament which confers any jurisdiction whatsoever upon the Court of Chancery or upon the Court of Admiralty to entertain an original suit at the instance of one claiming damage under Lord Campbell's Act, or claiming damages merely for a personal injury. The case in the Queen's Bench, as far as it went, is an authority to this effect. But without such authority, and independently of any such authority, I see nothing whatever to enable the Court of Chancery or the Court of Admiralty to entertain such a suit, and the language to which I have adverted of the 54th section, which relates to the Court of Chancery, is quite at variance with it; for the only power conferred on the Court of Chancery by that section is, as I have already observed, a power to ascertain the amount of the damages and afterwards to apportion among the claimants the fund that may be paid into court. I think, therefore, that it is an objection to these proceedings that there was no admission of liability; indeed there has been no sufficient admission of liability in the suit at all until a late period in the suit, at which period indeed that which had been a conditional admission became an absolute and irrevocable admission, which, perhaps, may be deemed sufficient. But then comes the question, although there must be an admission of liability by the shipowners who claim the relief under these Acts of Parliament before any decree in their favor can be pronounced, is it absolutely necessary that in the original proceeding by which the suit is first commenced and put or brought into the court in question, that then and there the unconditional admission of liability should appear? I am not prepared to say that it is so. There are no words in either Act of Parliament expressly requiring that before either court shall entertain a suit of this nature the liability shall be admitted. It results only from the limited powers conferred upon these two courts in secession, and from the language of the Act of Parliament, by which their functions and their jurisdictions seem to be confined to the mere ascertaining of the amount, and then the appropriation of the different portions of the fund; and I am not prepared to say that it would not be competent to the Court of Admiralty—I say nothing at present of the Court of Chancery—to make a rule or order, as no particular mode of procedure is pointed out by the Act, giving the Admiralty Court jurisdiction to make any rule in relation to procedure, to the effect that upon the institution of a suit of this nature the plaintiff might petition in general terms for relief under the Act, and that there should be an admission of liability made within a certain number of days, or made in such form and at such period, but always before a decree could be pronounced and the relief given; that at some period or other in the suit convenient with reference to the course of proceedings in the Court of Admiralty, there should be an admission of liability. If that be so the effect is this—there must be an admission of liability, and an unconditional and irrevocable admission to enable the court to pronounce judgment, that is, to pronounce a decree in favour of the claim to limited liability. It does not follow, and I do not see, that there is anything in the statute absolutely to require that that admission should be made at, and as part of, the institution of this suit

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itself. It is very true that in the case in *Kay and Johnson (Hill v. Andrus 1 K. & J. 263)*, in the decision of which I entirely concur, the bill was dismissed and the plaintiffs held to be not entitled to the relief claimed, by reason of the bill itself, by which the suit was commenced, containing no allegation of an admission of liability; but when we look to that bill, we find it was a bill in which not only was the liability not admitted but it was denied, and it was clear that upon the bill the relief which the statute afforded, or might afford, under a decree, was duly claimed, and in proper and sufficient terms. That bill was not determined on demurrer. If there had been a demurrer to that bill and the suit had been dismissed by reason of there being no statement in the bill of an admission of liability it might have had a different effect, because it might then have been contended that the bill was dismissed for want of jurisdiction; but the bill was entertained, and it appears to me that the effect of that decision is not that the court has no jurisdiction unless the bill shall show that in instituting the suit there is an admission of liability; but it was necessary, before any decree could be pronounced, that there should be an admission of liability. We find that an injunction in that case was applied for. Not only was there no admission of liability, but there was a denial of liability; and under those circumstances the learned Vice-Chancellor held, and most correctly held, that the claim could not be maintained, and whether it was followed by a mere refusal of the injunction or by a dismissal of the bill is not material. It was a decision of a matter of law upon a question of law, arising in the course of the suit, and then it did not in terms, nor necessarily in effect, imply a decision upon the want or absence of jurisdiction. Then we come to the Court of Admiralty, and to consider whether there was a want of jurisdiction. I have already observed that it appears to me to be within the power of the court, in regulating its own procedure, to determine at what period of the suit, so that it is not prejudicial to other parties in the suit, and in what form an admission of liability shall be made. Therefore, under the circumstances, I must say it appears to me—I am far from saying that it is not open to a great deal of doubt—that it would be going too far were this court to pronounce judgment in favour of the plaintiff in prohibition, on the ground that there was no jurisdiction in that court to entertain the suit, because there was not in the original Act or the petition, and indeed not till a later period of the suit, an admission of liability. It has been indeed said, under the authority of a decision of Dr. Lushington (*The Amalia*, 1 Moore P.C. C. N.S. 471; 1 Mar. Law Cas. O.S. 359), that no admission of liability is necessary at all. I cannot think that that is, or could be, the effect of that decision, or that that very learned and distinguished judge could have come to any such conclusion—I mean treating it as a general proposition applicable to all descriptions of cases of this nature that might arise in the Court of Admiralty. Looking at the circumstances of the case which were before him, in which the only question of damage, and the only claim to damage, arose in a suit between ship-owners, or the owners of cargo or parts of cargo and the shipowners, it might have been true that as the court had jurisdiction to determine the

question of liability in those suits, that is, in the suits then before the learned judge, and as the question of liability had already been determined, or might, or might not have been determined before a decree could be pronounced in the suit for limited liability, the observation may have been made, "it is unnecessary there should be an admission of liability, because that question will be determined, and there must be a decision to the same effect, that is, a decision that the ship-owners are liable, before the decree can be pronounced." That would reconcile the dictum or the decision of Dr. Lushington with the law as we are now disposed to hold it as applicable to cases of this nature. I must, however, add that if it really be the effect of that or any other decision in the Court of Admiralty that there must not be an absolute, unconditional, and irrevocable admission of liability before a decree of this kind can be pronounced, in such a suit, I am clearly of opinion that the decision is wrong, and ought not to guide any court of law or equity, or admiralty, or any other court, in any case that may arise under these Acts of Parliament. It is perfectly clear that the whole power conferred upon the Court of Chancery, and therefore the sole power conferred by the Act of Parliament upon the Court of Admiralty, is limited to the ascertaining of the amount, and the appropriation and distribution of the fund in court among the different claimants. I think, therefore, that it was absolutely necessary that there should be an admission of liability before any decree in this case could have been pronounced in relief of the company; but it does not appear to me to follow, and I am not disposed to hold, that there was want of jurisdiction to entertain the suit by reason of that admission not having been made until a comparatively late period of the suit, so that it was made; however, it was made before any decree was pronounced. I do not speak with confidence upon this subject. I am not at all prepared to hold that as in the course of these proceedings it was necessary to entertain the question of liability, though indirectly and incidentally only, the court did not exceed its jurisdiction in proceeding to ascertain that question, and that the prohibition might not have been moved for and ought to have issued at an earlier period of this suit; because, when we look at the facts of this case, we find that there had been a cause of damage, first between the owners of the *Mary* and the company, the owners of the *Normandy*, and then again an error suit by the owners of the *Normandy* against the owners of the *Mary*, and in those suits the question of liability arose. As in fact those were the only suits in which any question of liability could or did arise at the time, and the court, after the institution of this suit, the suit in question, proceeded with the investigation of those two causes, and in truth to a decision of those two causes, which involved the question of an admission of liability in the cause in question or of a limitation of liability, I am by no means prepared to hold that it was not competent to the plaintiff in this case, to sue for a prohibition in order to restrain the Court of Admiralty from proceeding to entertain, even indirectly, the question of liability in the suit or suits before that court. But, as I have observed, as this seems to me to involve rather a question of procedure as to the period of the suit at which it is necessary this admission should be made, and does not necessarily

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involve the question whether it must be made before the suit is instituted, I would forbear to hold upon the present occasion that the prohibition ought to go in this case, on the ground merely that at the time when the suit was instituted, or in the petition by means of which it was instituted, the plaintiff and now the company have failed to admit their liability. I think it may be deemed a mere question of procedure, and therefore, on this ground, the plaintiff has not entitled himself to the judgment of the court. I now come to the more material question, whether the court had jurisdiction to entertain this suit of limited liability under the 13th section of the Act of Parliament (24 Vict. c. 10), or whether this 13th section does not confer this jurisdiction upon a condition which had not been performed, and which did not therefore attach at the moment when this suit was instituted. That depends upon the words introducing the 13th section. First, it is to be observed that they are totally and essentially different from the words in which the 514th section confers this power or jurisdiction upon the Court of Chancery, and in the earlier Act the words are, "In cases where any liability has been or is alleged to be incurred by any owner in respect of loss of life or personal injury, or loss of, or damage to ships, boats, or goods," and so on, it shall be lawful to the court to entertain a suit of this nature. It is, therefore, necessary only to give the Court of Chancery jurisdiction to entertain a suit of limited liability that there should be a claim or claims, and that there should be either a liability or the mere allegation of a liability to the damage which may be claimed. Therefore in the Court of Chancery if, after a collision of this nature, the loss of a ship, injury to the cargo, the death of persons, giving claims to executors under Lord Campbell's Act, or personal injuries, or any other such species of claim of damage, it is quite enough that such claims should exist and be made upon the company, upon the shipowners, to entitle the shipowners at once to go in the Court of Chancery, file their bill, and claim the relief afforded by the Act of Parliament. The mere existence of the claims, even without suit, is enough. If several come together and make their claim against a shipowner for damage arising from a collision, it is at once competent to a shipowner to go to the Court of Chancery to file his bill for limited liability, in other words admitting his liability to the claims, and call upon the Court of Chancery to ascertain the amount, and then to apportion the value of the ship or the value of the ship in reference to her registered tonnage, which of course must be paid into court, and then he is entitled to the relief which he claims. The only condition as I have observed, in the earlier Act of Parliament upon which the jurisdiction of the Court of Chancery arises, is that claims should exist and be made upon the shipowner. But when we come to the case of the Court of Admiralty, there is a condition of a totally different nature, and a condition made in very plain and express terms, without which, and independently of which, no power whatever is conferred, no jurisdiction whatever arises in the Court of Admiralty. The condition here is, not if any claim shall be made or exist, but "whenever any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty," the Court shall then have the same powers as the Court of Chancery. If there

be any force or meaning in words, there must therefore be a case in which a ship or vessel, or the proceeds thereof, are under arrest in the High Court of Admiralty, or some such state of things clearly amounting to an equivalent, shall exist to enable the court to assume to itself and to exercise any such jurisdiction. Well, did it exist in this case? It clearly did not. What were the circumstances of this case? At the time, I mean, that this suit of limited liability was instituted in this Court of Admiralty, a cause of damage had arisen by the owners of the *Mary* against the owners of the *Normandy*. A cross suit was instituted by the owners of the *Normandy* against the owners of the *Mary*; and what has taken place in those suits to bring the case, or even to seem to bring the case, or tend to bring the case, within the provision of the 24th Vict. c. 10? Not the arrest of the ship or the proceeds of the ship, or anything equivalent, but merely the payment into court on the part of the owners of the *Normandy*, the company in question, of the sum which, it now appears beyond all doubt, is less than the amount for which the company are liable with reference to the registered tonnage and the value of the ship; and therefore wholly insufficient to meet the claims that might be made, indeed to meet any claims that might be made, under this Act of Parliament. Such was the state of things at the time this suit was instituted. But then, did a state of things exist which was an equivalent? Undoubtedly we have the high authority of a very learned and accomplished judge, and one having a long and great experience in causes of this nature—Sir Robert Phillimore—that an equivalent is sufficient. But in the case that was before him—I think it was the *Northumbria* (3 Mar. Law. Cas. O. S. 316)—the state of things which existed was this: it was not the case of the arrest of the ship or the proceeds thereof, but merely of a sum of money, the full value of the ship being in court and under the control of the court. It was more than an equivalent, and therefore, under those circumstances, the Act of Parliament applied. Again, I say here, I entertained considerable doubts whether an equivalent could be sufficient, whether there must not be in the very language of the Act of Parliament some "ship or vessel or the proceeds thereof under arrest." I cannot but say I entertained a doubt whether any equivalent can be substituted for these very plain and intelligible words which the Legislature need, and which they have made the condition of the assuming by this court of the jurisdiction in question. But when I find that the learned judge of the Admiralty Court has held that an equivalent is sufficient, that is, if not indeed the whole proceeds of the ship, but the whole value of the ship in the case where the ship has sunk in the sea, is an equivalent, and brings the case within the Act of Parliament, I am not at all disposed to overrule that decision, and to hold in this court, unfamiliar as we are with the process and procedure, and a great deal relating to and involving the practice of the Court of Admiralty, that that decision is wrong. I think, therefore, at once adopting the opinion of Sir Robert Phillimore, as far as it goes, that there may be an equivalent for the ship or the proceeds of it being under arrest, and all we have to consider is whether any such equivalent existed in this

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case. Here I must say, and with great regret, I am clearly of opinion that no such equivalent did exist. What is supposed to be the equivalent? 5000*l.* has been paid into court; that is manifestly insufficient. The court could not exercise its functions or perform its duty supposing claims were made, as probably they will be, to the amount of 6000*l.* or 7000*l.* or more. The court could not perform its duty under the Act of Parliament and appropriate the requisite sum to each and every of the claimants, because 5000*l.* is not equal to 6376*l.*, which is the sum that ought to have been in court. If, under any circumstances, consistently with the proceedings of the court and the Act of Parliament, a sum of 6376*l.*, the full value of this ship in relation, I mean, to its registered tonnage, had been in court, and under the control of the court, I should have been quite prepared to hold that it was an equivalent, that the foundation of the jurisdiction then existed, and that this suit might have been properly and lawfully instituted. But inasmuch as at the time it was instituted not only was there no such sum as 6376*l.* in court, but no sum at all adequate to the exigencies of the case—and I do not see how it appears with any certainty that any such sum would have been paid into court—I think the foundation of the right to proceed, the foundation of the jurisdiction of the court, is altogether wanting; that this condition, which is made in clear and express terms, in this the only section of the Act of Parliament that confers any such jurisdiction upon the Court of Admiralty, was wanting; and that, consequently there was no jurisdiction in the Court of Admiralty to entertain this suit, and therefore that this writ of prohibition or the judgment in favour of the plaintiff in prohibition must go. I can only say again that if it were possible, consistent with the terms of the Act of Parliament by which we are all bound, whatever we may think of the provisions which we must submit to and act upon, I could come to any other conclusion and pronounce any other judgment I would do so; and most readily, because nothing can be clearer than that, under the circumstances of this case, the shareholders of this company are entitled to the benefit of this Act of Parliament. Unfortunately they have proceeded in the Court of Admiralty in such a way, that is, first of all, without their admission of liability, as to raise a series of important and difficult questions; in other words, a series of obstacles to that to which they were entitled; and they have also instituted their suit without regard as to the language of the Act of Parliament, which alone entitled them to bring any such suit before the court, or the court to entertain any such suit. Under these circumstances I must hold that this court has proceeded without jurisdiction, and that consequently there must be judgment for the plaintiff.

MARTIN, B.—I am of the same opinion. The last point made by Sir John Karslake was that upon the present constitution of the Court of Admiralty, under the Admiralty Act 1861, this writ of prohibition did not lie at all, and that the effect of that Act of Parliament was to place the now existing Court of Admiralty on the footing in all respects of one of the Superior Courts. As I have always understood, there are four Superior Courts in this country, the Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, and the Court of Exchequer; and I apprehend none of those courts is competent to direct a writ of prohibition to one of the others, and that the law of this country vests in those Superior Courts the power of determining whether they have jurisdiction or not, subject of course to a writ of error, or any other legal mode of questioning a decision they may come to. But with respect to all other courts of this country, I apprehend they are all inferior to the four Superior Courts I have mentioned; and as regards the Court of Admiralty, prohibitions have issued for centuries in respect of proceedings in the Court of Admiralty from all the other Superior Courts. From the form in which the Admiralty Act of 1861 is framed I am satisfied that it does not and did not intend to take away that writ of prohibition; for it will be found when I come to call attention to the effect of the Act, that if it had been the intention to take away the writ of prohibition, there would have been an express clause to that effect. That is my belief upon the construction of this Act; but as far as we are concerned there is no necessity to give any judgment upon it, because it is concluded. The Court of Queen's Bench have given judgment in the case of *Smith v. Brown* (sup.), in which they claimed to exercise this right of issuing this writ of prohibition, and they did issue it. By that judgment we are bound, and if there be error in that it must be decided in a court of error. With respect to this particular case the facts are these: Upon some day in 1870 the plaintiff went to the Waterloo Station and took a ticket from London to Guernsey. That was for a journey partly by land and partly by water; and he proceeded and got safe to Southampton, where he got on board a vessel called the *Normandy*, belonging to the defendants, for the purpose of being conveyed to Guernsey. In the course of that voyage the *Normandy* came into collision with a vessel called the *Mary*, the consequence of which was that the *Normandy* was sunk. Considerable injury was done, both to persons and property, and amongst other things the plaintiff's luggage was lost. Now I, for myself, must say that I should be perfectly open to hear an argument whether or not this case is within the jurisdiction of the Court of Admiralty at all. A man enters into a contract in London. His contract is to be performed partly on land and partly on water, and it is said that because the breach of that contract occurred on the sea, therefore the man loses the protection of the common law of this country, and is confined to the protection given by a court of law utterly different from the common law of England, giving different damages, giving a different mode of redress, on altogether a different principle. And if this be correct, the consequence may be, that if a man took his ticket from Euston-square to go to Dublin, so far as Holyhead he would be under the protection of the common law of his country, but when he got from the port of Holyhead he would be under a different law altogether—the law as administered by the Court of Admiralty. That has not been argued at all. All I can say is, that I will keep my mind open for it; and I am by no means prepared to say that upon a contract made in this fashion, when a passenger goes into a packet to go to Guernsey, or Dublin, or Belfast, or any other place, he loses the protection of the common law, and is cast upon the code of law administered in the Court of Admiralty. Sufficient for that day is the evil thereof. When

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the point arises it will be discussed, and I can give no opinion upon what has not been discussed. These goods being lost upon the 21st May 1870, the plaintiff brought a common law action against the defendants in this court as common carriers. That action was clearly maintainable. There was clear jurisdiction in this court for the action to be sustained, and it was the proper, and, up to the year 1734, the only mode by which a man, under such circumstances, could get redress; up to the year 1734, there was no other mode of bringing an action. He gives notice of proceeding to trial, but, in the meantime, two suits were instituted in the Court of Admiralty, and I apprehend those suits were properly instituted there so far as the parties to them were concerned. The parties to the cross action were the *Normandy* upon one side, and the *Mary* on the other; they therefore brought cross actions against each other, alleging negligence the one against the other by reason of which this collision occurred on the sea; and I am not aware that there is any reason why the Court of Admiralty had not jurisdiction in those cases by reason of its ordinary jurisdiction, without anything more. But in the proceedings of the Court of Admiralty it is stated that the *Normandy* proceeded against the owners of the *Mary*, and against the owners of the cargo of the *Mary*, and against all and every other person or persons interested in the said *Mary*, or having any right, claim, or interest whatever in reference to, or arising out of the relation aforesaid, and afterwards presented and filed a petition. Therefore, in the proceeding it is one against all the persons interested in this collision; but they did not take the step of giving any notice of this to any of those persons whose property and persons were injured at all. They are not cited to appear, and the case goes on as between the two parties, being as in an ordinary suit. The result of that was that the *Mary* denied all negligence in the matter brought against her, and the *Normandy* denied all negligence in the matter brought against her. They both insisted that they were innocent, and that no cause of action in the Admiralty Court existed against either of them. That cause went on, and was determined and the court, upon some day in July, gave judgment that the *Normandy* was alone to blame. Thereupon comes this which is supposed to give jurisdiction to the Admiralty Court against the plaintiff: in the proceeding the *Normandy* people state that in the event of its being decided that the *Normandy* was solely to blame, or in the event of its being decided that the *Mary* and the *Normandy* were jointly to blame, they then claimed to institute this suit in respect of limited liability. But they made it conditional upon the decision in the case. They did not give any notice to the plaintiff in this action, or to the other persons whose goods have been injured by reason of this collision, but went on discussing the case between themselves and the owners of the *Mary* without the slightest reference to anyone else. But after judgment—this is what I consider is the real point in this case—before the final decision, but pending it, that is, when there was this merely conditionally admitted liability, upon 4th June an order was made by the Court of Admiralty, which order was to this effect: Amongst other things they ordered that all actions and

suits pending in any other court in relation to the subject matter of this suit, to wit, the liability of the owners of the vessel *Normandy*, in respect of loss of life, or personal injury, or loss of, or damage to ships, goods, or merchandise, or other things on the occasion of a collision which occurred on or about 17th March 1870, between the said vessel *Normandy* and a vessel called the *Mary*, be stopped. And the real question in this case is, whether the Court of Admiralty had jurisdiction without notice to the plaintiff in this suit without giving him an opportunity to be heard, without taking any step whatever, to interfere in this way, and order this action to be stopped; and I am very clearly of opinion that there was no such jurisdiction. The question depends upon the construction of two Acts of Parliament. The first of these Acts of Parliament is the 17 & 18 Vict. c. 104, part ix. I have already said that till the year 1734 the liability of carriers by water was to the full extent of the loss. In *Abbott on Shipping*, 11th edit. p. 348, head "Limitation of Responsibility," it will be found that up to the year 1734 the liability of a carrier by water was the same as the liability of a carrier by land; and they were responsible for the whole amount of loss in the ordinary way. But upon a petition to the House of Commons by several merchants in London, setting forth the alarm of the petitioners at the event of an action in which it was determined that the owners were answerable for merchandise embezzled by the master, an Act was passed limiting the responsibility, by enacting that they should not be answerable beyond the value of the ship, and of the freight then being earned. That Act of Parliament was continued by three other Acts of Parliament, but ultimately they were all repealed, and the existing Act of Parliament upon the subject is the ninth part of the Merchant Shipping Act 1854, which is the 17 & 18 Vict. c. 104, and the only authority now existing to restrict the liability of a shipowner—a carrier by water—under that which must be borne by a carrier by land, is this Act of Parliament, which proceeds to enact by sect. 503, "No owner of any sea-going ship or share therein shall be liable to make good any loss or damage that may happen without his actual fault or privity," which I take to mean where he himself is not guilty of any negligence, or a party to any carelessness "of or to any of the following things, that is to say, of or to any goods, merchandise, or other things whatsoever taken in or put on board any such ship, by reason of any fire happening on board such ship, of or to any gold, silver, diamond, watches, jewels, or precious stones, taken in or put on board any such ship by reason of any robbery, embezzlement, making away with or secreting thereof unless the owner or shipper thereof has, at the time of shipping the same inserted in his bills of lading, or otherwise declared in writing to the master or owner of such ship the true nature and value of such articles, to any extent whatever." Then the 504th section (a) is, "No owner of any sea-going ship or share therein shall, in cases where all or any of the following events occur without his actual fault or privity, that is to say, (1.) Where any loss

(a) This section is now repealed by 35 & 36 Vict. c. 63, s. 2. Table A of the schedule of that Act and sect. 54 of that Act is substituted. By that section a shipowner's liability is absolutely limited to 15*l.* per ton where there has been loss of life. The learned judge seems to have overlooked this latter section.—*EN.*

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of life or personal injury is caused to any person being carried in such ship. (2.) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship. (3.) Where any loss of life or personal injury is by reason of the improper navigation of such sea-going ship as aforesaid caused to any person carried in any other ship or boat. (4.) Where any loss or damage is by reason of any such improper navigation of such sea-going ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise or other things whatsoever, on board any other ship or boat, be answerable in damages to an extent beyond the value of his ship and the freight due, or to grow due in respect of such ship, during the voyage which at the time of the happening of any such events as aforesaid, is in prosecution or contracted for, subject to the following proviso, that is to say, that in no case where any such liability as aforesaid is incurred in respect of loss of life, or personal injury to any passenger, shall the value of any such ship and the freight thereof be taken to be less than 15*l.* per registered ton." So that the substance of this enactment is, that in respect of various matters stated, there shall be a limitation of responsibility to the value of the ship and the then earning freight, and with this proviso, if there be loss of life or injury to the person, the value of the ship shall be taken to be at all events at 15*l.* per ton. That will be found, I think, to be fatal to these proceedings, when we come to look into it, for in point of fact the shipowner is responsible for the value of the freight. The ship may be of greater value than 15*l.* per ton, but instead of the ship being paid in to satisfy the Act of Parliament, it has been said without any proof or finding upon it to be sufficient to pay in 15*l.* per ton. That I think is fatal to these proceedings. The Act of Parliament then proceeds to show the mode of getting the remedy. The 513th section relates to proceedings by the Board of Trade. Then the 514th section enacts: "In cases where any liability has been, or is alleged to have been, incurred by any owner in respect of loss of life, personal injury, or loss of, or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, then subject to the right hereinafter given to the Board of Trade of recovering damages in the United Kingdom, in respect of loss of life or personal injury, it shall be lawful in England or Ireland for the High Court of Chancery, and in Scotland for the Court of Session, and in any British possessions for any competent court to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability, subject as aforesaid and for the distribution of such amount rateably amongst the several claimants, with power for any such court to stop all actions and suits pending in any other court, in relation to the same subject matter; and any proceeding entertained by such Court of Chancery or court of session, or other competent court, may be conducted in such manner and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the court thinks just." That is the jurisdiction which is given to the Court of Chancery by this Act of Parliament; and it has no other jurisdiction. It has, as I under-

stood, exercised this species of jurisdiction frequently, and, as I collect from the judgment of the Vice-Chancellor in the case which has been referred to in Kay and Johnson (*Hill v. Andrus*, 1 K. & J. 283), the Court of Chancery has, in carrying out this Act of Parliament, insisted that the party who sought to obtain this limited responsibility should admit as a foundation of the jurisdiction of the Court of Chancery that to some extent he was liable. I collect from the Vice-Chancellor's judgment that that has been the construction, and he expressly puts the construction upon the section of the Act of Parliament. That judgment has never been appealed against, and it seems to me that as it stands it is binding upon every other court. If this case had been in the court of Chancery, the Court of Chancery might have dealt with it as it thought fit. The Court of Chancery is one of the Superior Courts. It has a right to conduct the proceedings in any way it thinks fit, and no prohibition would lie against it; it is master of its proceedings in the same way as we are masters of our own proceedings in this court; and no prohibition would lie against it from this court. What it did could not be challenged. I do not say that the Court of Chancery would do anything but what was just and right; but I mean to say that as far as the Court of Chancery is concerned it is a court against which no prohibition would lie, and it had absolute control over this matter, subject to an appeal to the House of Lords. But now comes the Act of Parliament under which the Court of Admiralty has jurisdiction at all at common law. But for that Act the Court of Admiralty would have no jurisdiction whatever over this matter; everything they did would be a pure nullity, and this court, or any other court, would have been bound, in the event of an attempt to exercise jurisdiction in a matter over which they had no jurisdiction, to issue a prohibition. The sole power they have got is under the Act of the 24th Vict. c. 10. This is an Act to extend the jurisdiction and improve the practice of the High Court of Admiralty. It first states when it shall come into operation. Then the 4th section enacts: "The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing, of any ship, if at the time of the institution of the cause the ship or the proceeds thereof, are under the arrest of the court." Then there is jurisdiction as to claims for necessities (sect. 5); then as to claims for damage to cargo imported (sect. 6); then over claims for damage done by any ship (sect. 7.) I do not know that this would come under that Act at all. My own impression is that it would, and the Court of Queen's Bench in the case cited, put the true meaning upon damage. Then they are to have jurisdiction over questions as to ownerships, &c., of ships (sect. 8). The 17 & 18 Vict. c. 104, as to claims for salvage of life is extended to that court (sect. 9). They are to have jurisdiction over that; they are to have jurisdiction over any claims made by seamen as to wages earned by them (sect. 10), and over any claim with respect to mortgages within the provisions of the Merchant Shipping Act 1854, whether the ship or the proceeds thereof be under arrest or not (sect. 11). So where they are giving jurisdiction in respect of this mortgage dispute they expressly state that the Merchant Shipping Act shall be extended to them,

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and they shall have that jurisdiction whether the ship or the proceeds thereof be under arrest or not. Then clause 12 is: "The High Court of Admiralty shall have the same powers over any British ship or any share therein, as are conferred on the High Court of Chancery in England by the 62nd, 63rd, 64th, and 65th sections of the Merchant Shipping Act 1854." Then comes the 13th section: "Whenever any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty, the said court shall have the same powers as are conferred upon the High Court of Chancery in England by the ninth part of the Merchant Shipping Act 1854." Under the 11th section they have jurisdiction whether the ship or proceeds be under arrest or not, and by the 13th section it is stated specifically, when the ship or the proceeds thereof are under arrest, then and not until then have they the power conferred on the Court of Chancery. It seems to me to show the meaning of the Legislature as clearly as words can do it; that the Legislature did not intend to confer this jurisdiction upon the Court of Admiralty except the ship or vessel or the proceeds thereof were under arrest. Therefore it seems to me that is a condition precedent to their jurisdiction in the matter at all. With regard to that matter the learned judge of the Court of Admiralty seems to have decided that, in his court, after this action had been discussed to the extent that the *Mary* was entitled to recover against the *Normandy* in regard to this misfortune, and they had come and stated that although the *Normandy* is at the bottom of the sea, and although there were no proceeds of the *Normandy* because she was never sold, and therefore could not be under arrest, they had jurisdiction in the event of the owners of the *Normandy* paying into court the sum of money which would represent the ship if she had been in existence. Whether that is so or not I do not know, but certainly the value of the ship has not been paid into court, but what has been paid into court is that conventional value in respect of loss of life which is represented by £5L, or a certain number of tons regulated by the Act of Parliament, and I find no overment anywhere that that is the real value of the ship. Therefore it seems to me there never has arisen that which can be taken as a substitute for the value of the ship at the bottom of the sea; that has not been done which the Act of Parliament requires to be done, that is, that the parties who seek for this protection should have the ship actually in the possession of the Court of Admiralty for the purpose of satisfying the claim. Therefore it seems to me there was no jurisdiction to entertain this action at all according to the plain and obvious meaning of the Acts of Parliament. Supposing the Court of Admiralty had jurisdiction, it ought to have been exercised by a suit brought for the purpose, having nothing to do with the liability of the *Mary*. There ought to have been a simple suit in which liability was admitted to the extent the Vice-Chancellor decided in the case cited. Then the suit should have been brought simply for the purpose of having this matter decided. It is not competent of them to bring such an action as they have thought fit to bring, to introduce by a sideway this proceeding, making it conditional on liability being found in the *Normandy*. For these reasons I am of opinion that this prohibition should go, and I must further say I think the prohibition should go on a higher

ground altogether. I do not understand how it is possible that the Court of Admiralty can have jurisdiction when a man is known to have a cause of action, when a man is known to be prosecuting that cause of action in one of the Superior Courts according to the law of this country, without notice to him to issue a prohibition against proceedings in that court, without giving him an opportunity of appearing and stating his reasons. I do not mean to go at any length into this matter, but I refer to Mr. Broom's *Maxims*, where all the cases seem to be collected, and I find that it is not by reason of an Act of Parliament, or by the omission of any mention in an Act of Parliament, but that by the English law of jurisprudence, by the mode in which it carries into effect its rules of law, it is an essential principle of justice that if the man be known against whom the court is about to proceed to make an order, he shall have notice of that proceeding, and an opportunity given to him to come and show that it cannot be maintained. A maxim is cited, which is true enough. It seems to me it is taken from Seneca, and therefore it is a very old one. The meaning of it is that when a judgment has been given without the other side being heard, although the judgment be quite right, it is not a lawful or right judgment, for the want of those persons upon whom that judgment imposes some burden having an opportunity of coming in and stating their reasons why it should not be. Therefore, it seems to me there was a defect in this proceeding in the plaintiff not having had an opportunity given to him of going into the Court of Admiralty and stating his reasons, if he had any, why he should not be prohibited from prosecuting an action in one of the Superior Courts of common law, which seems to me to be the right of all people in this country, whether native or foreign, and that it cannot be stopped without giving some reason for it, to which he would have a right to answer. In my judgment this proceeding is without jurisdiction. I think the suit is wrong, and I think further, and what I particularly direct my attention to is, that there was no jurisdiction whatever to issue that order of the 4th June to stop the proceedings in this suit, that that proceeding was a nullity, and that we are bound for the purpose of protecting the plaintiff from any consequences thereof to grant the prohibition. I therefore to a certain extent concur with my Lord in what he has said, but as I have already observed, I am not prepared to say that this matter is a matter within the jurisdiction of the Court of Admiralty. When a contract is made in London for the carriage of goods in the ordinary way, it does not seem to me that because a breach of that contract happens upon sea, the carriage being to a place beyond the sea, therefore the case is taken away from the common law, and transferred to the Court of Admiralty; and I am satisfied in my own mind, that the persons connected with this branch of business are aware of it; because up to a short period, within a year, the ordinary ticket that you got for going to Dublin or Belfast or anywhere was one ticket. It was from Euston-square to Dublin or Belfast, as the case may be. They saw the difficulty that might arise from that, and instead of one there are two—one is for conveying you from London to Holyhead, and the other is for conveying you from Holyhead across to Dublin or Belfast. I have not the slightest doubt that this difficulty has occurred

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to the people who have advised these companies, and they have shifted the matter in this way for the very purpose of getting out of the difficulty this company are now in. Whether they will be successful or not I do not know; but we have had no argument upon the question of a man who is under the protection of the common law of England, till he gets to Holyhead, and when he gets a quarter of a mile beyond Holyhead on the sea, should be under the admiralty law, which is taken from the civil law, and supposed to be more in accordance with the law of foreign lands. We have not had an argument upon that, therefore I have not to pronounce an opinion upon it.

CLEASBY, B.—I shall add very little in this case to what has been said, but as it is a case in which we are exercising a somewhat unusual jurisdiction, and I may not perhaps agree altogether with all the reasons that have been given, I feel bound to state, very briefly, those which bring me to the same conclusion as the rest of the court have arrived at. This is an application for a prohibition. The prohibition is a writ directed to the court commanding them (I am now reading the words of Blackstone) to cease from the prosecution of a suit upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognisance of some other court. It is quite obvious from the statement of what its object is, that it is a matter of great importance to the subject, and it is not a matter that rests in our discretion. If it was a matter that rested in our discretion, then, considering all that has taken place in this case, subject still to the question that has been adverted to by my brother Martin, I should decline to accede to the motion made. But this is a case in which I am bound, I am sorry to say, to express my opinion. You will find it laid down, no doubt correctly, in Com. Dig. ("Prohibition" Letter C.), "Prohibition ought to be granted *ex debito iustitie*." Then he quotes numbers of authorities "by all the judges." (2 Inst. 607). If it ought to go according to law it must go, and we must agree to its going. The prohibition which is asked is a prohibition to the Court of Admiralty, and the same passage in Blackstone, vol. 3, p. 112, says, "It may be directed to the Courts Christian, the University Courts, the Court of Chivalry, or the Court of Admiralty, where they concern themselves with any matter not within their jurisdiction, as if the first"—that is the former courts—"should attempt to try the validity of a custom pleaded, or the latter a contract made or to be executed within this Kingdom." So that it stands as matter beyond dispute that the Court of Admiralty is one to which this writ of prohibition in the ordinary course goes. You will find a great deal about it in Com. Dig. ("Admiralty" Letter F. 1.) The Court of Admiralty has no jurisdiction in any case which arises upon land or within any county, (4 Inst. 134); and by the statute Ric. 2, c. 5, it was enacted that the Admiralty meddle not with things done in the realm but only on the sea; and it goes on to say that the person doing so comes within the danger of *premunire*. Afterwards at F. 2, "So upon motion after a suggestion that the suit in the Admiralty is for a matter out of their jurisdiction, and after oyer of the libel and day given to the party, a prohibition goes." (4 Inst. 135-6.) As if the libel there be upon a contract, plea, or complaint made by water or

by land, within any county of the Kingdom. Well, now, the Court of Admiralty then had a limited jurisdiction. Nothing that has taken place since has prevented it from being a court having a limited jurisdiction. For the purpose of providing judges for the Judicial Committee of the Privy Council by an interpretation clause, you may class it with the Superior Courts, or you might even call it a Superior Court; but still you do not prevent it from being a Superior Court having a limited jurisdiction. The jurisdiction has been enormously enlarged by the Act of Parliament referred to. But that does not show it to be a court with anything but a limited jurisdiction. On the contrary, all those specific enlargements assume it to be still a court with limited jurisdiction, and provided a suit were to be brought in reference to a contract made upon land for the purpose of extending the jurisdiction, and we know that jurisdictions have been from time to time extended in courts, could it be said that this court or other courts could not properly interfere, by prohibition, to prevent that jurisdiction from being so exercised? It could not be done properly by appeal. An appeal corrects either the interlocutory or final judgment of the court, but the hardship upon the subject is to be compelled to go on to judgment in a case in which there is no jurisdiction. Therefore, he has a right to come, if there be no jurisdiction, and apply to prevent the case proceeding. I have thought it worth while to give these reasons, because I do not accede entirely to what was said by my brother Martin about our being bound by *Smith v. Brown* (sup.). Upon this matter, if we are called upon to exercise a particular jurisdiction, we ought to be satisfied that we have the right to exercise it. At the same time that authority goes a great way to satisfy me that we have the jurisdiction, and I am very glad to find that the Court of Queen's Bench have had no hesitation in considering themselves justified, and we are justified to the same extent, in issuing the prohibition to the Court of Admiralty. Having disposed of those two matters satisfactorily, certainly to my own mind, we have now to consider, were they or were they not exceeding their jurisdiction? They have a limited jurisdiction. It is a case for a prohibition. We are bound to issue the prohibition if they did exceed their jurisdiction. Was it within their jurisdiction or was it not? I will go through the facts again, but very shortly. This action was brought in consequence of a collision at sea. A man having entered into a contract with the company to be carried from London to Guernsey, or wherever it may be, two vessels came into collision, and the passenger sustained loss. Two suits are instituted—two causes of damage in the Admiralty Court. Then what is called the limited liability suit is also commenced by the defendants in the ordinary form, and an order is thereupon made, to which my brother Martin has particularly referred, on the 14th June, followed up by a decree on the 14th July, or something of that sort, directing that all actions, proceedings in respect of loss of life, or anything else, in the most general terms, shall at once and forthwith be stopped. Well, first, we have to consider, had they jurisdiction to make this order, and is a prohibition a proper course if they have made the order without jurisdiction? The state of facts is simply this:—An action had been brought for redress. The Court of Admiralty

at the time it made that order could not give the redress. It is admitted it could not give it, because until it could give that redress a question remained to be tried—a question between the *Mory* and the *Normandy*. It was therefore incompetent to give redress, and it issued an injunction stopping and preventing a subject obtaining the redress to which he was by law entitled in the common law courts of the country. Well, now, upon that proceeding being taken, whether the plaintiff in this case could have stopped the suit until that order was made, which to some extent, no doubt, was hindering upon him, it is not necessary to inquire; but as soon as it was made, and he was directly affected by this exercise of jurisdiction preventing him obtaining the redress which he could not obtain anywhere else, then I apprehend it was a case in which it was the duty of the common law courts to interfere and say, "You have no right to interfere to prevent this man getting the redress where he can get it." Well, now, has anything occurred to prevent this from being a case in which a prohibition should go? Why could not the Court of Admiralty give the plaintiff redress in this case at that time? Merely because they had no jurisdiction to do it. Their jurisdiction to give that redress arose subsequently. They had not the jurisdiction to give the redress themselves, but as at that time in that suit which was instituted for the purpose that has been mentioned, they had not the jurisdiction to give the redress themselves, and they issued an injunction preventing the subject from having the redress to which he was otherwise entitled, it becomes, it appears to me, exactly a case in which the prohibition ought to go, and nothing that has occurred since, that I can imagine, has interfered with the right which the plaintiff then had, unless it can be shown that the court had jurisdiction to make that order—his right to have a prohibition go against that suit being proceeded with, in which that order stands. Had they jurisdiction to give the redress then? Had they jurisdiction to proceed in that suit for the purpose of giving redress? That depends upon the construction to be put upon the 13th section of the Admiralty Act. It appears to me plain that the intention of that section was that where the ship or the proceeds thereof, or I will assume for the sake of argument, where all those matters were in court, and therefore the Court of Admiralty could give redress, such redress as it could give in respect of the matter complained of in the court of law, then they should have the jurisdiction conferred upon the Court of Chancery in general where liability is admitted and nothing remains but to administer the fund. That seems to me plainly to have been the object. It shall not be necessary to go to the Court of Chancery to get this redress. You shall have it, provided the vessel, or the proceeds thereof are in court; and the reason is manifest which I have given. Therefore, in this case, we have to consider—were the vessel or the proceeds thereof in any sense whatever in court? Was that part of the section complied with? I am not going to repeat the reasons given, because it is not necessary. I entirely agree with what has been said by the court upon that subject, that that preliminary condition has not been complied with, therefore the jurisdiction to give this redress at that time did not exist. But then another question occurred to me, which I threw out in course of the argument; whether it

was a case for a prohibition; whether, though there was no jurisdiction to entertain the suit at the time it was commenced, yet when the suit was afterwards going on, and proceedings taking place under circumstances which would have given jurisdiction to commence the suit—of course it was a matter of discretion—that would have been sufficient to prevent them exercising the prohibition? But even treating it, not as a matter of discretion, but as a question of law, the point might have deserved consideration, more especially if the condition had clearly been performed, upon which there is a difference of opinion—I mean as to the distinction between the vessel and the proceeds. But without considering that, it appears to me sufficient to say in this case that this was a suit in which, on the 4th June, an order had been made for an injunction stopping the action; that at that time there was no jurisdiction to make that order, and no jurisdiction to entertain the suit; and that the plaintiff had a right, therefore, to prevent that suit from continuing which was commenced without jurisdiction, in which an order was made against him without jurisdiction, which order may always operate as a prejudice against him, and be the ground of proceeding. That seems to be a satisfactory answer to the difficulty which I felt—I will not say it is a real difficulty—but an answer to the difficulty such as it is. He has a right to prevent the suit going on, in which an order has been made where there was no jurisdiction to entertain a suit at that time.

Judgment for the plaintiff.

Attorneys for the plaintiff, Brooksbank and Gailand.

Attorney for the defendants, Lewis Crombie.

AMERICAN REPORTS.

Compiled by F. O. CROMBIE, Esq., Barrister-at-Law.

UNITED STATES DISTRICT COURT—SOUTHERN DISTRICT OF NEW YORK.

March 1872.

GJESSING v. THE STEAMER HANSA.

Collision between steamer and sailing vessel—Fog—Speed of steamer—Rule as to.

A steamer going at the rate of nine and a half miles an hour during a fog at night which occasionally lifted, ran into and sank a sailing vessel. The sailing vessel had kept a good look out, and blown a fog horn, which, however was not heard on board the steamer. It was submitted for the steamer that she answered her helm better when steaming rapidly, and that her speed was not so great that she could not have been stopped on receiving due warning, that is to say, within the distances at which a fog horn is usually heard, and that she had not heard any warning:

Held, that this was no defence, and that the steamer was to blame.

It is the duty of a steamer to avail herself of her boiler power, to be ready to stop and reverse with power and efficiency in a fog, while at the same time she moderates her speed, so as to enable such power to be exercised with efficiency, and with greater efficiency than if she did not moderate her speed.

The result of the authorities is that while the justifiable rate of speed will depend upon the circumstances of the case, there is no such criterion as

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that the steamer may go at a rate such as will enable her to stop within an assumed distance at which she may, under favourable circumstances, expect to hear a fog horn or a steam whistle, if blown.

Beebe, Donohue, and Cooke, for the libellant.

W. C. Morton, and W. W. McFarland, for the claimants.

BLATCHFORD, J.—On the morning of the 31st May, 1871, but a few minutes before half-past-two o'clock, the German screw steamer, *Hansa*, in the Atlantic Ocean, about 350 miles from the port of New York, came into collision with the Norwegian barque *Rhea*, striking her a square blow on her port side, between her main-mast and mizen-mast, and cutting into her to a distance of some 18ft. The barque had all her sails set except her light sails, and was going three or four knots an hour, heading south-half-west, the wind being about west-south-west, and the barque being close hauled. The steamer was on a voyage from Bremen to New York, and the barque on a voyage from Rotterdam to New York. After the collision, which occurred in a fog, the steamer backed out from the barque, and the barque disappeared in the fog, towards the port hand of the steamer, and undoubtedly went down with her cargo. The value of the barque and her cargo are claimed to have been 160,000 dollars. The libel alleges that at and before the collision the barque had a fog horn blowing and sounding; that the barque kept on her course without variation until the steamer was close on board of her; that then, to ease the blow if possible, the mate ordered the helm a port, but the collision took place before any change could be made in her course; that the collision was caused without fault on the part of the barque; that she had a proper look-out set, and a fog horn blowing, and a good man at the wheel; that a full and efficient look-out was kept; and that the fault was in the steamer in running at too great a rate of speed, in not keeping a good and sufficient look-out, in not in time taking steps to avoid the barque, as it was the duty of those on the steamer to do, and in not stopping and backing in time. The answer avers that during the time between midnight and half-past two o'clock a.m. on the 31st May, a drifting, but not continuous, fog was experienced, which had commenced some hours before, and had varied in the extent of its obscuration, from time to time lighting up and changing in character, and presenting thick and clear atmosphere alternately; that during the prevalence of the fog the *Hansa* was kept at a moderate rate of speed, part of the time as low as seven knots an hour, and at no time exceeding nine and a half knots, nine knots per hour being about the rate immediately before and at the time of the collision; that her rate of speed was regulated according to the circumstances; that, in view of the skill and care exercised and the precautions taken in navigating her, and of the reciprocal precautions required by law from other vessels, her rate of speed was at all times prudent and safe; that during the half hour immediately preceding the collision, blasts of her steam whistle were sounded at intervals not exceeding at any time one minute and a half, lights of the most effective description were displayed, the most vigilant look-out was maintained, an officer of capacity and long experience was in charge of the deck, a force of four men—two able

seamen and two quartermasters—was kept in the wheelhouse, the most effective apparatus for conveying orders from the officer in charge to the engine-room and the wheel respectively were provided, thus creating a reciprocal duty on the part of approaching vessels to give notice of their location by proper sounds of their steam-whistles or fog-horns, the distance at which the *Hansa's* steam-whistle could be heard, being at least two miles in much less favourable circumstances, and the distance at which ordinary fog-horns and steam-whistles on other vessels could have been heard by those on board the *Hansa*, not being less than two miles; that, under these circumstances, the speed of the *Hansa* was, in all respects moderate, judicious and safe, and did not in any manner contribute to the collision; that while so proceeding, the steamer heading about west, and no answering blast of whistle or fog-horn, and no hail having been detected, although attentively listened for in the intervals between the blasts of the *Hansa's* steam-whistle, and immediately after another blast of the *Hansa's* steam whistle, a dim light the colour of which was not at first distinguishable, but which proved to be the red light of a vessel alleged to have been the barque *Rhea*, came into view, and was sighted and reported simultaneously by both lookouts on the bows of the *Hansa*; that the light bore about two points on the starboard bow of the *Hansa*, and indicated the dangerous proximity of a vessel apparently under full sail, heading to the southward, across the bow of the *Hansa*; that, by immediate telegraphic orders from the bridge to the engine and wheel of the *Hansa*, her engine was at once stopped and backed, and her helm was put hard-a-starboard, but, before the heading or way of the *Hansa* could be materially affected thereby, a collision, inevitable to the *Hansa*, occurred, and the port side of the barque came in contact with the bow of the *Hansa*; that, as soon as the vicinity of the barque became known, every possible effort on the part of those navigating the *Hansa* was made to avoid the collision; and that no fault was committed by them, and the collision was not caused by any fault or negligence on the part of those in charge of navigating the *Hansa*. The answer charges that the collision was occasioned by the negligence and unskillfulness of those in charge of the barque, and deficiencies in her equipment, and omissions of duty and of precautions, as follows: First, the failure on the part of those navigating the barque to give due notice of her presence and approach by sounding properly one or more fog-horns, as, had the same been so sounded, they must necessarily have been heard on board of the *Hansa* at a distance much farther than was necessary to enable those on board of her to easily avoid any danger of collision, at even a much greater rate of speed than she was then going; and, in the absence of such signal or signals on the part of the barque, to indicate her presence and bearing, all precautions by those navigating the *Hansa* were, necessarily unavailing to prevent a collision, and would have been so at whatever rate of speed the *Hansa* might have been proceeding. Secondly, the barque, at the time of the collision, was being navigated on a part of the ocean out of the usual course of sailing vessels. Thirdly, her master, officers, and crew were not vigilant, but negligent in the performance of their duties, and were inefficient as to nautical

competency, seamanship, and number. Fourthly, before, and at the time of, the collision, no competent or effective look-out was stationed or maintained on the barque. Fifthly, immediately before, and at the time of the collision, the wheel of the barque was in the sole charge of an inexperienced and incapable boy, who was ignorant of the Norwegian language, in which language the usual orders for navigating the barque were given. Sixthly, the lights on the barque were dim, defective, and placed on an unusual and improper part of the vessel, and, as so defective and misplaced, tended to mislead as to her true position and bearing. Seventhly, there was a general neglect of discipline and proper precautions on board of the barque; and blasts of the steam whistle sounded from on board of the *Hansa* were heard on board of the barque in ample time for her, by answering sounds of fog horn and otherwise, to have notified those navigating the *Hansa* of the position of the barque, and enabled them to avoid a collision; and, through culpable negligence and want of seamanlike presence of mind, sagacity and promptitude on the part of those navigating the barque, no answering fog horn or horns was or were sounded, or other measures resorted to to notify the *Hansa* of her position; and the collision was due solely to the seven causes thus stated. The consideration of this case might well stop here. The *Hansa* and the *Rhea* were proceeding in such directions as to involve risk of collision, and it was the duty of the *Hansa* to keep out of the way of the *Rhea*, and she failed to do so. The *Hansa* was approaching the *Rhea* so as to involve risk of collision, and it was the duty of the *Hansa* to seasonably slacken her speed, and to seasonably stop and reverse, and she failed to slacken her speed in season, and she failed to stop and reverse in season. The *Rhea* kept her course. There was no danger to accrue to the *Hansa* from obeying the rules, and there were no special circumstances existing to render necessary any departure by the *Hansa* from the rules. The *Rhea* did not neglect to carry the proper lights, or to make the proper signals, or to keep a proper look-out, or to observe any precaution required by the ordinary practice of seamen, or the special circumstances of the case. The burden being on the *Hansa*, under such circumstances, to excuse herself from fault, and she not having done so, condemnation of her necessarily follows. But, I think it is shown affirmatively that there was fault on the part of the *Hansa* in failing to observe the requirement to go at a moderate speed in the fog which prevailed. The actual rate of speed of the *Hansa* at the time of the collision was nine and a half knots an hour. That had been her speed for an hour and a half previously. Her average speed up to the previous noon, during the voyage, had been eleven knots an hour, using sails whenever practicable. From the previous noon, without sails, her speed had at no time exceeded ten and a half knots. The answer avers that, during the prevalence of a drifting, but not continuous fog, which commenced some hours before the midnight previous to the collision, the *Hansa* was kept at a moderate rate of speed, part of the time as low as seven knots an hour, and at no time exceeding nine and a half knots, nine knots per hour being about the rate immediately before and at the time of the collision. These statements are not borne out by the evidence from the log

book of the *Hansa*. On the contrary, of the fourteen logs at the fourteen even hours between the time of the collision and the previous noon, there was no rate of nine knots, there were two logs at nine and a half, six logs at ten, four logs at ten and a half, and two logs, namely, at seven p.m. and at eight p.m., at seven. The master of the *Hansa* testifies that he would consider ten miles a very moderate kind of speed for a vessel like the *Hansa* on a night when there was a thick fog at times and lighting up at times, and in the location where the collision occurred. Her speed from the noon before the collision until the collision averaged, taking the log rates, a little under nine and two-thirds miles an hour, without sails, her speed at the time of the collision being nine and a half. From noon of the 29th to noon of the 30th, with fore and aft sails, gaff topsails and staysails set for twenty-two hours, she ran at the average rate of nearly eleven and one-tenth miles an hour. Yet her master testifies that, during a part of the time of the day preceding the collision, the fog was steadily very heavy; that during that time the rate of speed they made was from about six and a half to seven miles; that when the fog was thick at times, and lighting up at times, their speed was about nine and a half miles; and that he regards those rates of speed as prudent rates under the circumstances. He says that during the 29th and 30th the weather was sometimes very thick, and sometimes lighter, mostly cloudy, dark weather, with rain and fog; that when he went to bed, two hours and three-quarters before the collision, the weather was quite clear; and that he had not been in bed before for more than thirty-six hours. Sander, the second officer of the *Hansa*, testifies that, in his judgment, the speed of the *Hansa*, nine and a half knots, at the time of the collision, was a moderate and prudent rate of speed for her on such a night, heading as she was, and with the wind, sea, and fog such as they were. He says that it began to get thick soon after midnight, and continued getting thicker, and lighting up until the time of the collision. The fog was such that the *Hansa* kept her whistle blowing at the same intervals from before half-past twelve until the collision, and that Sander lost sight of the *Rhea* after the collision, when the *Rhea* was about half the length of the *Hansa* away from the *Hansa*, that is, about 185 ft. off. It is urged, on the evidence, that a steamer steers better when going at a quick rate of speed than when going at a slow rate of speed; that a steamer making a given rate of speed, with only sufficient steam for that rate, cannot be stopped in any less distance than when making double that rate, with sufficient steam for such double speed; and that the *Hansa* could be brought to a full stop, when going at the rate of nine and a half knots an hour, in the condition of things as they were at the time of the collision, in, as her master thinks, less than twice her own length, and in, as Sander thinks, from two to three times her own length, her length being 367 ft. The evidence shows that there was no difficulty in managing and steering the *Hansa* at a much less rate of speed than nine and a half knots, for, after the collision, she moved around in a circle of a half or three-quarters of a mile in diameter, for a considerable time, at a speed of four miles an hour and sometimes less, sometimes stopping entirely, searching for traces of the *Rhea*. There is no

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don't that a steamer, or any other vessel, will answer her helm more readily, so as to avoid a given object ahead by actuating the helm at a less distance off from such object, when she is going at a higher speed than when she is going at a lower rate. But this has nothing to do with the control exercised by her steam machinery to stop her headway and give her sternway. That control is more effective at the lower speed. Not that five knot steam will give her sternway when her speed is five knots only, any sooner than ten knot steam will give her sternway when her speed is ten knots. But, a steamer with boiler capacity for steam for ten knots, and whose usual rate is ten knots, in clear weather, can, from running at ten knots, with ten knot steam, reduce her rate to five knots in a fog, and so manage her fires and have in reserve a force of steam, as to be able to apply, in aid of obtaining sternway in an emergency, a greater power of steam than that used to go ahead at five knots, and thus avoid many a collision at five knots which could not be avoided at ten knots. It is the duty of a steamer to avail herself of her boiler power to be ready to stop and reverse with power and efficiency in a fog, while at the same time she moderates her speed so as to enable such power to be exercised with efficiency, and with greater efficiency than if she did not moderate her speed. That is the meaning of the rule that a steamer shall in a fog go at a moderate speed. It is that she may avail herself of the power which belongs to a steamer to go directly astern in spite of wind and waves, and thus avoid collisions which no vessels but a steamer can avoid. Hence it is the steamer that is to keep out of the way of the sailing vessel, and she is to do it by moderating her speed in a fog. Independently of the question of avoiding entirely another vessel, a collision at a less rate of speed may be very much less disastrous. There may be time to give a slanting blow. In the present case, a considerably less rate of speed in the *Hansa* would probably not have put the *Rhea* nearly in two, or, the light of the *Rhea* being seen at the same distance it was, the *Hansa's* helm might, at the less speed, have sheered her so as to give the *Rhea* a glancing, and, perhaps, not necessarily fatal, blow. In regard to the distance in which the *Hansa* could be brought to a stop, when going at the rate of nine and a half knots an hour, the evidence given is purely a matter of speculation and opinion. It is not stated to be the result of experiment, or even observation. It is not given by an engineer. It is given solely by the master of the *Hansa* and the officer of the deck, the persons responsible for this collision and for the loss of property and of life attendant upon it. But, even if it should be assumed to be possibly true, it amounts to nothing. In the first place, plunging on through the fog as the *Hansa* was, with a fresh breeze from nearly ahead, and a head sea, at the rate of nine and a half knots an hour, with the attending circumstances before referred to, which made it impossible to hear her steam whistle on the *Rhea*, and impossible to hear the fog horn of the *Rhea* on the *Hansa*, a capacity to be brought to a full stop in a distance so great even as that suggested was of no service. There should have been a capacity to be brought to a full stop in a less distance. There would have been such capacity if the speed had been less than nine and a half knots, with the proper reserve of steam power

ready to be instantly commanded to reverse with the utmost efficiency. It is a self-evident proposition, that if, with a reserve force of steam ready to be used but not in use, and the throttle-valve only partly open, a speed be maintained less than that which would result from having the throttle-valve wide open, the vessel can, by reversing with the throttle-valve opened wide, be brought to a full stop in a less distance from the lesser speed than from the greater speed. No proposition to the contrary of this is sought to be maintained by any evidence. Instead of that this question, and this alone, is put, not to any engineer, but to Sander, the officer of the deck on the *Hansa*: "Assuming that a steamer is making five knots an hour, with sufficient steam for only that rate of speed, can she be stopped in a greater or less distance than a steamer going ten knots, with steam enough for going at that rate of speed?" He answers: "It will take the same time to stop her." The premises being irrelevant, the conclusion is equally so. It is the more incumbent on these large steamers of great speed, weight, and momentum to go at a moderate speed in a fog in order to be ready to reverse with more power than that used in their onward movement, because of the almost certainly fatal consequences to anything which they hit with a direct blow, as in this case, where the *Hansa* cut into the *Rhea* to a distance of eighteen feet. The probability of serious injury to such a steamer in a collision with a sailing vessel is so comparatively small, that the steamer, feeling safe herself, takes precautions in a fog substantially only in reference to other steamers. The probability of serious injury to a sailing vessel in a collision with such a steamer is so comparatively great, that the steamer should take extraordinary precautions in a fog, especially in moderating her speed, and making that moderate speed efficient by being ready to reverse with a greater power than that used in her onward movement. The propositions maintained on the part of the *Hansa*, as to speed, are, that if her speed did not exceed such a rate as would admit of her being stopped, after being warned that another vessel was in her way, she was going at a prudent and allowable rate; that this test depends on the distance within which she could be stopped and the distance at which she was entitled to expect warning that another vessel was in her way; that if she could be stopped within the distances at which such warning was to be expected, her speed was not unreasonable; that such distance is to be taken at the usual reach of the customary warning; and that any other rule will destroy rapidity of communication by steam across the ocean, and interfere with the rapid transit of merchandise and of the mails, which has become a necessity. It is sufficient to say that no such rule of speed has ever been established or recognised by any Admiralty Court. It would put all sailing vessels, even though complying with all the rules of navigation, wholly at the mercy of these large and powerful steamers, with no chance of redress. If the steamers will persist in going at these rapid rates in fogs, they must take the risk upon themselves and bear the consequences, and not throw the risk upon those whose lives and property they destroy. I had occasion, in the case of the *Chancellor*, in May, 1870 (N. Y. Daily Transcript of June 10, 1870), to express what I regard to be the settled views of courts of admiralty on this subject, and it is well, in view of

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the continued and persistent recklessness of steamers, to repeat those views. One of the witnesses for the claimant in that case was the master of a steamer plying regularly between New York and Liverpool. He said that while crossing the bank in a fog it was not his custom to diminish his rate of speed at all; that he generally went ten or eleven knots an hour through a fog on the banks; and that from three hundred to four hundred yards was the furthest distance which a fog horn or a bell could be heard. On this testimony I made these observations: "This practice, if it be one, of not diminishing speed in a fog on the Banks, is directly, so far as steamers are concerned, in the face of the 16th article of the sailing rules, which provides that every steamship shall, when in a fog, go at a moderate speed. . . . Two prominent ideas were advanced by the witnesses for the claimant in this case, as justifying and diminished speed in a fog on the Banks. One was, that the danger to any vessel in a fog is greater the longer she remains in the fog. The other was, that the faster the vessel is going, the more quickly will she mind her helm, and thus the better will she be able, on a signal of danger, to avoid colliding with another vessel in a fog. Neither of these ideas has any sanction in the law, and any vessel which acts upon them takes upon herself the consequences of recklessness. The first idea disregards wholly the rights and the safety of other vessels. The other idea pre-supposes that a signal of danger proceeding from a vessel unseen in a fog, to another vessel, will necessarily be heard so seasonably, and acted upon so intelligently, by the latter, as to secure, by a proper movement of her helm, the avoidance of a collision." A review of the principal cases on the subject of speed in a fog will show not only that no such rule as that contended for on the part of the *Hansa* has ever been laid down or sanctioned by courts of admiralty, but that the rule which is applied has not been relaxed in view of the increase of intercourse by steamers, and of the enlargement of the size and power of steamers. In the *Lose* (2 W. Rob. 1, 3), in 1843, Dr. Lushington said: "It may be a matter of convenience that steam vessels should proceed with great rapidity, but the law will not justify them in proceeding with such rapidity if the property and lives of other persons are thereby endangered." He reiterates this view in the cases of the *Virgil* (2 W. Rob. 201, 205), the *Iron Duke*, in 1845 (2 W. Rob. 377, 385), and the *Juliet Erskine*, in 1849 (6 Notes of Cases, 633, 635). The same view was taken in the case of the *London-derry* (4 Notes of Cases, supplement, 31, 45), and by the Supreme Court of the United States, in *Newton v. Stebbins*, in 1850 (10 Howard, 586, 606), in *McCready v. Goldsmith*, in 1855 (18 Howard, 89, 91), and in *Rogers v. The St. Charles* in 1856 (19 Howard, 109, 112). It was enforced in the *Northern Indiana*, in 1853 (3 Blatchf. C. C. R. 92, 109), in the *Batavier*, in 1854 (9 Moore's P. C. R. 287, 297, and 40 English Law and Eq. Rep. 19, 25), and in *The John Adams*, in 1860 (1 Clifford, 404, 414). In *The Great Eastern*, in the Privy Council, in 1864 (2 Mar. Law Cas. O. S. 97; 11 L. T. Rep. N. S. 5, 8, and Holt's Rule of the Road, 167, 180), it is said: "Their Lordships do not mean to lay down any rule beyond that expressed in the regulations themselves, as the occasion when a steam vessel is bound to moderate her

speed, or as to the rate which, in the circumstances prescribed in the evidence, she ought not to exceed; but their Lordships are of opinion that it is the duty of the steamer to proceed only at such a rate of speed as will enable her, after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent any collision from taking place." This was the principle adopted by this court in the case of the *D. S. Gregory*, in 1868 (2 Benedict 167), where the *D. S. Gregory*, a steamer, came into collision with a vessel at anchor, and where it was said that the fact that the steamer, while under way in a fog, collided with the vessel at anchor, which used all proper precautions to give notice of her position, was sufficient evidence that the speed of the steamer was not moderate, there being no special circumstances existing in the case to justify her in maintaining the rate of speed she did; that in such a fog her speed ought to have been as much less than it was, as would have been sufficient to enable her to avoid the vessel at anchor; that she ought not to have gone so fast as not to have been able by slowing, stopping, and backing, to avoid a collision; and that, if the fog was so thick, that at the speed she had, with all the precautions she used, she could not avoid the collision, the conclusion was irresistible that her speed was not that moderate speed in a fog which was required by the well-settled rules of navigation. The same principle was again applied by this court in the case of the *Louisiana*, in 1868 (2 Benedict, 371), and in the *Bristol*, in Dec. 1870 (*New York Daily Transcript*, of Feb. 3, 1871). In the case of the *Monticello*, in the Circuit Court for the Massachusetts District, before Clifford and Shepley, J.J., where a steamer running not less than eight miles an hour, in a fog, collided with a sailing vessel in the ocean, thirty to forty miles from Cape Lookout, the court say: "The only rule to be extracted from the statute and a comparison of the decided cases is, that the duty of going at a moderate speed in a fog, requires a speed sufficiently moderate to enable the steamer, under ordinary circumstances, seasonably, usefully, and effectually to do the other things required of her in the same clause of the statute, namely, to slacken her speed, or, if necessary, to stop and reverse." In the case of the *Blackstone*, in the district court for the Massachusetts district, in Nov. 1870, where a steamer ran down a sailing vessel, in a fog, in the Vineyard Sound, Judge Lowell held, that the steamer, in running at her usual speed, took the risk of meeting any other vessel properly navigating, and further said: "I do not place much reliance upon the evidence, though not contradicted, that a slower speed would have made no difference. It was well suggested at the argument that it might at least, have enabled the lookout to hear the fog-horn sooner, because the noise at the steamer's bow would have been less; and it is by no means clear that it would not have enabled the steamer to avoid the libellant's vessel after she was seen. Even an expert must speak very cautiously to such a question, which involves a very close calculation of what a steamer can do in a given time, because no one is in the habit of timing them exactly, and a difference of a few seconds changes the whole aspect of the question. The statute undoubtedly assumes that a slow speed conduces to safety, and there is nothing in this

case that should take it out of such a general rule, unless it be that the fog was unusually dense, or the steamer particularly difficult to manage, (in either of which cases the necessity for caution was all the greater. I should be glad to see the experiment tried by a steamer of moderating her speed in a fog, but I have hitherto found that they do not consider it to be important. If it is not, they should procure a change of the law." A very instructive case on this subject is that of the *Pennsylvania*, in the Privy Council, in June 1870 (*The National Steamship Company v. Merry; The Pennsylvania*, 23 L. T. Rep. N. S. 55; 3 Mar. Law Cas. O. S. 477). The *Pennsylvania*, a screw steamer running in a line from Liverpool to New York, collided, in a fog, in the day time, with a barque, about 200 miles to the eastward of Sandy Hook, while on a voyage to New York. There was a fresh breeze from the south south-west, and a heavy swell, the speed of the steamer was about seven knots per hour, her steam whistle was being sounded at proper intervals, she was steering west by south, and she was keeping a careful look out. The barque was heading to the southward and eastward, and making about a knot an hour, her helm being lashed a-lee. The barque was seen by the steamer about a length of the steamer off on her starboard bow, the helm of the steamer was put hard-a-port, and her engines were stopped and reversed. She struck the barque with her stem. The barque had been sounding a bell instead of a fog-horn, which bell was heard on board of the steamer at about the same time the barque came into view. The Court of Admiralty held that the barque, being under way, ought to have sounded a fog-horn and not a bell, but that the use of the bell instead of the fog-horn, did not occasion or contribute to the collision; that there was no fault in the barque; and that the collision was caused wholly by the wrongful porting of the steamer, and by her improper rate of speed. The Privy Council affirmed the decision, holding, that, if the collision was inevitable when the vessels first came in sight, it was the fault of the steamer for going at an improper rate of speed; that the collision was not occasioned by the absence of blowing the fog-horn of the barque; that if, on the evidence, the fog-horn would have been heard further than the bell, it would not have been heard at a sufficient distance to have enabled the steamer to avoid getting into that position; that in a thick fog, in the Atlantic Ocean, in the direct line to New York, about 200 miles to the east of Sandy Hook, seven knots an hour is too great a speed for a steamer to proceed at; that, as against the view that a less speed than that would paralyze mercantile transactions, and interfere with business and trade in the carriage of passengers and goods, the lives of passengers and the safety of goods must be protected in the first place; and that, even if these fogs should last longer than they are said to do, still the steamers must abate their speed, and if they do not they must take all the consequences of a collision: (See also on this point, *Rogers v. The St. Charles*, 19 How. 108, 112.) The case of *The Westphalia*, in 1871, in the District Court for the Eastern District of New York (*ante*, p. 12; 24 L. T. Rep. N. S. 75), holds the same views. The steamer, in a thick fog, the breeze being very light, and the sea calm, collided in a thick fog, in the day time, in the

English Channel with a brig. The steamer was whistling every fifteen seconds, and had slowed her speed to from eight to ten knots an hour, and her look-out and other precautions were proper. The brig came in sight from 150ft. to 160ft. distant, no sound from her having been previously heard. The engine of the steamer was at once stopped and reversed, and her helm was hove hard a port, but the vessels were in contact before she could be stopped or her course materially changed. The brig was sunk. The brig had blown a fog-horn after hearing the steamer's whistle, but it had not blown it before. The court held, that the steamer was not in fault for porting, but was in fault for running at a speed of nine or ten knots an hour in a dense fog; that a speed of seven knots could not be justified; that although the steamer would answer her helm more quickly when going at eight or ten knots than at six, she could not stop so quickly; that, in such a dense fog she was bound to be going as slow as it was possible for her to go consistent with steerage-way, in order to enable her to stop in proper time; that she was in fault for not doing so; that the brig was in fault in not sounding her fog-horn before she heard the steamer's whistle; and that the damages ought to be apportioned. In the case of the *Magna Charta*, in Nov. 1871, before the Privy Council (*ante*, p. 153; 25 L. T. Rep. N. S. 512), which was a collision between two steamers, in a fog, in the daytime, in the Baltic Sea, both steamers having been sounding their whistles, one of them going at the rate of one and a half knots an hour, and the other at the rate of from four to five knots an hour, the vessels having become visible to each other at seventy yards' distance, the latter having cut into the former to the distance of 11ft., and the fog being so thick that a vessel could not be seen more than a ship's length off, both the Court of Admiralty and the Privy Council held that the speed of from four to five knots was too great. The result of all the authorities is, that while the justifiable rate of speed will depend upon the circumstances of the case, there is no such criterion as that the steamer may go at a rate such as will enable her to stop within an assumed distance at which she may, under favorable circumstances, expect to hear a fog-horn or a steam-whistle, if blown. The present case illustrates the folly of such a test. Neither vessel heard the signal of the other. Yet, on the evidence, each gave the proper signal. The barque could do nothing but what she did. The steamer could easily have been going at less speed. I forbear to remark on the look-out kept on the *Hansa*, in view of the speed she was going at. The officer on the bridge saw the light of the *Rhea* before it was reported by the men on the look-out on the bow. If the *Hansa's* speed had been less; and the light of the *Rhea* had then been reported, as soon as a vigilant look-out on her bow could see it, and her helm had then been starboarded, and her engines had at the same time been reversed, it might well have been that the collision would have been avoided, or at least have been less disastrous. But I put the decision as to affirmative fault in the *Hansa* on the ground solely of the *Hansa's* speed not having been, under the circumstances, that moderate speed in a fog required of her by the rules of navigation. There must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the damages.

ADM.]

THE GREAT NORTHERN AND THE MIDLAND—THE RIGA.

[ADM.]

COURT OF ADMIRALTY.

Reported by J. P. ARNOLD, Esq., Barrister-at-Law.

Tuesday, Feb. 20, 1872.

THE GREAT NORTHERN AND THE MIDLAND.

*Foreign Enlistment Act 1870 (33 & 34 Vict. c. 90) sect. 24—Arrest of vessels by the Crown—Motion for indemnity—Practice.**In an application to the Court of Admiralty for indemnity by the Crown in respect of the detention of vessels under the Foreign Enlistment Act 1870, sect. 24, where the Secretary of State has released the vessels without issuing his warrant stating reasonable and probable cause for the detention, the proper form of procedure is by motion upon affidavit.**The Crown is entitled to time to answer the affidavits in support of the application, so as to raise any questions of law and fact.*

THIS was a motion upon affidavits praying the court to order that the owner of the steamships, the *Great Northern* and the *Midland* should be indemnified by the Crown by the payment of costs and damages for the detention of those vessels, under the Foreign Enlistment Act 1870 (33 & 34 Vict. c. 90) sect. 24. (a) The two vessels, it was alleged, were in January 1872 lying in the Birkenhead Docks in the Mersey, about to be sent to America to carry the mails and passengers between New York and Havana; on the 10th Jan. they were seized by the collector of customs at Liverpool, who suspected that they were to be despatched to Cuba for the use of the insurgents against the Spanish Government. The Secretary of State issued no warrant, and on Feb. 7th 1872 the vessels were released.

Mitford, Q.C., Clarkson, and Goldney, in support of the motion.

Archibald, for the Crown, submitted that the proper course was for the applicants to file a petition, or at least that the Crown was entitled to have time to answer the affidavits.

Mitford, Q.C., and Clarkson.—There are three distinct cases in which an owner whose ship is seized may apply for indemnification, and the sections of the Act clearly point out different modes of procedure. Under sect. 23, where the Secretary of State arrests, by his warrant, and continues to detain the ship, the owner may apply to this court for its release, and "the court shall, as soon as possible, put the matter of such seizure in course of trial between the applicant and the Crown, and has power to indemnify the owner." In this case the Act points to formal trial, by way of petition and answer, and the court may inquire as to the arrest having been on reasonable grounds. Again, under the same section, where the ship is arrested on warrant, and released before application to the court, the court "has power to make a like order for the indemnity of the owner in a

summary way." The warrant raises the question of whether the Crown had good cause for the arrests, and in their case the Crown may go into the merits. But in a case like the present, the Secretary of State himself, by not issuing his warrant, finds that there was no ground for the arrest, and this court has power only to assess the damages. The 24th section says that the owner "shall be indemnified," and the court has no discretion to consider whether the Crown was justified, as in the first case, where the words are, "shall have power to declare," &c. The Crown, therefore, are entitled to no time to answer, as they cannot now say that there was reason for the arrest. The remedy is to be given in a "summary way," and that in contra-distinction to "course of trial," as in the first case. The words "summary way" clearly point to motion upon affidavit, and not to petition, which is the most formal proceeding in this court. The object of the statute is to prevent delay. *The International* (40 L. J. 1. Adm.; 23 L. T. Rep. N. S. 787; 3 Mar. Law Cas. O. S. 523) was upon motion.

Archibald, contra.—I only ask for direction as to procedure. There ought to be a distinct allegation as to the question raised. There may have been reasonable cause for believing in an intention to violate the Act, even though there was no such intention. The Crown are entitled to have the question of law raised as to their liability where there was such reasonable cause. A motion is a most indefinite form, and raises no distinct question.

Sir R. PHILLIMORE.—I am quite clear upon the point that the court must have before it the case raised in some form in which it can give judgment upon the points raised. One party must make an allegation as to the facts and law, and the other must deny it. I think the Act contemplated, in a case under this section, the most summary way, and that is clearly by motion. The Crown can move to reject the motion, and support their case by affidavits. The proceedings must be by motion and affidavits, and I consider that the Crown are entitled to have ten days to prepare their affidavits in answer.

Solicitors for the applicants, Gregory and Roscliffe.

Proctor for the Crown, *The Queen's Proctor*.

Feb. 13 and March 5, 1872.

THE RIGA.

Necessaries—Definition of—Shipbroker—Brokerage—Payment of charges—Advances—Pilots—Dock dues.

The term "necessaries," where used in the statutes giving the Admiralty Court jurisdiction over such claims, has the same meaning as is given to it by the common law courts, and signifies, whatever the owner of a vessel, as a prudent man, if present under circumstances in which his agent, in his absence, is called upon to act, would have ordered. *Webster v. Seekamp* (4 Barn & Ald. 352) followed. Premiums paid by a shipbroker at the owner's request to procure insurance on freight are *necessaries*.

Charges paid by a shipbroker at the owner's request for entering, reporting, and piloting a ship, and for tonnage and light dues, and for noting protest, are within the meaning of the term "necessaries."

(a) The following is the material part of this section: Where the Secretary of State, or chief executive authority, orders the ship to be released on the receipt of a communication from the Secretary of State without issuing his warrant, the owner of the ship shall be indemnified by the payment of costs and damages in respect of the detention upon application to the Court of Admiralty in a summary way, in like manner as he is entitled to be indemnified where the Secretary of State having issued his warrant under this Act releases the ship before any application is made by the owner or his agent to the court for such release.

[ADM.]

THE RIGA.

[ADM.]

Advances at the owner's request for travelling expenses of the master and goods supplied for the ship's use are necessities.

Brokerage charges made by a ship's broker for acting as ship's agent, and for negotiating a charter-party, may be necessities within the meaning of the statutes, but must be proved, to come within the definition.

Where a petition merely alleges that money was advanced for necessary expenses at the owner's request, without stating what those necessary expenses were, such a claim will be struck out on motion to reject or alter the petition.

There was a cause of necessities instituted on behalf of Wilko Hermann Foges, a ship broker in the city of London, against the Norwegian schooner *Riga*, her tackle, apparel, and furniture, and against the freight due for cargo lately carried on board the *Riga*, and against Ole Waaboe and others, her owners.

An appearance was entered by the assignee of the creditors (in Sweden) of the shipowners; the assignee had instituted a writ of possession, in which judgment had been allowed to go by default.

The cause now came before the court on motion by the defendant to reject or alter the petition, on the ground that the claims therein set out were not claims for necessities within the meaning of the 3 & 4 Vict. c. 65, s. 6. The petition was as follows:

1. The *Riga* is a Norwegian schooner, and on or about the 17th July 1871 she sailed from the port of D'Urban in Port Natal, Africa, laden with a cargo of wool, bound for the port of London.

2. On or about the 6th Sept. 1871 the plaintiff received a letter from Ole Waaboe, port owner of the said schooner, bearing date D'Urban, 18th July 1871, requesting the plaintiff to effect an insurance on the freight due for the transportation of the aforesaid cargo to the amount of £400.

3. In pursuance of the request contained in the aforesaid letter, the plaintiff on the 11th Sept. 1871 effected an insurance upon the said freight in the sum of 900*l.*, on payment of a premium of 2 per cent., and paid in respect thereof the sum of 6*l.* 1*s.*

4. On or about the 10th Oct. 1871 the plaintiff received a letter from the said port owner, Ole Waaboe, at St. Helena, dated the 2nd Sept. 1871, confirming the instructions contained in the previous letter.

5. In the month of Nov. 1871 the *Riga* arrived off the Scilly Islands, and the said Ole Waaboe landed and proceeded to London, and on the 20th Nov. 1871 he had an interview with the plaintiff, at which the said Ole Waaboe, being without any funds to pay the necessary expenses arising out of the arrival of the said ship, requested the plaintiff to make to the said Ole Waaboe an advance of 150*l.* against the said freight, in order to enable him to meet the aforesaid necessary expenses.

6. The plaintiff accordingly made the advance of 150*l.*, as requested, on account of the said freight, taking a receipt in the words and figures following—'that is to say, £ London, 20th Nov. 1871.—Received of W. H. Foges the sum of 150*l.* on account of freight receivable in London of my vessel the *Riga*, now bound here from Natal.—O. Waaboe.'

7. The said Ole Waaboe also at the same time handed to the plaintiff the ship's papers, and requested him to pay all charges for pilotage, light, tonnage, and harbour dues, and other necessary expenses on the arrival of the said vessel. Accordingly, on the arrival of the said vessel at London, the plaintiff paid charges for entering, reporting, and piloting the said vessel, and for tonnage and light dues and for noting protest, in all to the amount of 21*l.* 1*9s.*; supplied goods for the necessary use of the said vessel to the amount of 1*l.* 10*s.*; and also advanced various sums for pilotage, travelling expenses of the master, and other charges, amounting in the whole to 2*l.* 3*s.*

8. Shortly after the arrival of the *Riga* in the port of London, that is to say, on the 24th Nov. 1871, the vessel

and the cargo laden therein was arrested by the marshal of this honourable court on a warrant issued at the suit of one Cornelius Kras, claiming possession of the said vessel, and also claiming the said freight, as the representative of the creditors in Norway of the said Ole Waaboe, the owner of the said vessel; and on the 2nd Sept. 1871, a second writ was commenced in this honourable court against the said vessel and freight by the seamen then or lately serving on board, in respect of claims for wages then due.

9. The said freight was paid into court by the persons claiming the cargo, in order to obtain release thereof.

10. The plaintiff also continued to act as agent and broker for the said vessel, and negotiated a charter-party on behalf of the said owners, and there is now due and owing to the plaintiff as such agent or broker, in respect of his necessary services as such agent or broker, the sum of £48 0*s.* 6*d.*

11. The said insurance of freight was effected, the said advances made, the said charges paid, the said goods supplied, and the said services rendered by the plaintiff upon the credit of the *Riga*, and of the said freight, and not upon the personal credit of the owners, and the whole of the said sums, amounting to £231 13*s.* 11*d.* are still due and unpaid to the plaintiff.

Clarkson, for the defendant, the creditors' assignee, in support of the motion.—The question is whether any of these items are necessities within the meaning of the statute. To be necessities the things supplied must be actually wanting for the service of the ship at the time of supply.

The Alexander, 1 W. Rob. 346;

The Sophie, 1 W. Rob. 368.

Money advanced is not always necessities, and must always be more strictly proved to have been necessary than in the case of goods supplied (*The Alexander*, *sup.*), and cannot be recovered under this statute when advanced to pay for necessities already supplied: (*The N.R. Gosfabrick*, Swab. 344.) The section was passed to enable persons supplying necessities to foreign ships on an emergency to do so with a fair chance of payment, and necessities mean articles immediately necessary for the ship, as contra-distinguished for what is required for a voyage: (*The Comtesse de Fréguille*, Lush. 329; 4 L. T. Rep. N. S. 713; 1 Mar. Law Cas. O. S. 106.) Necessaries must be furnished on an emergency, and not in the ordinary course of business: (*The Onni*, Lush. 154; 3 L. T. Rep. N. S. 447; 1 Mar. Law Cas. O. S. 6.) Advances of money are not necessities unless for the use of the ship or crew: (*The Aaltje Willemina*, L. Rep. 1 Ad. and Ecc. 107.) Premiums paid for insurances are not necessities for the ship; when they were paid she was not in this country. Pilotage, light, tonnage, and harbour dues are not necessities, but rather a matter of mercantile account, and paid in the ordinary course of a broker's business. Again, the pilot's service has been already supplied at the time of advance, and money advanced to pay for what is already supplied is not necessities. An advance upon freight, even though to procure necessities, cannot be called necessities within the statute, as it is upon the security of the freight which is to pass through the broker's hands. Broker's charges for chartering a ship are not necessities, being in the ordinary course of a broker's business. A tradesman advances goods, which are delivered by him for the use of the ship, but a broker advances money to procure goods on the credit of the owner, and looks to him for payment. [*Sir R. Phillimore*.—In *Webster v. Seckman* (4 B. & Ald. 352), Lord Ten-terden lays down that the rule for ascertaining what is necessary is to consider what a prudent owner, if present, would have done under cir-

cumstances in which the agent, in his absence, is called upon to act. The words of the Act would include necessities supplied for a voyage.] I submit not. The common law cases turn upon the question of the master's authority to bind his owners. The question here is, what evil does the statute remedy? and Dr. Lushington has held (in the *Comtesse de Frégerille*, *sup.*) that the section applied only to what was supplied on an emergency. The common law meaning of necessities is much wider. [Sir R. PHILLIMORE.—There is no definition of necessities to be extracted from these cases except that of Lord Tenterden. I presume you contend that the word is more strictly applied in this court than in the common law courts.] In the decisions since the 3 & 4 Vict. c. 65, the word has been mostly strictly applied, and the Admiralty Court Act 1861 did not extend the meaning so given. The word "necessaries" must be taken to mean such things as material men would supply. It has been so decided, and this court is bound by those decisions.

Webster, contra.—The real defendants are the representatives of the shipowner, who instructed the plaintiff to make the advances, and he placed the ship's papers in the plaintiff's hands. The defendant is the assignee of the shipowner's creditors. In the *Comtesse de Frégerille* (*sup.*), the engagement of the broker by the owner was in the ordinary course of business, and the claim was for a balance of account. The moneys were here advanced on the security of the ship, as shown by the ship's papers being in the plaintiff's hands, and this is a claim in this ship only, and not for a balance of account. The real question is whether there was such a *bond fide* necessity that these things would have been supplied by the master or the owner acting as a prudent man. In the *West Friesland* (Swab. 454), it is held that what is needed for the service of the ship, such as coals, are necessities. The *Onni* (*sup.*), as quoted, was for money advanced to pay off a bottomry bond, and is inapplicable. There is no case which says that premiums paid are not necessities. The *Alexander* (*sup.*) expressly finds that "necessaries" have the same meaning in the Admiralty Court and the common law courts. If the Admiralty Court Act 1861, s. 5, was intended to limit the meaning of the word "necessaries," it should have expressly used the words "material men." Necessaries have a wider meaning than supplies by material men. The decisions do not alter this interpretation. He also cited

The Underwriter, 25 L. T. Rep. N. S. 279; 1 Asp. Mar. Law. Cas. 127.

Clarkson in reply.—The common law cases do not use the technical word "necessaries," they only talk of what is "necessary" for the service of a ship.

Cur. adv. vult.

Morch 5.—Sir R. PHILLIMORE.—This is a motion to reject a petition in a canoe of necessities instituted by a London shipbroker against the Norwegian vessel *Riga* and her freight. The ground of the motion is that the items set forth by the plaintiff in the petition do not fall under the legal category of "necessaries," according to the construction put upon that term by my predecessors in this court. I have taken time to look into the various decisions upon which this proposition was alleged to be founded. The 3 & 4 Vict. c. 65, s. 6, conferred upon this court a "jurisdiction to

decide all claims and demands whatever. . . for necessities supplied to any foreign ship or sailing vessel." In the case of the *Alexander* (*sup.*), Dr. Lushington said: "And here I may observe, that when the recent statute conferred upon this court a jurisdiction in these matters, or rather perhaps revised an ancient jurisdiction long prohibited, it never was nor could be intended to alter the law, but merely to give a new remedy which was rendered necessary in the peculiar cases of foreign ships, and is confined to that necessity. I will state in one sentence what I apprehend to be the condition necessarily imposed upon the court. It is this: That the court must not make the owners of a foreign ship liable for the supply of any articles for which, under similar circumstances, if resident here, they would not be responsible in a court of common law." In the following case of *The Sophie* (1 W. Rob. 369), the court said: "The technical meaning of the term 'necessaries' I have already explained, as strictly applying to anchors, cables, rigging, and matters of that description; at the same time I consider myself at liberty to enlarge the term necessities so as to include money expended upon necessities; but in such cases I must be satisfied that the necessities were wanting, and that the money was *bond fide* for the purpose of procuring them." In the *N. R. Gosfabrick* (*sup.*), the court included meat as strictly falling within the term necessities. In *The West Friesland* (*sup.*), in 1859, coals were held to be necessities. In the *Onni* (*sup.*) it was held that under this section it mattered not whether the necessities were furnished on personal credit or not, and that an advance of money for procuring necessities was within the equitable construction of the statute. This decision was in 1860; the statute had then been in force twenty years. In a subsequent case, of the *Comtesse de Frégerille* (*sup.*), in 1861, Dr. Lushington seems to have considered the proper legal meaning of the word "necessaries" still unfixed. In that case Dr. Lushington said: "I have to determine whether the demand made in this suit can be maintained within the statute of the 3 & 4 Vict. c. 65, s. 6, and this question wholly turns upon the proper legal meaning to be affixed to the word 'necessaries.' I have no hope of finding the means of solving this difficulty from resort to any other part of this statute, or to any other statute; neither has the question ever been submitted directly to the court of appeal. In former times, and up to a late period, up to the decision in the case of *The Neptune* (3 Hagg. 120; 3 Knapp's P. C. 84), by the Judicial Committee, the Court of Admiralty was accustomed to allow material creditors to sue against the proceeds, when in court. Material men were those who repaired a vessel or furnished materials to enable her to proceed to sea; it was a technical term, the meaning of which was well understood. I do not think, as my former decisions show, that the term 'necessaries' in this statute should receive so circumscribed a meaning. On the other hand it has been urged that the term 'necessaries' ought to receive the same liberal construction as in cases of bottomry. This construction would include every requisite for a voyage, for there are many articles allowed to be covered by a bottomry bond which it would be very difficult to comprise within any ordinary meaning attached to the word 'necessaries.' Unless enabled by superior authority, I cannot venture to adopt so comprehensive a meaning

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for this enactment. It appears to me that the most convenient course I can follow is to take an intermediate one, to make a distinction between the ship and the voyage. I shall hold that 'necessaries' means primarily indispensable repairs, anchors, cables, sails, when immediately necessary, and also provisions; but, on the other hand, does not include things required for the voyage, as coals distinguished from necessities for the ship." The attention of the court (Dr. Lushington) does not seem to have been drawn to the previous case of the *Onni* (sup.), nor to the 24 Vict. c. 10, which had been passed in the month preceding the decision in the *Comtesse de Fréville* (sup.), to which it seems to me very important to advert, because, in the 4th section, that statute, I take it, gives the court a jurisdiction over "claims for building, equipping, or repairing any ship"—claims which would answer to those of the old material man, as known in this court before the decision in the *Neptune* (sup.)—and in the 5th section it gives the court a distinct jurisdiction over "any claim for necessities supplied to any ship" in certain cases. Since this statute, in the case of *The Bonne Amie* (L. Rep. 1 Adm. & Ecc. 19; 14 L. T. Rep. N. S. 191; 2 Mar. Law Cas. O.S. 321), in 1865, it was decided that the travelling expenses of an agent to attend a trial is a case of collision were not necessities; and in the *Aaltje Wilhelmina* (sup.), in 1866, the court refused to consider money, advanced to a master to pay averages, necessities. In both these cases, however, and in other former cases, the court seems to have considered that money advanced for the purchase of necessities stood on the same footing as necessities themselves. It appears to me on a review of these cases, on which the court seems to have proceeded tentatively, so to speak, with the new jurisdiction, and on a consideration of the language of both the statutes, I must come to the conclusion that there is no distinction as to necessities between the cases in which by common law a master has been helden to bind his owner, and suits for necessities instituted in this court. This seems to have been Dr. Lushington's original opinion in the *Alexander* (sup.), and it seems to me to be strengthened by the language in the subsequent statute, and was, I think, also the foundation of my decision in *The Underwriter* (25 L. T. Rep. N. S. 279; 1 Asp. Mar. Law Cas. 127), in 1868. I am unable to draw any solid distinction (especially since the last statute) between necessities for the ship and necessities for the voyage; and I shall follow the doctrine of the common law as laid down by the high authority of Lord Tenterden in the case of *Webster v. Seekamp* (4 B. & Ald. 352). In that case he says (p. 354): "The general rule is, that the master may bind his owners for necessary repairs done, or supplies provided for the ship. It was contended at the trial that this liability of the owners was confined to what was absolutely necessary. I think that rule too narrow, for it would be extremely difficult to decide, and often impossible in many cases, what is absolutely necessary. If, however, the jury are to inquire only what is necessary, there is no better rule to ascertain that than by considering what a prudent man, if present, would do under circumstances in which the agent, in his absence, is called upon to act. I am of opinion that whatever is fit and proper for the

service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man would have ordered, if present at the time, comes within the meaning of the term 'necessary,' as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable." I have now to apply the principles of this law to the particular case before me. I allow the sum of 8*l.* 1*s.* for insurance for freight, as set out in Articles 2, 3, and 4 of the petition. I disallow the sum of 150*l.*, as pleaded in Articles 5 and 6, on the ground that though it is alleged in general terms that that sum was advanced for necessary expenses, it is not stated, as it ought to have been, what these necessary expenses were. I allow the sums of 21*l.* 19*s.*, 1*l.* 10*s.*, and 2*l.* 3*s.*, as set forth in the 7th Article. With respect to the item of 48*l.* 0*s.* 6*d.* charged for brokerage in Article 10, I shall allow this article to go to proof, reserving my opinion till I see what that proof is, as to whether the item falls within the legal category of necessities or not. Subject to these alterations I admit the petition. I shall make no order as to costs.

Solicitors for the plaintiff, Cattara, Jehu, and Cattara.

Proctors for the defendant, Rothey and Co.

Thursday, Feb. 15, 1872.

THE JOHN FENWICK.

Collision—Steamship getting under way—Lights—Want of proper precaution—Regulations for preventing collisions at sea, Art. 20.

A steamship, which, in getting under way in the Thames to go up the river between sunset and sunrise, is compelled to go astern and partly ahwaft the river in order to get clear ahead, and whose regulation lights are not visible to vessels coming up the river, is bound to take every possible precaution to warn approaching vessels of her position, and to use the best light she has on board for that purpose.

Placing a service lantern, ordinarily used to give light in discharging the cargo, over the stern is not a sufficient precaution.

A vessel neglecting such precaution commits a breach of the 20th Article of the Regulations for preventing Collisions at Sea, and will be held to blame if a collision ensue.

THIS was a cause of damage instituted on behalf of the General Steam Navigation Company, the owners of the steamship *Granton*, against the steamship *John Fenwick* and her owners inter-vening. The *Granton* was an iron screw steamship, of 637 tons register, 245 feet long, with engines of 240 horse power nominal, and manned by a crew of thirty-two hands, all told, and employed in the trade between London and Hamburg. The *John Fenwick* was a screw steamship of 548 tons register, and ninety horse-power, and at the time of the collision was bound on a voyage from Zante to London with cargo. Between three and four p.m. on the 19th Oct. 1871, the *Granton* arrived at Gravesend from Hamburg, and took on board a pilot, and proceeded up the Thames to Brown's Wharf in Blackwall Reach, where she arrived at about five p.m., and discharged part of her cargo. At about ten p.m., she was ready to proceed higher up the river to Horselydown Pier in the Upper Pool, where the

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rest of the cargo was to be discharged. It was then very dark, with driving rain, and the tide was three-quarters ebb, and the river very full of craft coming down, and the master deemed it prudent to await the flood tide, and, therefore, made the *Granton* fast alongside a coal bulk moored in Blackwall Reach, above Brown's Wharf, about abreast of the Folly House, on the north side of mid-channel. She was moored on the outer or south side of the bulk, and her head was up the river, and her anchor light was up. There is not room to anchor a ship of the *Granton's* class at that part of the river. At about half-past four a.m., on the 20th Oct., the tide being then on the last quarter flood, the *Granton* cast off from the bulk. Her regulation lights were burning, and her anchor light was taken down. She was too long to be able to steam ahead at once without running into the tiers, and, therefore, the stern fastenings were first cast off, and the flood tide acting on her stern sheered it off from the bulk. She then steamed astern, casting off her head ropes and angling over to the south side of the river, so that she might have ample room to go ahead, got steerage way, and proceeded up the river. When steaming astern, and abreast mid-channel, and partly athwart the river, a sailing barge, driving up the river under her stern, obliged the *Granton* to stop, and then move easy ahead, to keep her stationary. At this time the *John Fenwick* under charge of her master, and with a licensed waterman on board, was coming up the river, and, rounding Blackwall point about three quarters of a mile below the *Granton* with her regulation lights burning, and a good look out. She was then going, according to the defendants' evidence, at about three knots an hour through the water, but the plaintiffs contended that she was going very fast. The master of the *Granton* at this time saw her, and as from the relative positions of the two vessels none of the *Granton's* lights would be visible on board the *John Fenwick*, he ordered a lantern to be put over the stern, which was done. The lantern used for the purpose was a common lantern, which had been in use for some hours, to give light to those engaged in discharging the cargo. The fact whether the lantern was put over the stern of the *Granton* in such a place as to be visible on board the *John Fenwick* was in dispute between the parties. The plaintiffs called evidence to show that it was over the starboard quarter; the defendants sought to prove that the lantern was hung over the stern in a position in which it could not be seen from the *John Fenwick*. When the *John Fenwick* got into Blackwall Reach, her engines were slowed till she was going at the rate of two knots an hour, and she ported and whistled on perceiving another steamer, and almost immediately afterwards saw a dark object which proved to be the *Granton*, lying across the river, and her engines were stopped and reversed, and the *Granton* was hailed to go ahead. The *Granton* whistled, and as soon as she was able to clear the vessels on her way, went ahead, but too late to avoid the collision. The starboard bow of the *John Fenwick* came into collision with the starboard quarter of the *Granton*, and cut deep into her.

Butt, Q.C. (Webster with him), for the plaintiffs, contended that the *John Fenwick* was alone to blame. She was coming at too high a rate of speed. Those on board of her ought to have seen

the light hung over the stern of the *Granton*. The *Granton* was justified in acting as she did, and took all precautions necessary to avoid the collision.

Milward, Q.C. (Gainsford Bruce with him), for the defendants.—The *Granton* was in an improper place in the river. She ought not to have gone astern without showing lights. The light she did show was insufficient, and not visible. The proper thing to have used was a flash light. The having her regulation lights is no excuse. Under Art. 20 of the Regulations for preventing Collisions at Sea, the *Granton* was bound to take precautions to meet the special circumstances, and she neglected to do so. The regulation lights were not at all visible.

Butt, Q.C. in reply.—The *John Fenwick* was overtaking the *Granton*, and was bound under Art. 17 of the Regulations to keep out of the way of the *Granton*.

Sir R. PHILLIMORE.—It is quite clear that the *Granton*, when she cast off from the bulk and placed herself athwart the fairway of the river, in the early morning, when it was dark, incurred great risk. When executing such a manœuvre at such a time she ought to have taken every possible precaution to warn approaching vessels of her position. What did she do? According to her own account, when she saw the *John Fenwick* approaching, all she did was to put an ordinary service lantern over her stern, or, as some of the witnesses say, over her quarter. I am of opinion that this service lantern was not sufficient to give effective warning to the *John Fenwick*. Those on board the *Granton* should have used as a warning signal the very best light they had on board. It is true that there is no special regulation defining the signals to be used in such a case as the present, but the provisions of the 20th article of the Regulations for preventing Collisions at Sea, states that nothing in those rules shall exonerate any ship from the consequences of any neglect to carry lights or signals, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. There is no evidence of any negligence on the part of the *John Fenwick*. I must, therefore, pronounce the *Granton* alone to blame for the collision.

Solicitors for the plaintiffs, Cattlans, Jchu, and Cattlans.

Solicitors for the defendants, Hülyer, Fenwick and Stibbard.

March 5 and 8, 1872.

THE DEMETRIUS.

Collision—Cross cause by owners of cargo—Principal cause already decided—Admissibility of evidence taken in the principal cause—Costs.

Where a cause of damage, arising out of a collision between two ships, has been heard and decided, and both ships have been found to blame, and the owners of cargo on board the ship proceeded against in the former cause, subsequently institute a cause against the former plaintiffs in respect of the same collision, the Court of Admiralty has no power to make an order allowing the plaintiffs (the owners of cargo) to use the evidence given in the former cause, on the hearing of the latter, if the defendants refuse to consent to such an order.

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Quere, if the defendants refuse their consent, will they be entitled to their costs?

THIS was a cause of damage, instituted on behalf of Charilaos Notara and Nicholas Notara, the owners of 2589 ardebs of beans, lately laden on board the steamship *Trojan*, against Michael Spartali, the owner of the steamship *Demetrius*. The cause was in personam. On the 24th Oct. 1868, the *Trojan* and the *Demetrius* came into collision in the river Mersey, and both vessels were injured. A suit (No. 4660) was afterwards instituted, in rem in this court, by the owners of the *Demetrius* against the *Trojan* to recover damages for the collision, and on 30th July 1869 that suit was heard before the Judge, assisted by Trinity Masters, and the court found that both vessels were to blame, but that the *Trojan* was exempted from liability by reason of being at the time of the collision under the command of a compulsory pilot. Subsequently the present plaintiffs brought an action in the Court of Queen's Bench against the owners of the *Trojan* to recover for damage sustained to the cargo consequent upon the master carrying it on to its destination in its wetted condition caused by the collision, without taking the proper steps to dry it, and so prevent deterioration; the plaintiffs had offered to pay *pro rata* freight at Liverpool, but the master of the *Trojan* had refused to deliver, and carried the freight on to Glasgow so as to earn full freight. On a special case stated for their opinion the Court of Queen's Bench held that the master's act was unjustifiable, and that the owners of the *Trojan* were liable for the damage sustained by that act (see *Notara v. Henderson*, L. Rep. 5 Q. B. 346; 22 L. T. Rep. N. S. 577; 3 Mar. Law. Cas. O. S. 419), and this judgment has been confirmed on appeal by the Exchequer Chamber (L. Rep. 7 Q. B. 225).

The present suit was brought to recover damages for the wetting of the beans caused by the collision, and the amount claimed was (both vessels having been held to blame) half the total damage sustained, less the sum recovered in the common law action.

The case was now brought before the court on a motion set out in the following notice of motion:

Take notice that this Honourable Court will be moved on Tuesday next the 5th March, at 11 o'clock in the forenoon, or as soon after as counsel can be heard, for leave to the plaintiffs to be allowed to sue, at the hearing of this cause, the whole of the evidence given and used at the hearing of the cause, No. 4660, the *Trojan*, in this Honourable Court, and also for leave to the plaintiffs to be allowed, if they should think fit, to adduce further evidence at the hearing of this cause in addition to the said evidence given in the said cause.

Dated this 28th Feb. 1872.

In support of the motion the following affidavit was filed and used at the hearing of the motion:—

I, Charilaos Notara, of Liverpool, in the county of Lancaster, merchant, one of the above-named plaintiffs, make oath and say as follows:—

1. I, and the said Nicholas Notara, during 1868, carried on business in co-partnership as merchants at Liverpool aforesaid.

2. On or about the 25th Sept. 1868, we shipped at Alexandria, on board of the *Trojan*, 2589 ardebs of beans to be carried in the *Trojan* to Glasgow.

3. The *Trojan*, on her voyage to Glasgow aforesaid, touched at Liverpool, and whilst proceeding down the Mersey on the 24th Oct., and with our said beans on board, she was run into by the steamship *Demetrius*, of which the defendant was the owner.

4. In consequence of the collision, and of the *Trojan* being beached to prevent her sinking, the said beans became

saturated with salt water and were damaged, and a portion of the said beans were washed away.

5. Afterwards the defendant instituted a suit in this honourable court against the owners of the *Trojan*, and in due course the said suit came on for hearing, when evidence was adduced on behalf of the defendant and the owners of the *Trojan*, and the judge of this honourable court, assisted by two elder brethren of the Trinity House, after hearing the said evidence, delivered judgment, pronouncing both vessels to blame, and exempting the owners of the *Trojan* upon the ground of her being by compulsion of law in charge of a duly licensed pilot.

6. I am informed and believe that the said defendant afterwards entered an appeal from the judgment of this honourable court to the Judicial Committee of the Privy Council, but has long since abandoned the said appeal, and paid to the owners of the *Trojan* one half of the damage and loss sustained by the *Trojan* in the said collision.

7. We have instituted in this honourable court a suit against the defendant, the owner of the *Demetrius*, for the damages and loss to our said beans consequent upon the said collision.

8. I am advised that we are entitled to the leave of this honourable court to be allowed leave to sue at the hearing of this suit the evidence given at the hearing of the suit in which the present defendant was plaintiff, and the owners of the *Trojan* were defendants; such leave, if granted, will cause a great saving of expense to all parties.

9. I believe great difficulty will be experienced to procure the presence at the hearing of this suit of the persons who gave evidence at the hearing of the said suit, and that unless the said evidence in the said suit be allowed to be used in this suit, a long time must necessarily elapse before the suit could be heard.

Mileard, Q.C., Butt, Q.C., and Myburgh, in support of the motion.—In a cross action for damage by collision, where the cross action is heard after judgment in the original action, the court will admit the evidence in the original action: (*The North American*, Lush. 79.) In the suit against the *Trojan* the judgment was *in rem*; will not that judgment be binding on all parties? The refusal to admit this evidence will entitle us to our costs if we are compelled to call further evidence. In the former trial the defendants had an opportunity of cross-examining the witnesses whom we shall have to call. They might have forced us, if our suit had been instituted at the same time, to consolidate, and then this evidence would have been used.

Cohen, contra.—In the *North American* (sup.) the parties were the same in both suits. An action cannot be consolidated after the hearing of the original action, and if this motion is granted that effect will be produced. Evidence in a cause instituted by the owners of a ship cannot be admitted in a cause concerning the same collision by the owners of cargo on board the ship unless the owners of cargo consent to consolidate. As the parties are not the same consolidation can only take place in such a case where it is not opposed. As to the question of the judgment being binding because it was *in rem*, it is quite clear that if the judgment is sufficient proof of the plaintiffs' case, the evidence taken before is useless; if the judgment is not binding the evidence cannot be admissible, as it was on that evidence the court founded its judgment.

Mileard, Q.C. in reply.

Cur. adv. vult.

March 8.—Sir R. PHILLIMORE.—This is a motion made on behalf of the plaintiffs for leave to be allowed to sue at the hearing of this cause, the whole of the evidence given and used at the hearing of the cause of collision, *The Trojan* (No. 4660). The collision took place between the two vessels, the *Demetrius*, now proceeded against, and the

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Trojan, and the plaintiffs' cargo was on board the *Trojan*. The suit referred to was a suit *in rem*, and I held that both vessels were to blame for the collision. The facts appear from the affidavit filed in this cause. [His Lordship here set out the facts.] It will be observed that this application is made at a very late period, long after the hearing of the original cause of collision, and the application of the plaintiffs is opposed by the defendant, and I have to consider whether the court has power to order the evidence to be admitted notwithstanding such opposition, as it would manifestly be a great saving of time and expense to do so. I must remark here that the practice in this court is invariable for parties to consent to an order that evidence used in one cause shall be used in another, when the question at issue is practically the same. There is no case which shows that a contrary course has been followed; but, on the other hand, there is no case in which the court has, of its own authority, and without the consent of both parties, made an order admitting evidence given in a cause already heard, to be used in another cause, even though the issue in both had been identical on the point for which it is intended to use the evidence. The law on this point is laid down in *The William Hutt* (Lush. 25). That case was a motion to disavow suits of damage which had been consolidated by an order of the court, and Dr. Lushington said, "the court was not a little surprised when the learned counsel who moved, sat down without giving the court any information of the reasons for making the motion, or of the consequences of granting it. When I ordered these three actions to be consolidated, did I do so according to the power and practice of the court? If not, I should willingly retract the order if I had the opportunity. But, according to my knowledge, the universal practice of the court has been to consolidate actions where the decision of each action depends on precisely the same facts; and in salvage suits the court has gone further, consolidating actions where there are several sets of salvors not rendering precisely the same services. The power of consolidating actions is most beneficial. But for this power the owners of a ship would often be vexed by a host of different actions arising out of one matter—as in a case of collision, by all the several owners of cargo in the vessel run down—and the court could afford no relief, having no power to order the evidence in one action to be taken as evidence in another." From the law as laid down in that case, I deduce two propositions; first, that the object of consolidating actions is, that they may be heard together and upon the same evidence, and therefore that they must be consolidated before the hearing, and not after one has been heard and decided; secondly, that where one action been heard and decided, and another action is brought against one of the same ships arising out of the same matter, the court has no power to make an order admitting the evidence in the first action as evidence in the second. I derive confirmation of my opinion from the wording of the 34th section of the Admiralty Court Act 1861 (24 Vict. c. 10). That section provides that the court "may, on application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence." That section gives the court

power to order cross causes to be tried at the same time and upon the same evidence as principal causes, but if parties neglected to bring their cross cause till after the principal cause was heard and decided, it is, to say the least, doubtful whether the court could allow the cross cause to be heard upon the same evidence without consent. In fact, the presumption to be derived from the words of the statute is the other way, as the statute seems to suppose that the cross cause will be brought before the principal cause is heard, and only gives power to make the order in such a case. I am of opinion, therefore, that I have no power to make an order for the admission in this cause of the evidence in the former action according to the terms of the prayer of the motion, and I therefore reject the prayer. But I must be taken as expressing no opinion upon the question of the propriety of the course which the defendants have adopted in refusing to consent to the admission of this evidence, nor as to how far that refusal may in the future affect their right to costs. If the plaintiffs had brought their action before the principal cause was heard, and had refused to consolidate, or had negligently delayed the institution of their suit until after that hearing, and had then brought forward the old evidence, they would perhaps not have been entitled to their costs; but where they have offered to admit the evidence taken in the former cause, it will be a question for the consideration of the court hereafter, how far that course alters their position. And further, I must not be taken as expressing any opinion upon the difficult question as to how far these parties are bound by the decision in the original suits, as being a decision *in rem*, but I decide that question only which is before me today. I reject the motion.

Solicitors for the plaintiffs, *Gregory and Rowcliffe*.
Solicitors for the defendants, *Thomas and Hollams*.

COURT OF ADMIRALTY (IRELAND).

Reported by OLIVER J. BURKE, Esq., Barrister-at-Law.

April 8 and 15, 1872.

THE MULLINGAR.

Collision—Notice of action—Proceedings in rem—City of Dublin Steam Packet Company—Ad (Local and Personal) 6 & 7 Will 4, c. 105, ss. 8, 11.

Where a proceeding *in rem* is instituted in the Admiralty Court to enforce a maritime lien, it is wholly immaterial to whom the *res* belongs. The owner or other persons interested may intervene to defend the suit, but the court deals with the *res* only, and it is the *res* and not the owner personally that is liable in the suit.

The 8th section of 6 & 7 Will. 4 (Local and Personal Acts) c. 100 (a), which requires notice to be given one calendar month before bringing any

(a) The section is as follows: "No action in any of His Majesty's courts of law, to which the City of Dublin Steam Packet Company should be liable in respect of any damage, injury, or trespass, alleged to be done, committed, or occasioned, to or against any ship on the high seas, or to or against any person or persons, property, goods, or effects, shall be brought, commenced, or prosecuted against the company, unless one calendar month's previous notice in writing should have been given by the party or parties commencing such action to the said company."

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action in any of His Majesty's courts against the City of Dublin Steam Packet Company, has reference merely to actions in personam against this company, and not to actions in rem against the company's vessels.

The Court of Admiralty is a court of law within the meaning of the 8 section of the said Act.

THIS was a motion on behalf of the City of Dublin Steam Packet Company, the owners of the steamer *Mullingar*, against which vessel a cause had been instituted, for an order that the cause be dismissed with costs.

The cause was one of collision, which took place near Halpin's Point, on the river Liffey, and within the harbour of Dublin, on the 20th Jan. 1872, between the steamer *Mullingar*, the property of the City of Dublin Steam Packet Company, and the smack *Belle*, of Dublin, the property of the plaintiffs. The affidavit to lead the warrant, made by Mr. Good on the 21st March last, merely states

That the smack *Belle*, of Dublin, received considerable damage on the 20th Jan. last, by reason of the steamer *Mullingar* coming into collision with her;

That the damages, actual and consequential, sustained by reason of said collision amount to the sum of 183*l.* 13*s.* 8*d.* sterling, with interest until paid;

That the steamer belongs to the City of Dublin Steam Packet Company, and trades between Dublin and Liverpool.

On filing this affidavit the usual warrant issued to seize the *Mullingar*. The warrant was not actually executed, but the Messrs. Hone, solicitors of the company, signed an undertaking (which was endorsed on the warrant), dated the 28th March, to appear under protest and give bail for the company. On the 4th April Mr. Hone filed an affidavit on behalf of the company, setting forth the grounds of protest.

The facts and arguments are fully stated in the judgment of the Court.

Exham, Q.C., LL.D., and Robertson were heard in support of the motion.

Etrington, Q.C., LL.D., and Corrigan, LL.D., contra.

April 15.—TOWNSEND, J.—This case comes before the court under the following circumstances. On the 21st March 1871 a cause of damage was instituted by Messrs. Hamerton and Son, on behalf of Matthew Good and Thomas Byrne, against the steamer *Mullingar*, of Dublin, and on the same day a warrant of arrest in the usual form was obtained by Messrs. Hamerton, requiring the marshal to arrest and detain the *Mullingar*, and to cite all persons who had, or claimed to have, any right, title, or interest therein, to appear. The warrant was not actually executed, but Messrs. Hone, the solicitors of the company, signed an undertaking, which is endorsed thereon, dated the 28th March 1872, to appear under protest, and give bail for the vessel on behalf of the City of Dublin Steam Packet Company, the owners of the steamer *Mullingar*, in the cause of damage which had been instituted on behalf of the plaintiffs against the vessel. On the 4th April Mr. Hone, on behalf of the company, filed an affidavit, according to the 32nd General Order of the court of the 4th Feb. 1869, in which he sets forth the grounds of protest, and on the same day gave notice of a motion to have the cause dismissed with costs. The ground stated for the protest is that by a local Act (6 & 7 Will. 4, c. 100), which by its 11th section is to be judicially noticed as a public Act, it was enacted (sect. 8) that "no

action in any of His Majesty's courts of law, to which the company should be liable in respect of any damage, injury, or trespass alleged to be done, committed, or occasioned to or against any ship on the high seas, or in any river, port, or harbour, or to or against any person or persons, property, goods, or effects whatsoever, shall be brought, commenced, or prosecuted against the company, unless one calendar month's previous notice, in writing, should have been given by the party or parties commencing such action to the said company." The affidavit states, and the fact is not disputed, that the claim of the plaintiffs is for the cost of repairs of injuries alleged to have been done to a smack called the *Belle*, by a collision with the *Mullingar*, on the river Liffey, in the port and harbour of Dublin, and for the damages consequent upon that collision. The affidavit further states that the action is one to which the company, as owners of the *Mullingar*, are liable. It is admitted that no such notice as the Act requires was given on the part of the plaintiffs. The defendants' counsel insist that this cause is to be deemed an action, brought, commenced, and prosecuted against the company. They have relied upon the terms of the warrant, which directs the citation of all who claim an interest in the vessel, and contend, as I understand the argument, that the owners have in fact been cited by the mere mention of the warrant. The plaintiffs' counsel have very properly not made any objection to the raising of this question by the protest, but they insist in the first place that the Act of 6 & 7 Will. 4 is not applicable to this court, because it is not one of Her Majesty's courts of law; I have, however, no doubt that this court, though not a court of common law, is still to be deemed one of Her Majesty's courts of law in the ordinary meaning of those words: "A court," says Sir Edward Coke (Co. Lit. 38a), "is a place where justice is administered," and Sir Wm. Blackstone says that all the courts of justice are derived from the power of the Crown, whether created by Act of Parliament, "letters patent, or subsisting by prescription." (See Stephen's Commentaries on the Laws of England, 6th edit., p. 383.) He enumerates the several courts of justice which are of a public and general jurisdiction, and in these he includes the Maritime courts (*Id.*, p. 442), so that I cannot attribute much weight to the argument suggested, that this court was anciently the court of the Lord High Admiral, while such an officer existed, and that the judge was appointed by him. That was indeed so, but as the judicial power of the Admiral, or his appointee was deemed to be ultimately derived from the Sovereign, the court was still, I think, one of the King's Courts, and now by the Court of Admiralty (Ireland) Act, 1867, the judge is appointed directly by the Sovereign, and by sect. 21 of that statute this court has been made a court of record, and Sir William Blackstone further tells us expressly "that all the courts of record are the King's Courts, in respect of his crown and dignity." (Stephen's Comm., p. 384.) In *The Johannes* (Lush. 182) Dr. Lushington says that the High Court of Admiralty is a municipal court, and is bound to obey the statutes of the realm in all matters; and in *The Heart of Oak* (30 L. J. 15, Adm.; 21 L. T. Rep. N. S. 727; 3 Mar. Law Cas. O. S. 317), Sir R. Phillimore expressly laid down that the High Court of Admiralty

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of England was both a court of law and equity, and, for that reason, would follow the decisions of the courts of law and equity in bankruptcy cases. As this court is now similarly constituted to the High Court of Admiralty in England, I am of opinion that it has equal claim to be considered a court of law and equity also. It is indeed a court of equity only so far as that it decides upon equitable principles, without assuming the general functions of a court of equity; but I think it is to be called a court of common law, although it administer a peculiar system of law, modified, recognised and allowed by the statute and common law, a system not originally founded on the common law of England, but rather on those foreign and peculiar sources of the law maritime, to which I need not more particularly refer. But the plaintiffs' counsel have further argued that the statute in question is not applicable to the present case, which is a proceeding *in rem*, inasmuch as the cause is not brought, commenced, or prosecuted against the company, but against the ship according to the peculiar procedure in this court. The question is one of importance, both to the company and to the public, I therefore felt bound to consider it carefully before proceeding to give an opinion on the point before me. I do not see the force of the argument which has been used by the defendants' counsel, that the Act is one for the public benefit, and should be liberally construed in favour of the defendants. It seems to me that there is more weight in that advanced on the other side, namely, that it is rather an abridgment of a public right; but I need not offer any opinion, whether the Act is a remedial one or not, because I think that however that may be, I am bound to give full effect to the language of the Legislature fairly interpreted, while I have no right either to extend or narrow it. If this be a proceeding against the company, the notice is clearly requisite. If not, I am not to stretch the words of the Act beyond their natural and ordinary import, merely because the notice may be deemed a protection to the company, or because the Legislature has favoured them by according that protection to them, confiding it would seem, in their solvency and high character. The title and preamble of the Act have no relation to the 7th section. The Act is entitled, "An Act to authorise the City of Dublin Steam Packet Company to apply a portion of certain moneys already subscribed in fulfilment of their contracts for building six additional steam vessels, and to legalise such subscription." The preamble first recites the 3 & 4 Will. 4, c. 115, and that since the passing of that Act an increase in the number of their vessels had been rendered necessary. It then recites the 5 Will. 4, c. 67, for the improvement of the Shannon navigation, and that the improvement of that navigation would greatly increase the necessity for an addition to the number of the company's vessels. It then recites, that to provide additional vessels, the directors had made certain contracts, and that divers persons had subscribed capital to be applied in completing them. Then follows the enacting part. This is *ex concessio*, a proceeding *in rem* corresponding with the real action of the civil law (Inst. Lib. 4, tit. 6, s. 2), which is founded not on a personal obligation, but on a right to the thing which is the object of the suit. A suit to enforce a maritime lien against a particular ship for damages

alleged to have been done by that ship in collision with another is certainly an action *in rem*. Such an action could not be maintained at common law, but it is a matter of almost daily practice in the Admiralty Court, and this distinction between a proceeding in respect of a personal wrong, or a personal obligation, has been recognised by Lord Kenyon in his judgment in *Menton v. Gibbons* (2 T. R. 267). In *The Ruby Queen* (Lush. 266), Dr. Lushington did not deem the law of negligence as applied in the courts of common law to be applicable to a proceeding *in rem* in the Admiralty Court, regarding it as distinct and peculiar. In *The Volant* (1 Wm. Rob. 383) the same great authority on matters of admiralty law distinguishes three modes of proceeding in the Court of Admiralty to recover the loss occasioned by a vessel doing damage—first, against the owners personally; secondly, against the master personally; thirdly, by a proceeding *in rem* against the ship. There can be no doubt, after reading House's affidavit, that this is a suit brought to enforce a maritime lien for damage against the *Mullingar*. Now, in such a case, it is wholly immaterial to whom the vessel belonged. Several American authorities are cited to that effect in *Dunlop's Admiralty Practice*, 92 (n) *Clarke v. New Jersey Steam Navigation Company* (1 Story's Rep. 531), *The Bee* (Ware, 332), *The Ada* (Davies R. 497). The owner, or anyone interested, may come in and defend the *res*, if the *res* be left to itself. The court, on finding that a just cause of action exists, will sell the *res*, but can go no further in that suit; if the *res* be insufficient, the plaintiff loses the full amount of his claim. In *The Victor* (Lush. 72), a cause of damage by collision, the court ordered the cargo on board a wrong-doing ship, although that cargo belonged to the owner of the ship, to be released, on the ground that it was not competent for the Court of Admiralty to attach the property of the defendant wherever found, though the ship itself would be liable for the damage. Anybody having or claiming an interest in the *Mullingar*, whether as owners, mortgagees, or otherwise, might appear and defend her, and thus become parties in the case. But a party who has appeared may, if he will withdraw from a suit *in rem*, and the suit will go on against the *res* as before. Bearing this in mind, we may get rid of a certain confusion of terms, when we speak of defendants in an Admiralty cause *in rem* who, although they may come in to defend the *res*, are not, therefore, necessarily the parties against whom the proceedings are brought. But, in fact, it is not the defendant, whether he be owner of the *res* or not, who is liable to the suit. In a certain loose and popular sense, indeed, a man may be said to be liable in a proceeding *in rem*, because, if he wishes to exonerate the *res*, he may be unable to do so without paying the plaintiff's demand; but I do not think that, legally and correctly speaking, the company are liable in a proceeding *in rem*. They may abscond the *res*, and no liability in the suit will exist beyond its value. The plaintiff may, and often does, establish his claim in a proceeding *in rem*, and recover his loss without the court ever knowing who the owner is. If the company had sold the *Mullingar* since the collision, that would make no change in the plaintiff's position, for they could still follow on their suit against the vessel and enforce it, whoever was the owner, and the company would not have anything to say to the

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matter. In a court of common law the party summoned appears and takes defence and becomes the defendant, but in the Admiralty Court the *res* is the original party against which the suit is instituted, that is the language of the forms, and, as I before observed, the antiquated style of the pleadings in this court, before it was laid aside as cumbersome, always designated the *res* as the "party implegnant, or proceeded against in the suit." I mention this as corroborative, by way of contemporaneous exposition of what I deem to be the ancient procedure of the court which, when not altered by the Act or rules, is expressly preserved, and to this hour the plaintiff may proceed either in personam, or in rem, and the Admiralty Court Acts, both in England and Ireland, recognise the distinction. If the proceeding had been a personal one against the company, no doubt the notice would have been necessary, but I think the clause in question has not provided against a proceeding in rem. I do not think this is a suit brought, commenced, or prosecuted against the company. I have no authority to extend the terms of the Act, if they be plain. The arguments *ab convenienti* on either side can hardly prevail against the plain language of the statute; and I think it quite compatible with the language of the statute, that while the company has the privilege of a month's notice whenever they are sued at common law for any damage done in collision by any of their vessels, they should not be protected against the procedure in rem in the Admiralty Court, which does not appear to me to have been in the contemplation of the Legislature when the Act of Will. 4 was passed. I am confirmed in that opinion by the language of that Act itself, for when the Act was passed no remedy lay in the court for damage done by collision in a harbour within the body of a county, whereas there has been a remedy for it against the owners of a damaging vessel at common law, whether done within a county or on the high seas. Had the Act been intended to apply to a proceeding in rem, the addition of the words, "or against any vessel of the company," or a similar expression, would have made its meaning unquestionable. But I do not think it extends to the present proceeding, and I must refuse this motion with costs, and require the defendants to appear absolutely.

Solicitors for the plaintiffs, J. T. Hamerton and Son.

Solicitors for the defendants, J. Hone and Son.

EXCHEQUER CHAMBER.

Reported by H. LEIGH, Esq., Barrister-at-Law.

ERROR FROM THE EXCHEQUER.

Thursday, Feb. 1, 1872.

(Before COCKBURN, C.J., and WILLES, BLACKBURN, MELLOR, BRETT, and GROVE, JJ.)

CASTLE AND OTHERS v. PLAYFORD.

Vendor and purchaser—Marine contract—Receipt of bills of lading—Arrival and delivery of cargo at port—Purchaser on delivery of bills of lading to take all risks of the seas, &c.—Agreement to buy and receive cargo on arrival—Payment on delivery "at per ton weighed on board during delivery"—Loss of cargo—Liability of purchaser—Insurable interest—Construction of contract—Condition precedent.

By an agreement in writing between the plaintiffs (therein described as "vendors"), and the defendant (therein described as "purchaser"), the vendors agreed to ship on board a vessel a cargo of fresh water ice, "to be dispatched with all speed to any ordered port in the United Kingdom, the vendors forwarding bills of lading to the purchaser; and upon receipt thereof, the purchaser takes upon himself all the risks and dangers of the sea, &c., and the defendant agrees to buy and receive the said ice on its arrival at ordered port, and to pay for it in cash on delivery at the rate of 20s. per ton, weighed on board during delivery." The ice having been duly shipped and dispatched, and the bill of lading forwarded to, and received by, the defendant, the vessel and cargo were subsequently lost on the voyage by risks and dangers of the seas within the meaning of the above agreement.

The plaintiffs having, therefore, brought an action against the defendant to recover the value of the cargo, it was held on demurrer by the majority of the Court of Exchequer (Martin and Channell, B.B., dissentient, Cleasby B.), giving judgment, for the defendant, that the contract was not one of insurance but of purchase, and that under its terms, the arrival of the cargo, and ascertainment of its weight during delivery, were conditions precedent to the defendant's liability to pay the price or value of it, and that the clause relating to "the risks and dangers of the seas," &c., was to save the plaintiffs from liability, in case of loss before arrival, to an action for non delivery. But Cleasby, B., held that, on receipt of the bill of lading, the property passed to the defendant as purchaser, and the cargo was then at his risk, and insurable by him, and that a good cause of action was disclosed by the declaration. The plaintiffs having brought error, and also appealed from that decision, it was

Held by the court of error (Cockburn, C.J., and Willes, Blackburn, Mellor, Brett and Grove, JJ.) reversing the decision of the majority of the court below, that, whether or not the property in the cargo passed to the defendant on the receipt of the bills of lading (which the court said it was not necessary to decide, though they strongly inclined to hold that it did pass with all its risks), yet that the defendant, the purchaser, having agreed to "take upon himself all the risks and dangers of the seas," &c., from the time he received the bills of lading, was liable to pay for the cargo according to a certain rate; and if, meantime, it perished through the perils of the seas, to pay for it according to a fair estimate of its value at the time it went down.

Fragano v. Long (4 B. & C. 210); and Alexander and another v. Gardner and another (1 Bing. N. C. 671; 4 L. J., N.S., 223, C.P.), cited and upheld by the court.

THIS was error from the decision of the Court of Exchequer in favour of the defendant upon cross demurrers to the declaration and plea. The declaration set out an agreement in writing dated the 25th March 1869, between the plaintiffs therein described as vendors, and the defendant therein described as purchaser, whereby the vendors agreed to ship with every dispatch during the month, and in the customary manner, a cargo of fresh water ice in square blocks, say cargo per result 170 register tons, more or less, at vendor's option, all in good and clean condition, and on the same being

duly shipped, the vessel to be despatched with all speed, direct to any port the captain likes best, for orders to unload at one safe place in the United Kingdom; twenty-four hours allowed for waiting orders, lay days to count; the said vendors forwarding bills of lading to the purchaser, "and upon receipt thereof, the said purchaser takes upon himself all risks and dangers of the seas, rivers, and navigation, of whatever nature or kind soever; and the said H. Playford (the defendant), agreed to buy and receive the said ice on its arrival at ordered port, or so near thereunto, &c., purchaser taking the ice from alongside the vessel at his risk and expense at the rate of 25 tons per running day, Sundays excepted, and paying for the same in cash on delivery and after the rate of 20s. sterling per ton of 20cwt., weighed on board during delivery." The declaration then alleged that the cargo of ice, 284 tons, was duly shipped and dispatched on the voyage, and that a bill of lading was forwarded by the plaintiffs to the defendant, and that he duly received the same; and that afterwards, during the voyage and the continuance of the said risks and dangers, the said cargo was wholly lost by risks and dangers of the seas, within the meaning of the said agreement; that all conditions were fulfilled, &c., yet the defendant had not paid the plaintiffs the value of the said cargo at end after the rate aforesaid. A second breach was assigned in that the defendant did not nor would take upon himself the risks and dangers of the seas and navigation according to the said agreement, whereby the value of the said cargo was wholly lost to the plaintiffs.

The defendant, by his sixth plea, as to the first breach, said that he was always ready and willing to buy and receive the said cargo on the arrival at the ordered port, &c., and to pay cash for the same on delivery thereof, &c., but that the said cargo of ice did not arrive at the ordered port, nor were the plaintiffs ready and willing to, nor did they deliver the same cargo there or elsewhere to the defendant according to the said agreement.

Demurrer and joinder in demurrer to the first count of the declaration, and the like to the sixth plea.

Upon the argument of the demurrers, the majority of the Court of Exchequer (Martin and Channell, BB.) were of opinion, in favour of the defendant, that the contract was not one of insurance, but of purchase, and that under its terms the arrival of the cargo and ascertaining of its weight during delivery, were conditions precedent to the defendant's liability to pay the price or value of it; and that the clause as to "the purchaser taking on himself the risks and dangers of the seas, &c., was to save the plaintiffs from liability in a certain event to an action for non-delivery, and they held that the plaintiffs were not entitled to recover. But Cleasby, B., on the contrary, was of opinion that, on the receipt of the bill of lading, the property passed to the defendant as purchaser, and that the cargo was then at his risk and insurable by him, and that a good cause of action was disclosed by the declaration, and that the plaintiffs were entitled to recover the amount thereby claimed: (See report of the case below, 3 Mar. Law Cas. O. S. 407; 22 L. T. Rep. N. S. 516; 30 L. J. 150, Ex.; L. Rep. 5 Ex. 165.)

The plaintiffs thereupon brought error from the above decision of the majority of the Court of Exchequer.

Points for argument on the part of the plaintiffs: First, that the delivery to and the receipt by the defendants of the bill of lading, after the dispatch of the vessel with the cargo duly shipped, was the only condition precedent to the plaintiffs' request to be paid for the cargo; secondly, that the receipt of the bill of lading by the defendant is equivalent to the receipt of the cargo, according to the terms of the contract; thirdly, that the defendant's liability arose upon the receipt by him of the bill of lading, and that the facts averred in the plea do not avoid such liability; fourthly, that the arrival of the ship at the ordered port is not a condition precedent to the plaintiff's right to have the defendant take upon himself all the risks and dangers of the seas, rivers, and navigation of whatever nature or kind soever; fifthly, that the matters mentioned as exonerating, or in denial of the defendant's liability, are matters which, on the true construction of the contract, fell to the defendant alone, and do not affect the plaintiffs; sixthly, that the plaintiff will also contend that the first count of the declaration is good in substance, on grounds similar to those on which they insist that the defendant's sixth plea is bad.

Points for argument on the part of the defendant: First, that the first count of the declaration is bad, because it does not show that the cargo arrived at the place at which the defendant was to purchase and receive the same; secondly, that it shows that such cargo never did arrive at such place; thirdly, that such arrival was, by the terms of the contract between the parties, a condition precedent to the plaintiff's right to sue the defendant for the matters alleged as breaches of his contract; fourthly, that the defendant, by the terms of the contract, was not liable to pay for the cargo until it arrived at the ordered port, or to take upon himself the risks and dangers of the seas and navigation, unless the said cargo so arrived; fifthly, that the said first count, so far as it relates to the said breach, is insensible, because, the cargo having been lost before the same reached the defendant or the ordered port, he cannot be liable to the plaintiffs unless he took upon himself the said risks and dangers; sixthly, that the provision as to the defendant taking upon himself the risks and dangers of the seas, &c., was not intended to impose upon the defendant the doing or performing of any act for the not doing or performing of which he was to be liable to be sued by the plaintiffs, but as a mere condition or limitation of the plaintiff's contract; seventhly, that the defendant will also contend that the sixth plea is good, on the ground that, under the circumstances stated in that plea, the defendant never became liable to pay the value of the cargo; eighthly, that the arrival of the said cargo at the said ordered port was a condition precedent to the plaintiff's right to be paid the value of the same.

Philbrick, for the plaintiffs, now contended that under the words "upon receipt of the bill of lading the purchaser takes upon himself all risks," &c., the property vested in the purchaser at the moment the bill of lading was delivered, and that he, therefore, had the risk upon him; and though it might be hard upon him, it was nevertheless his loss, and he must bear it. The plaintiffs are not common carriers. The majority of the court below seemed to think that the clause casting all risks on the purchaser might be satisfied by holding its meaning to be that, if the cargo were lost

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then the purchaser should have no complaint against the vendors, on the ground of his not getting what he had bargained for. [BLACKBURN, J.—I agree with you in one sense; but then there is the subsequent clause, by which the purchaser agrees to pay for the cargo on its arrival, and your construction would make him liable to pay for it beforehand.] The principle was much discussed in *Taylor and another v. Caldwell* and *another* (The Surrey Musio Hall case), in the Queen's Bench, 8 L.T. Rep. N. S. 356; 3 B. & P. 826; 32 L. J. 164, Q. B. [COCKBURN, C. J.—I do not see how you apply that case to the present one.] Even if the contract had been silent on this point and the clause relating to the defendant taking on himself all risks, &c., it would have had just as much effect as the court below have at present put upon it, and the defendant would still be liable on the contract, and it is in that way that that case seems to bear upon the present one. The contract contains two sets of provisions, first, a set of obligations binding on the vendors, and secondly a set of obligations on the part of the purchaser; both sets being correlative, and depending upon the contracts being carried out, that is to say, upon the arrival of the ice. And between these two sets comes the clause relating to the risks of the voyage. It may be admitted that there is an inconsistency between the two sets of clauses, but the different parts of this contract must be read as Cleasby, B. put it in his judgment below. In an ordinary mercantile sense the meaning and import of the words, "the purchaser takes on himself all risks, &c., of the sea," &c., is an assumption of an obligation that he will by insurance, protect himself against the happening of that which by the loss of the cargo, may prevent the vendors from completing their part of the contract. He assumes and takes upon himself the risk. [WILLES, J.—The cases of *Pragano v. Long* (4 B. & C. 219), and *Alexander and another v. Gardner and another* (1 Bing. N. C. 671; 4 L. J. N. S., 223, C. P.), do not appear to have been cited below. If the property passed, these cases decisively show that you are right.] The property in the ice passed to the defendant immediately on the bill of lading being delivered to him. He was then in a position to have insured his interest in it, and he ought to have done so, and must take the consequence of neglecting to do so. Arrival at port was not a condition precedent to the defendant's liability to pay.

Littler, for the defendants, *contra*.—The clause in question as to the risks and dangers of the seas, &c., is in fact a limitation in favour of the plaintiffs of their liability, and is not in any sense an increase of that of the defendant. If the plaintiffs ship the ice in good order, &c., then the defendant absolves them from any liability as to non-arrival of the cargo. It is a limitation on a condition to be performed by the plaintiffs. [COCKBURN, C. J.—If the defendant is not to pay for the ice till he receives it, what risk does he take upon himself?] He engages to absolve the vendor from the consequences of non-delivery by reason of the perils of the seas, &c. [BLACKBURN, J.—It says more than that.] Had this contract been drawn by a lawyer, it might be so, but it is an artificially drawn instrument. [COCKBURN, C. J.—If people will draw their own contracts, and use words which, ordinarily speaking, can have but one meaning, they must not complain if a court of law so con-

strues them.] It is contended that the effect of this contract is that only the property in so much or such part of the cargo (which, it must be remembered, was a melting cargo) as should arrive at port, passed by the delivery of the bill of lading to the defendant. The cases referred to by Willes, J. are distinguishable.

Philbrick did not reply.

COCKBURN, J.—I am of opinion that our judgment should be in favour of the plaintiffs. I am much disposed to think, though it is not necessary to decide the question upon the present occasion, that the effect of this contract was that the moment the cargo was shipped, and the bill of lading delivered to the defendant, the property thereupon passed to him. And I am confirmed the more strongly in that opinion by the fact that the parties to the agreement have introduced the clause, upon which the present dispute has arisen, and the present question turns, immediately after the clause providing for the forwarding of the bills of lading, namely, that from the moment the bills of lading were delivered to the defendant, the latter should take upon himself all the risks and perils attendant upon the conveying of the cargo to the port of its destination. It seems to me that, when one person says to another "I will ship the cargo upon your account, and I will hand you the bills of lading (which are the indicia of the property), and give you the control of it, and you are from that moment to undertake all the risks attendant upon its transfer by sea," it is very strong evidence to show that it was intended by the parties that the property in the cargo, with all its risks, should pass. But I do not think it necessary to decide the case upon that ground. I put it only alternatively. But if that is not the construction and meaning of the contract, I think the true one is this: "If you, the sellers, will undertake to ship me a cargo of ice, and to forward it by a given vessel to London, and hand me the bills of lading, so that I may have the control over the cargo, and the distribution of it, I will engage, when it arrives, to pay you according to what may be the turn-out (that is the technical term, I believe), the value, in fact, of the cargo; and if in the mean time, while it is upon the seas, it shall be lost and perish through the perils of the seas, I will undertake to pay you for it according to what may be estimated to have been its fair value at the time of its going down." That I take to be the true construction of this contract, and I do not think that it was intended to make the stipulation that the cargo should be at the risk of the purchaser, or in other words, to make the liability of the purchaser, to take the risk of the cargo contingent upon the fact of the cargo's arriving or not arriving in this country, which is the proposition contended for on the part of the defendant. If the first construction that I have been disposed to put upon this contract is right, then, the property having passed, the stipulation as to time and mode of payment would seem to have been put in merely with regard to the measure of price; but I do not, as I have already observed, think it necessary to rest my view of the case upon that construction of the contract, although I entertain a very strong opinion about it. It is enough that the contract is such as would be consistent with the second construction, namely, that the defendant undertook that, if the cargo should be shipped and the bills of lading transferred to him, he would pay for it

according to what might be a fair estimate of its value at the port of destination at the time it went down.

WILLES, J.—I am of the same opinion.

BLACKBURN, J.—I am of the same opinion. My impression is that the effect of this contract is that the property passed; but I do not think that it is necessary to decide that question now. Generally speaking, the risk follows the property, so that when we are discussing what the risk is, it is material to see where the property is. Now, in the present case, the parties have agreed that, whether the property passed or not, the purchaser should, on receipt of the bills of lading, take all the risks and damages of the seas upon himself; yet what risk he took upon himself, if Mr. Littler's contention be correct, I do not at all see, unless it was that he said, "If the goods are lost by the perils and dangers of the seas, I shall take the risk of having lost the property, whether it be mine or not." I can put no other sensible construction on the words which the parties themselves have used. The difficulty in the case is that which was put by the court below, with regard to the clause which specified the time of payment. No doubt it was provided that the defendant was to pay for the ice on the arrival of the ship, and according to what was weighed out and delivered. That was the time provided for payment, and that time never arrived, the ship and cargo having gone to the bottom of the sea. But in the cases to which my brother Willes referred in the course of the argument of *Prigano v. Long* (4 B. & C. 219), and *Alexander v. Gardner* (1 Bing. N. C. 671; 4 L. J., N. S., 233, U. P.), it was held that this made no difference, and if the property did perish before the time for payment came, that time being dependent upon delivery, and if the delivery was prevented by the destruction of the property, the purchaser must pay an equivalent sum. So, in the present case, there would be at the time the vessel went down so much ice on board, and, as a matter of probability, during an ordinary voyage a certain quantity would have melted away, for which a reasonable deduction could easily be made; and what the defendant has taken upon himself to pay is the amount which in all probability would have been payable for the ice upon its delivery. It would be much the same amount as upon an open insurance, as my brother Willes has observed; and doubtless the merchants, in inserting this clause, were considering who were to pay the premiums of insurance for insuring the cargo, and the defendant seems to have said, "As soon as the bills of lading come to me I will pay the premiums or stand my own insurer." I am therefore of opinion that the judgment of the court below should be reversed.

MELLOR, BRETT, and GROVE, JJ., concurred.

Judgment reversed. Rule absolute to enter a verdict for the plaintiffs for 200l.

Attorneys for the plaintiffs, *Lumley and Lumley*, 15, Old Jewry-chambers, E.C.

Attorneys for the defendant, *Morley and Sheriff*, 59, Mark-lane, E.C.

COURT OF ADMIRALTY.

Reported by J. P. ASHFALL, Esq., Barrister-at-Law.

Monday, Feb. 19, 1872.

THE SCOUT.

Salvage—Charterer—Owner—Right to salvage reward—Consolidated suit—Right of plaintiff to be heard separately—Practice.

A charterer hired a ship from her owner under a charter-party, which stipulated that the charterer should bear all expenses, pay the wages of the crew, and all charges incidental to the running of the steamer, except marine insurance, and that the steamer should be delivered up at the termination of the engagement in the same and as good condition as she was at the time of the hiring. The steamer performed salvage services, and, in consolidated suits instituted on behalf of the owner, the charterer, and the master and crew, it was held that, in respect of the services rendered by the vessel itself, the charterer, and not the owner, was, under the charter-party, entitled to salvage reward, as the vessel was at his risk, and he had to bear the expenses incidental to the service.

Where salvage suits have been consolidated by order of the court, but it appears that the interest of one of the plaintiffs conflicts with those of the others, the court will give leave for that plaintiff to appear separately by counsel at the hearing.

THIS was a consolidated cause of salvage instituted on behalf of the owners, master, and crew of the paddle steamer *Prince Frederick William* and J. W. Churchward, the charterer of that steamer, against the steamer *Scout* and her owners, the London, Chatham, and Dover Railway Company. The *Prince Frederick William* was a steamer of 215 tons register and 120-horse power, and was employed in carrying the mails between Calais and Cherbourg. On the 31st Jan. 1871 she left Dover for Calais, and at about 8.20 a.m., near the West Riding Bnoy, she came upon a boat making signals for assistance, and found her to be a boat belonging to the *Scout*. In consequence of information from the boats crew, the *Prince Frederick William* proceeded towards Cape Grisnez, and at about 9.30 a.m. found the *Scout* at anchor off the rocks near that place. The *Scout* had struck on the rocks and had sustained considerable damage, but as the tide made had slipped. She would have sunk had she not been built in water-tight compartments. The weather was thick and foggy, but not rough. The *Scout* belonged to the defendants, but was also employed in the mail service between Cherbourg and Calais, and was under charter to J. G. Churchward, who had the mail contract. The *Scout* had left Calais for Cherbourg on Jan. 30th, and had struck the rocks at 2.30 a.m. on Jan. 31st. A Mr. Thomsett was agent at Calais both for the plaintiff Churchward and the defendants. Just as the *Prince Frederick William* came up Mr. Thomsett arrived alongside the *Scout* in a small steamer called the *Poste*, belonging to the defendants. By his orders the passengers and mails were transferred from the *Scout* to the *Poste* which proceeded to Calais, and the *Prince Frederick William* got a hewer on board the *Scout* and towed her to Calais Roads, which were reached in about two hours, Thomsett going on board the *Prince Frederick William*. The two vessels anchored in the roads to await the tide, and afterwards got into Calais harbour about 6 p.m. in the

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same day. The towage service lasted about two hours and a half. The defendant's answer contained, amongst others, the following paragraph:

15. The *Prince Frederick William* at the time when she was so employed by the said Mr. Thomsett, as aforesaid, was under his control, in his capacity as agent of the plaintiff, J. G. Churchward, and was so employed by the said Mr. Thomsett, as aforesaid, in performance of her duty as a vessel under charter to the plaintiff, J. G. Churchward.

The charter-party of the *Prince Frederick William*, above referred to, was as follows:—

Kearney Abbey, Dover, 29 Jan. 1871.

Thomas Sterling Bghis, Esq., owner of P. S. *Prince Frederick William*, 4, Mansion-place, London, E.C.

Sir,—Referring to the negotiations between Mr. A. B. Godbold and yourself, I agree to charter from you the P. S. *Prince Frederick William*, from the 30th inst., for the purpose of running between Calais and Cherbourg or other intermediate French ports, and to pay you £40 per week, payable weekly in advance, for the use of the steamer, it being understood and agreed that I am to pay all expenses of the crew, fuel, oil, tallow, dues, repairs and all other costs and charges incidental to the running of the steamer, excepting only marine insurance, which is to be defrayed by you.

It is understood that this charter-party is to continue as long as the steamer is required by the exigencies of the French postal service to run between the above-mentioned ports, but terminable at any time by either party on giving seven days' written notice.

The steamer to be delivered up by me on the termination of her employment under this charter at Dover free of expense to you in the same and as good condition as she is now, reasonable wear and tear excepted.

Captain J. E. Happet is not to be removed from the command without your consent except in the event of misconduct on his part.

J. G. CHURCHWARD.

The terms of the charter-party under which the *Scout* was running did not appear. Two suits were originally instituted, each in 800*l.*, and bail was given for 1600*l.*, but by an order of the court was reduced to 800*l.*, and the suits were consolidated.

Bruce applied to the court to be heard separately for the plaintiff, J. G. Churchward, on the ground that his interests were distinct from, and opposed to, those of the other plaintiffs.

The *Admiralty Advocate* (Dr. Deane, Q.C.), and *Clarkson*, for the other plaintiffs, objected on the ground that the suits had been consolidated by an order of the court, and were under the conduct of one solicitor.

Sir R. PHILLIMORE gave Bruce leave to be heard separately.

The *Admiralty Advocate*, for the owners, master, and crew of the *Prince Frederick William*. Thomsett had no power under the charter-party to give orders to the *Prince Frederick William* to render this salvage service. The charterer was to pay all expenses, but only such as were incidental to running the steamer upon the mail route and not expense of rendering salvage. [Sir R. PHILLIMORE cited *Penton v. The Dublin Steam Packet Company* (8 Ad. & Ell., 835.) There the owners were responsible for damage done, and would have had the right to salvage. This case is even stronger, as the owner is bound to pay all insurances, and is therefore responsible for damage and loss. If this service had delayed the performance of the mail contract, the loss would have fallen on the owners. In the *Sappho* (L. Rep. 3 Adm. and Ec. 142; 23 L. T. Rep. N. S. 711; 3 Mar. Law Cas. O. S. 521) the ships belonged to the same owners, whilst here the charter-party does not divest the owners of their rights.

Bruce for the charterer, the plaintiff, J. G.

Churchward.—By the charter the *Prince Frederick William* was to be delivered up in as good condition as at the time of making the contract, and therefore any damage done to her on this service would be borne by the charterer. He would have borne any loss subject to what might be recovered under the insurance. As the charterer was liable for the damage, he is entitled to the salvage. It has never been decided that deviation to render salvage puts an end to a policy, and it is doubtful whether it would; and it is therefore always so element in considering the risk, and that risk was the charterer's. The charterer is bound to pay the extra expenses and the wages of the crew. A charterer may recover salvage against another vessel of which he is also charterer; *The Collier* (L. Rep. 1 Adm. & Ec. 83; 16 L. T. Rep. N. S. 155; 2 Mar. Law Cas. O. S. 473). In the absence of the charter of the *Scout*, it must be presumed to have been in the ordinary form and to have left the ownership in the defendants.

Milford, Q.C. (*W. G. F. Phillimore* with him), for the defendants.—The service cannot be called a salvage service, or, at any rate, it is so small that it ought to have been brought in the County Court. The sum in which the suits were instituted was excessive.

Sir R. PHILLIMORE.—The court regrets that this case should have come here at all; it should have been settled out of court by arrangement between the parties. This was a claim for salvage service rendered by the steamship *Prince Frederick William* to the steamship *Scout*, and I am of opinion that an undoubted salvage service has been performed. [His Lordship then stated the facts.] The service, however, was of a very slight character. There was no danger either to the salving vessel or to her master and crew. It was rather a towage service elevated into a salvage service by the risk that would have been run by the *Scout* if she had been left where she was. Now with regard to the rights of the respective claimants to recover salvage reward, *The Collier* (sup.) and *The Sappho* (sup.) show that the master and crew have a right to recover in this case, although the two vessels may have been in the hands and at the absolute disposal of the same person as owner, so long as their services were not included in the terms under which they served; but the question as to who is entitled here to recover as owner is more difficult. Looking, however, at the terms of the charter-party under which the *Prince Frederick William* was then running, I am of opinion that the charterer was *pro hac vice* owner. He had to bear all expenses, to pay the wages of the crew, and in case of damage to the vessel, would have been bound under the charter to repair her. He was bound to deliver her up to the general owners in good condition. He would have suffered loss, and not the general owner, in case the contract to carry the French mails had been broken. As I consider the service very trifling, I shall award to the charterer, master, and crew the sum of 30*l.* Now, as to costs. Although I do not consider this case ought to have come here, still I think that, considering the circumstance that there was a question of law to be decided, the plaintiffs are entitled to some costs, and I shall therefore exercise the useful power that this court has always exercised, and award the sum of 25*l.* *nomine expensarum*, which will approximate to the sum that they would have been entitled to if the suit had

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been brought in a County Court. As to the owner, Mr. Begbie, he has no claim for salvage at all, and therefore his suit, as far as he himself is concerned, is dismissed with costs. The salving ship was the chief agent in the salvage, and therefore the sum will be apportioned thus: 20*l.* to the charterer, and 10*l.* to the master and crew.

Solicitor for the plaintiffs, owner, master, and crew, *W. Shearman*.

Solicitor for the plaintiff, *J. G. Churchward, Jennings*.

Solicitors for the defendants, *Walton, Bubb, and Walton*.

Tuesday, Feb. 20, 1872.

THE HEINRICH.

Solicitor's Lien—Necessaries—Costs—Master's wages—Priority of lien.

Where a solicitor in a cause in the Admiralty Court has acquired, by order of the court under 23 & 24 Vict. c. 127, s. 28, or otherwise, a lien for his costs upon a ship, as for property recovered or preserved by his exertions, or upon its proceeds in court, his lien takes precedence of liens for necessaries supplied after the institution against the ship of the cause in respect of which he is entitled to costs, but not of liens for necessaries supplied before the institution of that cause.

His lien takes precedence of the lien of the master of the ship for his wages where the master is also part owner, and has instructed him to defend the cause. THIS was a motion made on behalf of *W. Jenkins*, a solicitor, for the payment to him out of the proceeds of the sale of the German vessel, the *Heinrich*, then in court, of his costs incurred in defending the vessel in a suit for damage to, and non-delivery of cargo instituted against her and her freight by the owners of cargo lately laden on board of her. Mr. Jenkins successfully defended the vessel in the suit, from which she was dismissed with costs: (see 24 L. T. Rep. N. S. 914; ante, p. 79.) That suit (No. 5459) was instituted on Sept. 15, 1870.

On 10th Nov. 1871, a suit of necessaries (No. 5874) was instituted against the *Heinrich* on behalf of Messrs. *J. F. and A. Alexander*, and their claim was pronounced for by the court 19th Nov. without prejudice to other claims, and was referred to the registrar and merchant; the vessel was sold in this suit, and the proceeds brought into court.

On 20th Dec. 1871, a cause of necessaries (No. 5936) was instituted against the *Heinrich* on behalf of Messrs. *Van Weenan and Co.*, the ship's agents at Falmouth, and on Feb. 6, 1872, this claim was pronounced by the court without prejudice to other claims. On 20th Jan. 1872, a cause of wages (No. 5983) was instituted against the proceeds of the *Heinrich*, on behalf of *Jacob Heinrich Krull*, late master of the vessel; and this was also pronounced for by the court. On 16th Jan. 1872, the court, upon a motion upon affidavits alleging that the shipowners were foreigners, and unable to pay, after hearing counsel for the defendant in the original suit (No. 5459), and for the various claimants, pronounced that the solicitors for the defendants were entitled (under 23 & 24 Vict. c. 127, s. 28) to a charge upon the *Heinrich* or her proceeds when paid into court, and also upon the balance of freight remaining in court, in exoneration for his and his agents' taxed costs, charges, and expenses in reference to the above suit (No.

5459), reserving all questions of priority, and ordered the costs to be taxed. On 15th Feb. 1872, the taxed bill of costs was filed, and amounted to 603*l.* 5*s.* 9*d.* In the cause of necessaries (No. 5936), some of the supplies had been furnished before and some after the institution of the cause on behalf of the owners of the cargo (No. 5459). In the other cause of necessaries (No. 5874) all the supplies were furnished after the institution of cause (No. 5459). The master of the *Heinrich*, plaintiff in cause (No. 5983), was also part owner, had instructed the solicitor, and also ordered the necessaries. The balance of proceeds in court was insufficient to pay even the taxed costs. The owners of cargo were bankrupt, and had scheduled the taxed costs given against them in their suit. The amount of the dividend on these costs was 314*l.*

Clarkson in support of the motion.—The solicitor has a lien upon the proceeds for his costs, and is entitled to priority over the claim for such necessaries as were supplied after the institution of the cause by the owners of cargo if not over such as were supplied before. The shipowners employed the solicitor to protect the ship from that suit, and be succeeded. He is entitled to the same priority as the owners of cargo would have had if they had succeeded. He has preserved the *res* against which these claims for necessaries are made, and, if these had been sufficient to satisfy all, would have preserved it for them, and is therefore entitled to priority. Persons supplying necessaries to a ship under arrest do so at their peril, and must forego their claim against the *res* if the proceeds are insufficient. Independently of the charge given by the court under the 23 & 24 Vict. c. 127, s. 28, a solicitor has a lien upon the *res* preserved.

Haymes v. Cooper, 33 L. J., Ch. 488; 10 L. T. Rep. N. S. 87.

Bayford, for claimants in cause (No. 5936).—Under the statute no lien exists until the declaration is made by the court, and the lien can only attach then. Our supplies have preserved the solicitor's security, and we have a maritime lien; (*The Ella A. Clark* (Bro. & Lush. 32; 8 L. T. Rep. N. S. 119; 1 Mar. Law Cas. O. S. 325). A solicitor can have no better claim than the shipowner as against material men, who are not benefited by the success. If the owners of cargo had succeeded, they could only have recovered damages subject to the maritime lien for necessaries. Before the solicitor can claim for costs against the proceeds he should attempt to obtain the dividend declared by the owners of cargo, in respect of their taxed costs. No lien can attach before the work, in respect of which it is claimed, is done, without express enactment, and, therefore, part of this claim, at any rate, only attaches from the date of the dismissal of the suit, and is subject to other claims.

Shepherd for the claimants in cause (No. 5874), and for the master (No. 5983).—A solicitor's lien is not on the same footing as a maritime lien and cannot be enforced as against third parties. (*Sir B. Phillimore* cited *The J. F. Davis* (L. Rep. 2 Adm. & Ecc. 1; 17 L. T. Rep. N. S. 151; 2 Mar. Law Cas. O. S. 555.) That case was against a person who had only the same rights as the owner, and is against the decision of the Court of Exchequer: (*Herf v. Edwards*, 1 H. & N. 171.) The master is entitled to be paid for wages due previous to his employment of the solicitor.

Clarkson in reply.—The costs taxed as against

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the owners of cargo are due not to the solicitor but to his clients. He is not bound to seek payment of this money and so incur expense. *Haymes v. Cooper (sup.)* was a question between a solicitor and third parties. The master was a part owner, and cannot have his claim preferred to that of a solicitor whom he employed.

Sir R. PHILLIMORE.—In this case the sum in court is inadequate to meet the demands made upon it by the various claimants, and the sole question for my decision is whether Mr. Jenkins, the solicitor for the owners of the *Heinrich*, is entitled to be paid his costs in priority to the other claimants. The *Heinrich* is a foreign ship, her owners are foreigners, and I think enough appears upon the papers before me to show that they are unable to pay the costs due to their solicitor. The *Heinrich* was arrested in this court in a suit instituted under the 6th section of the Admiralty Court Act 1861, and the plaintiffs in this suit would, if successful, have absorbed every farthing of the sum now in court. Mr. Jenkins defended the suit, and defended it successfully, and therefore has, I think, both equitably and under the statute placed himself in the position of a person who has preserved the property. But as the proceeds of the property are now in court and under the control of the court, I think that the question as to their proper distribution is to be decided not merely by looking at the words of the statute, but upon general principles. Having regard to the rights which solicitors in this court have always enjoyed, and to the principles laid down in *Haymes v. Cooper* (33 L. J. Ch. 488) and *The Jeff. Davis* (L. Rep. 2 A. & E. 1), I think the solicitor for the owners of the *Heinrich* is entitled to priority over all claims for necessities supplied after the institution of the original suit by the owners of cargo. But I must not be understood as intimating that the solicitor is entitled to priority over the claims in respect of necessities supplied before the institution of the original suit or over claims in respect of money advanced to pay dues incurred before the institution of the original suit. As regards the claim of the master, it is clear that he cannot enforce his claim for wages to the prejudice of the claim of the solicitor he himself employed, more especially as he is also part owner.

Agents for Mr. Jenkins, *Gregory and Rouliffes*. Solicitors for the plaintiffs in case No. 5874, and for the master, *Field and Sumner*.

Solicitors for the plaintiffs in case No. 5936, *Clarkson, Son, and Greenwell*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Reported by J. P. ASPINALL, Esq., Barrister-at-Law.

Feb. 14 and 15, 1872.

(Present: The Right Hon. Sir James W. Colville, Sir Montague E. Smith, Sir Robert P. Collier.)

THE MARPESIA.

Collision—Inevitable accident—Issue raised by pleadings—Onus of proof—Costs.

Inevitable accident in point of law is that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill.

The *Virgil* (2 W. Rob. 201) followed and approved.

Where, in a cause of collision, the defence of inevitable accident is raised, the onus of proof lies in the first instance upon the plaintiffs, who must establish that blame does attach to the vessel proceeded against. The onus attaches to the defendants only after a *prima facie* case of negligence and want of due seamanship has been shown against them.

The *Bolina* (3 Notes of cases, 210), followed and approved.

If a party to a collision suit intends to rely upon a particular act of negligence he is bound to set out that act in his pleadings, and it is not sufficient that the act may be included in an allegation in the pleadings which does not clearly express their intention, as the not having stated it is likely to mislead the other party and prevent him coming to meet that case.

Two sailing vessels were meeting end on in a dense fog and sighted each other at a distance of about 200 yards. The defendants' vessel having been close hauled on the port tack was then preparing to go about, and had eased off her head sheets. Both vessels immediately ported but came into collision. The plaintiffs' petition alleged that the defendants' vessel neglected to port, and it was proved in answer to a question by the Judge of the Admiralty Court that the head sheets of the defendants were not again hauled aft. On this evidence the vessel was found to blame, on the ground that she had not executed all the proper manœuvres which she might have executed after sighting the other vessel. Only one minute elapsed between the time of sighting and the collision.

Held (reversing the decision of the court below), that the collision was the result of an inevitable accident, the defendants' vessel having done all that could be effected by ordinary care, caution, or maritime skill in the short space of time that elapsed; and that the plaintiffs, if they meant to rely upon the head sheets not having again been hauled back, ought to have alleged that fact in their petition, the allegation of the neglect to port not sufficiently indicating the nature of the charge.

The rule of the Admiralty Court in cases where a collision is found to be the result of inevitable accident, is to make no order as to costs, unless it can be shown that the suit was brought unreasonably and without sufficient *prima facie* grounds, and this rule is followed by the Court of Appeal. The *London* (Bro. & Lush, 82; 9 L. T. Rep. N. S. 348; 1 Mar. Law Cas. O. S. 398), followed.

This was an appeal from the High Court of Admiralty in a cause of damage by collision, instituted on behalf of the owners of the barque *America* (the respondents), and of her cargo, against the ship *Marpesia*. The petition of the respondents (the plaintiffs) in the court below was as follows:—

1. The *America* was a barque of 379 tons register, or thereabouts, and at the time of the occurrence herein after mentioned, she was manned by a crew of thirteen hands, all told.

2. On the 20th May 1870 the said vessel left Queens-town, bound for Glasgow, with a cargo of sugar.

3. At about ten a.m. of the 21st May 1870, the said vessel, in the prosecution of her said voyage, was about six miles from the Saltee's Lightship. The wind was moderate, from about S.W. by S., the tide was flood, and there was a thick fog on the water. The *America* was proceeding at the rate of about four knots an hour, heading about E. by S., a good look-out being kept on board of her, and her fog horn being sounded every three minutes, or oftener.

4. Under these circumstances, a vessel, which after-

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wards proved to be the *Marpesia*, was observed by those on board the *America*, at a short distance off, and apparently right ahead of that vessel, or nearly so.

5. The helm of the *America* was at once ported, but although those on board the *America* shouted to the *Marpesia* to port, the latter vessel came on, and struck the *America* on the port side, near the main rigging, and did her so much damage that the *America* at once sank, and with the crew was totally lost.

6. Notwithstanding the thick fog that prevailed before and at the time of the said collision, those on board the *Marpesia* improperly neglected to sound the fog horn on board that vessel, in violation of the regulations in that behalf made and provided.

7. The *Marpesia* was proceeding at an improper rate of speed considering the state of the weather.

8. A good look-out was not kept on board the *Marpesia*.

9. Those on board the *Marpesia* improperly made default in not porting the helm of the said vessel.

10. The helm of the *Marpesia* was improperly star-boarded.

11. The *Marpesia* improperly made default in not keeping out of the way of the *America*, as she was bound to do.

12. The aforesaid collision, and the consequent loss and damage to the plaintiff, was caused by the circumstances in the six last preceding articles mentioned, or by some one or more of them, or otherwise by the default, negligence, and improper conduct of those on board the *Marpesia*, and was not in any way caused by those on board the *America*.

The appellants' (the defendants) answer in the court below was as follows:

1. On the 20th May 1870 the ship *Marpesia*, navigated by James Hensell and a crew of thirty hands, left the port of Liverpool, laden with a general cargo, bound to Melbourne, South Australia.

2. The *Marpesia* proceeded in the prosecution of her said voyage, and at about ten a.m. of the 21st of the said month was in St. George's Channel, with the *Saltees Light-ship*, bearing about N.W., distant about six miles, and was proceeding close hauled by the wind on the port tack, with the mainsail and cross-jack furled, heading about west by north, or west north-west. The wind was S.W., a moderate breeze, and there was a thick fog. The tide was flood, and of the force of about two knots an hour. The *Marpesia* had her fog horn sounding at short intervals, and a good look-out was being kept on board of her.

3. At such time the helm of the *Marpesia* was put down for the purpose of bringing her from the port on to the starboard tack; and whilst she was in the act of tacking, a vessel, which proved to be the *America*, was seen ahead at short distance off. The *America* was proceeding under all square sail, with the wind on her starboard quarter. The helm of the *Marpesia* was immediately put hard-a-port, but the vessels came into collision, the *Marpesia's* jibboom taking the *America's* port main-rigging, and then the stem and port bow of the *Marpesia* taking the port side of the *America*, between the main and misen rigging.

4. Save as herein appears, the defendants deny the statements contained in the petition in this cause.

5. The *America* was sailing under too great a press of sail, and at an improper speed.

6. The *America* neglected to keep out of the way of the *Marpesia*.

7. Those on board the *America* did not sound their fog horn.

8. The said collision was occasioned or contributed to by all or some of the matters set forth in articles 5, 6, and 7 of this answer.

9. The said collision was not in any way occasioned by any neglect or improper navigation on the part of the *Marpesia*; but, so far as she was concerned, was the result of inevitable accident.

The cause came on for hearing in the Admiralty Court on March 29th and 30th 1871, before Sir R. Phillimore, assisted by Trinity Masters. Witnesses were examined for both the plaintiffs and the defendants, the effect of whose evidence is sufficiently given in the judgments of the Court of

Admiralty and of the Judicial Committee. The Admiralty Court held the *Marpesia* solely to blame, and deliver the following interlocutory decree:—

Sir R. Phillimore.—This is a cause of collision between two vessels, the *America* and the *Marpesia*. It took place about ten o'clock on the 21st May in last year (1870), not very far from what is called the *Saltees Light-ship*, on the south coast of Ireland. The *Marpesia* ran into the *America* abaft the main rigging with so much violence that she sank in a very short time and with her cargo was totally lost. Now, it has been truly said that there are points in this case which are common to both parties, and which are either admitted or have been proved by the evidence. The state of the wind is admitted to have been either S.W. by S. or S.W.; the difference is immaterial in its bearing on the circumstances of the case. The course of the *America* was E. by S., and the course of the *Marpesia* was W. by N. $\frac{1}{2}$ N. before she attempted to go into stays. Therefore I entirely agree with the opinion of the counsel on both sides, that the vessels must be considered as meeting vessels, and the rule of navigation, that both vessels should port their helms for the purpose of avoiding a collision should be applied to them. In the course of things, during the examination of the witnesses it has become tolerably clear that the *America* could not by any construction be held to blame for this collision; and it has been very properly admitted, as I expected it would be, by the counsel for the *Marpesia*, that the defence of the *Marpesia* must rest upon the accident being inevitable. The *America* was right in doing what she did, namely, in porting as soon as the *Marpesia* became visible. She ported, and came up from E. by S. to S.S.E., somewhat about five points. That there was at this time a thick fog is, I think, a matter beyond controversy. The main question is, whether if the *Marpesia* had been properly navigated, with a proper look out, she would not have seen the *America* in time to have avoided the collision by porting her helm. I understand her case to be this, that after sounding with the lead to ascertain her position, she was heading W. by N. $\frac{1}{2}$ N., that she luffed, and came up about two points, and then, while she was still under her starboard helm, intending to go into stays, she saw the head sails of the *America* emerging from the fog. Now, the distance at which the vessels were mutually visible appears to me, on a fair balance of the evidence, to be between 250 and 300 yards. The *America*, as I have said, had time, after sighting the *Marpesia*, to come up five points. The *Marpesia*, having luffed and come up two points, and being under a starboard helm, says that she had eased off her head sheets, as I understood her, and swung her crossjack, and then she discerned the *America*, and put her helm to port, and went off two or three points, and it is admitted that her sails were full at the time of the collision. Now I have no doubt myself, and the elder brethren of the Trinity House confirm me in this opinion, that the *Marpesia* could not be said to have been in stays in the sense of being out of command. All the circumstances show that she was in sufficient command to have obeyed the rule of navigation. The question therefore is, Did she take the proper measures for putting that rule into due execution? Now, she ported her helm, but I am instructed by the Elder Brethren that if she had accompanied that manoeuvre by hauling aft the

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head sheets again, and letting go all the lee braces (and it is to be observed that all her hands were on deck at the time), in all probability she would have avoided the collision, and, at all events, have placed herself in a position of having done all in her power to prevent the accident. Not having done so, I must hold that she failed to execute the proper manœuvres, which, after sighting the *America*, it was competent for her to have executed, and, therefore, that she is to blame for this collision.

From this decree the owners of the *Marpesia* appealed, on the following amongst other grounds: First, because the evidence proved that the collision was the result of inevitable accident; secondly, because the evidence proved that the *America* was seen as soon as it was possible for those on board the *Marpesia* to see her, and that proper measures were immediately taken by the *Marpesia*; thirdly, because, owing to the short distance at which the *America* was seen, there was not sufficient time for the head sheets of the *Marpesia* to have been hauled in and her lee braces let go; fourthly, because there was not time for such measures to have been taken effectually, and so as to have avoided the collision; fifthly, because the judgment does not find, as a fact, that it was under the circumstances possible for those on board the *Marpesia* to have avoided the collision.

The respondents in their case on appeal submitted that the decree was right on the following amongst other grounds: First, because it is proved by the evidence that the *America* was not in any way to blame for the collision, and that the collision was not an inevitable accident by reason of the *Marpesia* being in stays or otherwise; secondly, because the aforesaid evidence shows that either there was not a good look out kept on board the *Marpesia*, or that if the *America* was observed as soon as she ought to have been by those on board the *Marpesia*, then that the helm of the *Marpesia* was not duly ported, nor proper steps taken to give effect to and assist the porting of the helm.

Bull, Q.C. and *Clarkson* for the appellants. —We contend that this collision was the result of inevitable accident. It could not have been avoided by the exercise of ordinary care, caution, and maritime skill: (*The Virgil*, 2 W. Rob. 201, 205). Our ship did everything in her power to avoid the collision, considering the time that elapsed between the *America* coming into view and the blow: (*The Europa*, 14 Jurist, 627; *The Lochlibo*, 3 W. Rob. 310, 318). The ground on which the judgment proceeds is that we did not do all we could to make our vessel answer her port helm. This was not raised by the plaintiffs, but by the court; and if the plaintiffs intended to rely upon it, they were bound to have stated it in their pleadings, so as to give us an opportunity of meeting their allegation by evidence. The court was not entitled to give judgment on an issue which was not raised by the pleadings: (*The Ebenezer*, 2 W. Rob. 206, 209; *The Speed* 2 W. Rob. 225, 227.) The plaintiffs were bound to prove their case *secundum allegata*.

Milward, Q.C. and *Cohen* for the respondents. —The sole point we now raise is whether the *Marpesia* was bound or not to assist her helm by her sails as found by the court below. We withdraw all other charges against her. First, with respect to the pleadings: The ninth article of our

petition in the court below alleged that the *Marpesia* neglected to port her helm. This allegation refers not merely to the act of putting the helm itself to port, but to all other measures which a seaman would, in the exercise of his nautical skill, adopt for the purpose of throwing his ship's head to starboard, and so assisting his port helm. It was not necessary to allege in specific terms that the *Marpesia* neglected to haul aft her head sheets, as this was a part of the manœuvre of porting her helm, and would have assisted the ship in more effectually answering her helm. Secondly, with respect to inevitable accident: The rule at common law seems to be that a plaintiff is bound to give *prima facie* proof that the defendant is guilty of negligence, even where the defence of inevitable accident is set up, and not until that is done is the onus of proof shifted to the defendant; but in the Admiralty Court, where inevitable accident is pleaded, it is the practice for the defendants to begin, and the onus is therefore thrown upon them. The appellants are bound, therefore, to satisfy your Lordships that they did all they could to avoid the accident, and we contend that they have failed to do so. Thirdly, with respect to the default of the appellants—we contend that the evidence shows that there was a want of ordinary care and nautical skill on the part of the *Marpesia* in not taking the steps pointed out in the judgment below to avoid the collision. If the judgment of the court should go against us, we ought not to be condemned in costs, as we had good ground for instituting this suit:

The London, Bro. & Lush, 82; 9 L. T. Rep. N. S. 348;

1 Mar. Law Cas. O. S. 398.

Bull, Q.C., in reply.—The rule at common law and in the Admiralty Court, as to the onus of proof, is the same. The plaintiffs are bound to show a *prima facie* case of negligence: (*The Bolina*, 2 Notes of Cases, 208.) They have failed here to establish any such case, and we are, therefore, entitled to judgment.

Feb. 14.—The judgment of the court was delivered by Sir JAMES COLVILLE.—This is a case of collision brought by the owners of the barque *America* against the owners of the ship *Marpesia*, the *America* having been run down by the *Marpesia* in St. George's Channel on the 21st May 1870. The points raised by the appeal lie in an extremely narrow compass. It is admitted on all hands that the collision took place in daylight, about ten o'clock in the morning, but in a very thick fog, in which the vessels could only discern each other at a very short distance. It is found by the learned judge of the Admiralty that the distance at which they could have been visible to each other was not more than from 250 to 300 yards. It is now admitted on the side of the *Marpesia* that no blame is attributable to the *America*; and it would further appear that neither in the court below nor now is it seriously contended that the *Marpesia* was in fault in any of the particulars which are specially stated in the petition of the *America*, unless it be in one to be afterwards considered. It is no longer contended that she was proceeding at an improper rate of speed considering the state of the weather. It is no longer contended that a good look-out was not kept on board that vessel; nor is it now contended that her helm was improperly starboarded, or that she made default in not keeping out of the way of the *America* as she was bound to do. The only point

which is now made by Mr. Milward is, that it cannot be said that those on board the *Marpesia* did not make default in not porting the helm of their vessel within the proper sense to be attached to those words. The clear and admitted facts of the case seem to be these: The vessels were proceeding one down the Irish Channel and the other up the Irish Channel in a thick fog. They could not have seen each other at a distance of more than 300 yards. Their lordships are rather disposed upon the evidence to say that 300 yards is an extreme limit, and that the distance within which each was visible to the other was probably nearer 200 yards. The combined speed of the vessels would seem upon the evidence to have been about eight knots an hour, and the result of this state of things is, that not more than a minute, if so much as a minute, must have been the time which elapsed between the sighting of the two vessels by each other and the actual collision. It is further admitted that the two vessels were proceeding in such a manner as that, under the sailing rules, each would be bound to port its helm; that they were in fact approaching each other stem on. It is also established by the evidence, that immediately before the *Marpesia*, which had been close hauled on the port tack, sighted the *America* she was proceeding to tack. It may be a question how far she had gone in a manoeuvre, but she had put down her helm, and had come up two or three points, and was in the act of altering her rigging in order to complete the operation of tacking. When, however, the two vessels sighted each other, her helm was shifted, and put, as they were bound to put it, hard-a-port. In that state of things, what is attributed to the *Marpesia* by the judgment, and substantially the only fault that has been imputed to her at the bar, is that she did not do something more than port her helm; that she did not take steps, which it is assumed she might have taken, in order to put the fore sails into such a position that the full pressure of the wind whilst she was under the port helm would come upon them; and also to ease the pressure of the wind upon the after sails of the vessel; the results of which operation would have been, that she would have paid off more rapidly under the port helm than she did; and in that way, as it is contended, might have gone clear of the *America*. The finding of the learned judge in the court below on this point is in these words:—"Now she ported her helm, &c." (their Lordships here set out the latter part of the judgment of the court below). It is to be observed that the judge does not in terms find that the collision would have been avoided, if she had done that which it is stated she omitted to do. His finding is only that in all probability she would have avoided the collision, and that at all events she would have been in a position, in which her owners might have said more unanswerably that she had done all in her power to prevent the accident. As far as their Lordships can see, the negligence thus imputed was not made a point in the case, until the learned judge, acting upon the advice of the elder brethren, gave his judgment. The omission is not expressly alleged in the pleadings as a culpable omission on the part of the *Marpesia*. Mr. Milward contends that it is included in the allegation that she did not port her helm, because he says that if she had done what she omitted to do to her sails, she would

have answered the port helm more effectually. But it appears to their Lordships that, if that was the case intended to be made, the pleadings ought to have stated it, and not having stated it was likely to mislead the parties and prevent their coming to meet that case. Now do their Lordships find that the point was really raised by the cross-examination? There was, no doubt, a good deal of cross-examination of the captain and one of the other witnesses as to the discrepancies between the evidence they gave at the trial, and the statements in the log as to what had been done with the cross-jack yards and other parts of the rigging; but it seems to their Lordships that that cross-examination was directed rather to show that the ship was not, as had been stated in the log, and in the case originally put forward by the captain, almost at rest as if she had been at anchor, and that the operation of the tacking had gone so far that she might be said to be technically "in stays," and therefore not under control; and, consequently, that the cross-examination was directed to show that there was a greater speed upon her than was admitted. The only place in which their Lordships can find that the point was directly raised in the evidence, was in the examination by the court, not of the captain, but of the mate, at page 39 of the case, and there, no doubt, the court asks the question, "Were the head-sheets let go?" The answer is, "Eased off." That would only go to show what was the state of the vessel at the time. The court then goes on to ask, "And when were they hauled back again?" The answer is, "Never hauled back at all, not until we struck." If that omission were intended at the time to be treated as culpable negligence, one would have expected that the examination would have been continued in order to give the parties an opportunity of explaining the fact. But as far as their Lordships can see, it was mainly on these questions and answers that the older brethren suggested, and the learned judge found, that there had been a culpable omission on the part of the *Marpesia*. In consequence of one of the arguments at the Bar, it seems desirable to say something as to the burden imposed upon a vessel that seeks to exonerate itself for a collision on the ground of inevitable accident. Mr. Milward suggested that there is some difference of practice between the Court of Admiralty and the courts of common law in that matter. Their Lordships, however, cannot find that there is any such difference. They take the law as they find it laid down by Dr. Lushington in two cases. In the case of the *Bolina* (3 Notes of Cases, 208), Dr. Lushington says, "With regard to inevitable accident, the onus lies on those who bring a complaint against a vessel, and who seek to be indemnified. On them is the onus of proving that the blame does attach upon the vessel proceeded against, the onus of proving inevitable accident does not necessarily attach to that vessel; it is only necessary when you show a *prima facie* case of negligence and want of due seamanship." Again, in the case of the *Virgil* (2 W. Rob. 205), the same learned judge gives this definition of inevitable accident:—"In my apprehension, an inevitable accident in point of law is this, viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. If a vessel charged with having occasioned a collision,

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should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four; it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred; if he could have used measures of precaution that would have rendered the accident less probable." Here we have to satisfy ourselves that something was done or omitted to be done, which a person exercising ordinary care and caution and maritime skill in the circumstances, either would not have done, or would not have left undone, as the case may be. Their Lordships, considering the admitted time which elapsed after the two vessels had sighted each other to have been not more than a minute, and the state in which the *Marpesia* was, in attempting to go about, have failed to come to the conclusion that the captain was to blame for having omitted to do that which the judgment seems to find that he might have done. It is a question entirely of navigation, and therefore it is one upon which they have felt at liberty to consult the gentlemen who assist them; and they have been confirmed in the opinion, which they would have formed themselves from all the circumstances of the case, it being the opinion of those gentlemen that the time was so short that the omission to do that which has been said ought to have been done with the rigging and the sails cannot be imputed as negligence, or anything approaching to negligence, in the master of the *Marpesia*. It may be observed that this view of the case is in some measure confirmed by a statement of the master of the *America*, who, in his examination before the receiver of wreck said, "There was no time to alter sails on either vessel, and the only precautions were confined to the helm." Their Lordships having, for these reasons, come to the conclusion that the collision in this case was one of those unfortunate accidents in navigation which no ordinary care, caution, or maritime skill could have prevented, are compelled to dissent from the finding of the learned judge of the Admiralty that the *Marpesia* was solely to blame. They will therefore humbly recommend Her Majesty to allow the appeal, to reverse the judgment of the court below, and to dismiss the suit. Their Lordships will consider the subject of costs.

On the following day their Lordships added:—With regard to the question of costs which was reserved yesterday, their Lordships have considered that matter. They find that in the case of *The London* (Bro. & Lush. 82), Dr. Lushington stated:—"In this case the court has found that the collision was an inevitable accident, and pronounced against the damages; and the only question now is whether the plaintiff ought to be condemned in costs. I quite agree with Mr. Brett that on principle costs ought to follow the event;" (that is also their Lordships' view); "but if there is any set rule of practice, it is necessary to abide by that. I have caused inquiry to be made, and I find that in these cases of inevitable accident the usual practice, the general rule I may call it, has been to make no order as to costs, as I had occasion to state in the *Itinerant* (2 W. Rob. 231.) But looking to all the cases, it is clear that the court still holds, and will on occasion exercise, a discretionary power to condemn in costs. Thus in the *Thornley* (7 Jurist, 600), I ordered the plaintiff to pay costs, saying that he had not

sufficient ground for bringing his action. I deem myself, therefore, free to consider the circumstances of the case; and I must say that, considering the collision took place on a most tempestuous night, a night in which in this one place eight vessels were wrecked, the plaintiff had good reason to think the collision was a mere accident which could not have been avoided, and that he was unduly rash in bringing his action." Their Lordships therefore conceive that the general rule of the Court of Admiralty is in these cases to make no order as to costs, and that in order to justify an exception to that rule it must be shown that the action was brought unreasonably and without sufficient *prima facie* grounds. In the present case they cannot say that there were not such grounds. The case is one in which the unsuccessful party might fairly suppose there was ground to impute blame to the other, and seek to have that question tried. Therefore there will be no costs in the court below; and as the party came here to support the decree which he had obtained, there will be no order as to the costs of this appeal. The order, therefore, which their Lordships will recommend Her Majesty to make is that the appeal be allowed, that the judgment of the Court of Admiralty be reversed, and that in lieu thereof a judgment be made declaring that the collision was the result of inevitable accident, and ordering that the suit be dismissed without costs, and that each party do bear their own costs of this appeal.

Appeal allowed.

Proctors for the appellants, *Prichard and Sons*.
Solicitors for the respondents, *Watsons, Bubb, and Wallon*.

V. C. MALINS' COURT.

Reported by G. L. F. COOPER and T. H. CARSON, Esqrs.,
Barristers-at-Law.

Tuesday, March 12, 1872.

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Mortgage of ship—Right to freight—Priority—Notice.

A, mortgaged a ship, then on her outward voyage, to *B*, and the mortgage was duly registered. Three days before the mortgage of the ship, *A*, mortgaged the homeward freight to *C*, but *C* omitted to give notice of such mortgage to *B*.

Held, that *B* was entitled to the homeward freight.

Lindsay v. Gibbs (22 Beau. 522), observed upon.

In May 1866, Joseph Wilson, a merchant in Liverpool, was the sole owner of a ship named the *Kenilworth*, then on a voyage from Liverpool to Calcutta, and in the course of business he had dealings with the Union Bank of Liverpool.

On the 15th May 1866 he executed to the bank a mortgage of the *Kenilworth*, in the statutory form, as security for advances, and this mortgage was duly registered on the 18th. On the same 15th May the plaintiff, Mary Wilson, who was the mother of Joseph Wilson, at his request, executed to the bank, as a further or collateral security, a mortgage of certain shares which she held in another ship named the *Refuge*.

On the 12th May 1866, three days before the mortgage of the *Kenilworth*, Joseph Wilson executed a deed of assignment, by which, in consideration of his mother granting the mortgage to the bank of her shares in the *Refuge*, he assigned to

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her all his right and interest in the freight and earnings of the *Kenilworth* on her voyage from Liverpool to Calcutta, and also in all succeeding or intermediate voyages.

On the arrival of the *Kenilworth* at Marseilles, which was her port of destination on her return voyage from Calcutta, the captain received instructions from the plaintiff to dispose of the cargo and receive the freight on her behalf, but the bank, immediately on the ship's arrival, by their agent, put a lien on the ship and freight, and subsequently received payment of the freight upon an understanding that they should account for it to the plaintiff. The question in this suit was whether the freight earned by the *Kenilworth* on her homeward voyage from Calcutta to Marseilles belonged to the plaintiff under the above-mentioned deed of assignment, or to the bank under their mortgage.

It did not appear from the evidence that any formal notice of the assignment was given by the plaintiff to the bank prior to their mortgage. Joseph Wilson, however, stated that on the 16th, the day after the mortgage, he mentioned to the defendant, James Wilson, the manager of the bank, that he had already mortgaged the freight; but James Wilson positively denied that either he or the bank had had any notice whatever of the assignment to the plaintiff.

In June 1866, Joseph Wilson became insolvent, and executed a deed for the benefit of his creditors.

Glass, Q.C. and Wille, for the plaintiff, contended that she was entitled to the homeward freight, and cited

- Douglas v. Russell*, 4 Sim. 524;
Holroyd v. Marshall, 10 H. of L. Cas. 191;
Lindsay v. Gibbs, 22 Beav. 522;
Brown v. Tanner, L. Rep. 3 Ch. App. 597; 13 L. T. Rep. N. S. 624; 3 Mar. Law Cas. O. S. 94;
Reeve v. Whitmore, 9 L. T. Rep. N. S. 311; 19 W. R. 113;
Rusden v. Pope, L. Rep. 3 Ex. 269; 13 L. T. Rep. N. S. 651; 3 Mar. Law Cas. O. S. 91;
Splidt v. Bowles, 10 East. 279;
Yates v. Cox, 17 W. R. 30;
Boaz v. Hopkinson, 18 W. R. 725;
Webster v. Webster, 31 Beav. 393; 6 L. T. Rep. N. S. 11;
Fulham v. Clark, 1 De G. & Sm. 307.

Cotton, Q.C. and Gunning Moore, for the bank, contended that their mortgage carried with it the right to the freight, and that they were in the position of mortgagees without notice. They cited,

Kemp v. Clark, 12 Q. B. 647.

Glass, in reply.

THE VICE-CHANCELLOR.—The point which I have to decide is probably one of considerable importance on a point of mercantile law, but I cannot say that I feel much doubt about it. In the year 1866 Mary Wilson, a widow lady of Liverpool, had a son Joseph Wilson, who traded as a merchant in that town. He had dealings with the defendants, the Union Bank of Liverpool. I collect that he was in considerable straits for money, and he therefore applied to the bank to make him advances upon security. He was the sole owner at that time of a ship named the *Kenilworth*, which was upon her outward voyage to Calcutta. His mother, the plaintiff, was part owner of another ship called the *Refuge*. In order to improve the position of the bank, and to induce them to make more advances to Joseph Wilson than they would otherwise have done, he applied to his mother to give

them, by way of collateral security, as the bill sets out, her interest in the ship named the *Refuge*. Now that collateral security, I rather collect, meant a security in addition to the security upon the ship *Kenilworth*; but I agree with Mr. Glasse in this—I do not think it is distinctly brought home to the plaintiff that she did know of the fact of the ship *Kenilworth* being mortgaged to the bank; that is not, as far as I can find out, distinctly proved, although I am bound to say I think there is very little doubt of the fact. It is stated that it was a collateral security, and what collateral security it was, except a collateral security of the ship *Kenilworth*, I am unable to discover. But, however, that was on the 15th May 1866. The case is that Joseph Wilson, being the sole owner of the *Kenilworth*, mortgaged it in the usual way to the bank as a security for whatever might become due from him to them. That mortgage, of course, would not be available without registration; but it is stated by the answer that it was duly registered. The date is not stated, but Mr. Cotton has stated (and I suppose it is not much in dispute, if at all) that the date of the registration was the 18th May, three days after the mortgage. Now then, on the 18th May, at all events, the bank had a complete mortgage on the ship *Kenilworth*; but, three days before the mortgage of the ship *Kenilworth*, the plaintiff, Mrs. Wilson, had taken from her son an instrument in this form: [The Vice-Chancellor read the deed of assignment above-mentioned, and continued:] This instrument gave her, in the most ample manner, security on the freight to be earned by the ship *Kenilworth*. There is no dispute between the parties—at least the bank does not raise any question—as to the right to the outward freight from Liverpool to Calcutta. I take it that that is because it is stated by Joseph Wilson that the whole of the cargo belonged to himself; and therefore, being the owner of the ship, and also being the owner of the cargo, no freight would have to be paid. Of that fact I collect the bank were aware, at all events they admit it; they do not set up any claim to the outward freight. But what is in dispute between the parties is the right to the homeward freight, the freight earned by the ship *Kenilworth* on the return voyage from Calcutta, not to Liverpool, but to Marseilles which was her port of destination on her return voyage. Now then, is the plaintiff, as assignee of the freight, or are the defendants, as mortgagees of the ship, entitled to this homeward freight? That freight, like any other property—freight not yet earned, for it is the case here that the freight was not yet earned, the ship being on her outward voyage, and not on her homeward voyage, in respect of which the charter-party was not entered into—may be the subject of assignment in equity, cannot be disputed, and has not been disputed in this case. Therefore, so far as this question depends on the right of the assignee to the freight, the title of the plaintiff is perfectly clear, because she had an assignment of it for value, and that assignment would operate on the freight when it was afterwards earned. So far the case is free from any difficulty. But then the contest is between the plaintiff as the assignee of the freight, and the defendants as mortgagees of the ship. Then, what is the position of the mortgagee of a ship? First of all, before I go to that, I will dispose of the question whether the defendants had or had not, notice of the deed of the 12th

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May, when they took the mortgage of the 15th May, because, if they had notice that the plaintiff was the assignee of the freight to be earned by the ship either on the onward voyage or on the homeward voyage, there is an end of their title, and consequently that point has been contested, and considerably contested, whether they had or had not notice. Now upon that subject, considering all the surrounding circumstances, I entirely agree with Mr. Cotton's observations that it was the bounden duty of this lady or her agent, considering the circumstances of this transaction altogether, to give notice of it when the collateral security was given. I can only come to the conclusion that she, or those who were acting for her, did know of the transaction with the bank, and therefore it was their bounden duty to give notice to the bank that, in taking the mortgage of the ship, they were not to have all ordinary rights of a mortgagee of a ship, but that the freight of the then voyage, that is, whatever the ship might earn before she came back to the port of her return, was already pledged to the plaintiff. Was such notice given or not? Joseph Wilson says it was. He is the only witness who proves the fact. Now, first of all, I must look on Joseph Wilson's evidence, under the circumstances, with considerable doubt. He was evidently under a bias to do the best he could for his mother. The correspondence shows he was anxious to do that after the money was gone, and I must look upon his evidence with grave doubt. But the fact of that notice having been given is most positively and distinctly denied by the defendant James Wilson, who was the manager of the bank, in his answer. I think his statement is completely confirmed by Joseph Wilson, because the important period as to his notice having been given or not, was on or before the 15th May; and Joseph Wilson's statement is, that on the 16th, not in a business-like manner, but to Mr. James Wilson as he came out of the bank, he mentioned that he had already mortgaged the freight. But the 16th was too late; the bank had advanced their money or given credit for it on the 15th. I am therefore satisfied, on the weight of evidence, that no notice whatever of this assignment of freight was given to the bank, and they are therefore in possession as mortgagees of the ship, whatever title that may give them without any notice whatever of any prior incumbrance on the ship or the freight. Then what is the position of a mortgagee of a ship? I take it that there is a perfect analogy (and cases have been cited, and very important ones, to that effect) between the mortgagee of land and the mortgagee of a ship. We know perfectly well that a mortgagee of land has a right, from the very day of his mortgage, to receive the rents. We also know that if he does not choose to enter into possession, or give notice to the tenants, but regards his security as sufficient, and allows the mortgagor to receive the rents, those rents can never be recovered back again as rents. The mortgagor has a continuing right to receive the rents until the right is intercepted by some act on the part of the mortgagee, and the payment of the rents by the tenants to the mortgagor, notwithstanding the mortgage, is perfectly valid and binding. So I take it to be perfectly clear that the mortgagee of a ship has a continuing right to receive all the earnings of a ship, that is, the freight, either under a charter-party or without a

charter-party; he is entitled, just like the mortgagee of land, whenever he thinks fit, to enter into possession; and if the ship has earned money, he has a right, before the goods are delivered in respect of which that money is earned, to give notice to the consignee, the person having to pay the freight, or to the charterer, who may be a perfectly distinct person, and ordinarily is perfectly distinct from the one who has to receive the goods, that he requires the freight to be paid to him. Now this is very distinctly laid down in many cases, and all agree upon it, but the recently decided case of *Brown v. Tanner* (sup.) shows it clearly. It is quite true, as Mr. Glasse stated, that that case arose upon the question of an assignment of a freight subsequent to the mortgage of the ship; but in deciding that case the present Lord Chancellor, then Lord Justice, said, "It is now settled beyond all dispute that the mortgagee of a ship becomes entitled to all the rights, and liable to all the debts, of an owner from the time of his taking possession. Amongst the rights so accruing to him is that of receiving all freight remaining due when possession is taken." In *Budden v. Pope* (sup.), where there was a difference of opinion, three of the learned judges being of one opinion, and Bramwell, B. being of another, Martin, B. expresses himself thus—"Now it has been held for many years, and frequently decided, that the effect of a mortgage of a ship, under a contract for earning freight, is to transfer the freight to the mortgagee. The freight becomes his property as a *chose in action*, and the case of *Kerrwill v. Bishop* (2 C. & J. 529) is a direct decision to this effect. But, in analogy to the case of real property, it is rightly held that though the mortgagee takes the accruing freight as his property, yet payment to the mortgagor is good payment. If, however, the mortgagee intervenes at any time before payment, he has a right to do so: he asks for his own property." That is like the rent of land, which is the mortgagee's own property, if he chooses to consider it so. So the freight earned by a ship is his own property if he chooses to receive it. Then Martin B. continues, "What entitles him to receive the freight is the communication of the fact that he is mortgagee, and that he claims it as such; and taking possession is only one mode of communicating the fact. I entirely dissent from the proposition that he is entitled because he does any act in earning the freight, for he usually does nothing; and it has been frequently pointed out that his right depends, not on contract, but on property. I think the law on this point is beyond doubt." Channell, B., says, "Now, it is true that some cases use the expression that the ship must be earning freight, but I take it to be clear that the freight passes with the assignment of the ship, and though to enable the mortgagee to establish his right to the freight, it is necessary that he should do some act, yet as soon as he does an act to show that the mortgagor is not his agent, he is immediately entitled to have it paid to him." The Lord Chief Baron also says, "The law is established, that the mortgagee of a ship takes at once under his mortgage all the rights of the mortgagor, except the right to be paid freight, and to that he is not entitled till he enters into possession, or does something equivalent to it." The same law is laid down by the Master of the Rolls in the case of *Lindsay v. Gibbs* (sup.), which has

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been so much relied upon by Mr. Glasse and Mr. Winstle, but in which, I confess, I fail to find a single line in the slightest degree favourable to their case. There the case depended upon a gross omission of a mortgagee of a ship to register his mortgage. I have already pointed out that on the 18th May there was no valid mortgage given until the mortgage was registered; but on the 18th May it was registered, and then the title of the mortgage was in every respect complete. In the case of *Lindsay v. Gibbs* it all turned on the omission of the mortgagee to register, and the right to the freight, and the question was whether the right to the freight was in the mortgagee, or in the mortgagor until registration. The Master of the Rolls says that those who claimed under the mortgage before registration were entitled to it, and that the mortgagee could only have a title as from the time he registered his security. It does not go beyond that. The Master of the Rolls lays down the rule in much the same way as all the other judges, that the mortgagee of a ship is entitled to the freight. Now, then, what was done in this case? The ship was on her homeward voyage. Joseph Wilson had failed in the month of June, and compounded with his creditors, and a deed was executed in that month of June, that is, a month after this security was given. The parties knew perfectly well that this ship was about to arrive. They sent out, and Joseph Wilson, who was very anxious after this failure, naturally, to do all he could for his mother, to reimburse her the money and the risk which she had incurred for him, sends out an agent to Marseilles. A great many letters are written by both parties, and arrive at Marseilles, are sent to the consulate, and there remain until the captain of the ship comes into Marseilles and receives them. But in the mean time the bank were not inactive. They were desirous of realising all they could, and they sent out to a very active agent, a very intelligent man, and a man who appears to have done his business remarkably well, for he was not satisfied with going on board the ship when she came into port, but he actually sent out, before the ship got into port, an agent, who boarded the ship. The ship went ashore, she was stranded in fact, and there remained two or three days. At length she came into port, and then, for the first time, the captain goes to the consulate and receives the plaintiff's letters. But in the mean time, to my mind it is clear, the defendants had done everything they could possibly have done to take possession of the ship. I do not think it material whether they took possession of the ship or not, because as owners of the ship, being mortgagees of the ship without notice, they had, in my opinion, a clear prior title to the plaintiff. They had a right at any time, until the money was paid which was owing by the mortgagee, to intercept it, and say that that money must be paid to them. That was quite sufficient in my opinion, before the money was paid, because it was arranged most reasonably afterwards between the parties that a certain house in Marseilles should receive the money without prejudice to any question, and the money has been deposited. Now, under these circumstances, it appears to me perfectly clear that the mortgage of the ship without notice of any assignment of the freight, carries with it the absolute right to receive the freight. It is in vain for the mortgagee of the freight, who has allowed the mortgagee of

the ship to take place without notice, to set up any claim, and it appears to me in this case that the mortgagee, the bank, have done all they possibly could. It is very true that the Master of the Rolls in the case of *Lindsay v. Gibbs*, says that where there is a charter-party, inquiries should be made, and notice should be given. I am disposed to think that that is rather a dangerous doctrine, because I think the mortgagee of a ship has a right to say, "I am going to take the ship; I am going to realise my security: I know nothing of anything whatever besides, for nobody has given me any notice." I am rather disposed to think that if he takes a mortgage of the ship and registers it, he is not bound to make any further inquiries. But, however, the Master of the Rolls says that when he knows there is a charter-party he should inquire of the charterer whether he has received notice of any incumbrance. That may be so, but it was impossible for these defendants to do that, because there was no charter-party. The ship was on her outward voyage with a cargo which was solely the property of Joseph Wilson. He could not give notice, and had no opportunity of doing so; they knew nothing of the charterer at Calcutta; they seem to have done everything they reasonably could, whilst the plaintiff, unfortunately, by her agent, omitted to do that very plain duty which devolved upon her; that is to say, having taken this mortgage of the freight on the 12th May, she omitted to give notice to the mortgagees of the ship until three days afterwards, of which mortgage I must assume she was aware. Under all these circumstances, therefore, I am sorry to be obliged to come to the conclusion that the plaintiff wholly fails, and consequently, that the bill must be dismissed with costs.

Solicitors for the plaintiff, *Field, Roscoe, Field, and Francis*, for *Bateson, Robinson, and Morris*, Liverpool.

Solicitors for the Bank: *Edwards, Lzyton, and Jaques*, for *Radcliffe and Layton*, Liverpool.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. McKELLAR, Esqrs.,
Baristers-at-Law.

Friday, Jan. 26, 1872.

GEIPEL AND OTHERS v. SMITH AND ANOTHER.

Charter-party—Restraint of princes—Blockade of port of discharge—Impossibility of performance. A blockade of the port of destination, of which there is no chance of termination within a reasonable time, operates as a dissolution of an executory contract of off-reightment containing the exception, restraints of princes and rulers, and where the shipowner obtains intelligence of the existence of the blockade after the contract is made, but whilst it is still executory, and before he has laden his cargo, he is justified in treating the contract as an entire contract to load and carry to the port of destination, and, as such, impossible of performance, and is, therefore, not bound to perform part of the contract by proceeding to load his cargo.

To a declaration for a breach of a charter-party whereby the defendants agreed that their ship should, with all convenient speed, proceed to a port as directed by the plaintiffs, and, having there loaded a cargo of coals, should, as soon as wind and weather permitted, proceed to Hamburg and there deliver the same "restraints of princes and rulers" (amongst other things) ex-

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cepted, the defendants pleaded, in various pleas, that before any breach was being carried on between Germany (wherein the said port of Hamburg was situated) and France; that Hamburg was blockaded by the French fleets; and that defendants were ready to perform their contract so far as they were not hindered and prevented by any of the excepted causes.

Held, on demurrer, that the blockade was a "restraint of princes and rulers," and, therefore, that the defendants were justified in refusing to carry out the contract. The performance of the whole undivided contract being rendered impossible by one of the excepted causes, the defendants were not bound to perform a part of it, viz., the loading of the ship. (a)

DEMURRER to pleas.

Declaration on a charter-party, whereby it was agreed between the plaintiffs and defendants that the defendants' vessel the *Martindale* being tight, staunch, and strong, and every way fitted for the voyage, should with all convenient speed sail and proceed to a port as directed by the plaintiffs or their agent, and there take on board a full and complete cargo of coals not exceeding what she could reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture, and being so loaded, the captain should immediately call at the office of the plaintiffs or their agents and clear with them at the Custom House, also sign bills of lading without qualification as they present them, but without prejudice to the said charter-party, and then as soon as wind and weather should permit, should proceed to Hamburg, and there deliver the same to the said freighters or assigns, they paying the freight for the same at a certain agreed rate, the act of God, Queen's enemies, restraints of princes and rulers, fire, and all and every of the dangers and accidents of the seas, rivers, and navigation, of whatsoever nature or kind during the said voyage, always excepted, the brokerage of 2½ per cent. on account of freight to be due on signing the said charter-party, and in case of the breach or non-performance of the said charter-party, the defendants or the captain to pay to the plaintiffs 100*l.*, as and for liquidated damages. And the plaintiffs say that they did and were ready and willing to do all things, and all conditions precedent were fulfilled, and all times elapsed necessary to entitle, and nothing happened to disentitle the plaintiffs to have the defendants observe and fulfil the terms of the said charter-party, and to maintain this action for the breach thereof hereinafter mentioned; yet the defendants before any breach by the plaintiffs of the said charter-party, and although not prevented

by any of the said expected perils, causes, manners, or things, absolutely refused to observe and fulfil the terms of the said charter-party and to let their said ship take or carry any goods of the plaintiffs to the said port of Hamburg, and gave notice to the plaintiffs that they absolutely refused to do, and they would not observe or fulfil, and absolutely renounced the said charter-party, and wrongfully and in violation of the said charter-party, discharged the plaintiffs from directing the said ship to sail or proceed to any port, and from otherwise observing and fulfilling the terms of the said charter-party, and renounced the said charter-party, and thereby wrongfully broke and violated the said charter-party, and by reason of the premises the plaintiffs became and were unable to have the said charter-party observed and fulfilled by the defendants, and uselessly incurred great expense in and about procuring cargo for the said ship, and were prevented from sending the said goods to Hamburg, and lost divers large profits, &c.

Pleas. (5.) That after the making of the said charter-party, and before any breach thereof, a war was being carried on between the peoples of Germany, wherein the said port of Hamburg was situated, and the peoples of France; and the said port of Hamburg was then blockaded by the fleets of France; and her Most Gracious Majesty the Queen, by her royal proclamation, enjoined all her subjects to maintain a strict neutrality between the said belligerent peoples, and not to commit any act contrary to or in violation of the law of nations; and the defendants say that they were and are British subjects, and that the ship was a British ship, and the said cargo was a cargo to be carried to and delivered at the said port of Hamburg. Wherefore, the further performance of the said charter-party became and was illegal, and the defendants, as they lawfully might, refused further to carry out the same. (6.) That after the said charter-party was entered into, and before any breach thereof by the defendants, a state of war arose and existed as in the last plea mentioned, and the said port of Hamburg became and was blockaded by the French, and her Majesty the Queen published a proclamation as aforesaid, and thereupon the defendants, having notice of the said blockade, and of the said proclamation of her Majesty, refused to allow the said ship to receive a cargo for the purpose of then carrying the same to the said blockaded port while the same was so blockaded, and of running the said blockade with the said cargo for the purpose of delivering the same at the said port during the continuance of the said blockade, which is the said breach complained of, and not otherwise. (7.) That after the said charter-party was made, and before any breach by them of the said charter-party, a state of war existed, and the said port of Hamburg was blockaded, and her Majesty, the Queen, published her proclamation as in the 5th plea stated, and the defendants say that they were ready and willing to perform the said charter-party on their part, so far as they might lawfully, and so far as they were not hindered and prevented by any of the said excepted causes; and the defendants say that the said ship could not have received a cargo, nor could the said charter-party have been carried out and fulfilled within a reasonable time in that behalf, except by the said ship receiving a cargo for the purpose of carrying the same to the said blockaded

(a) This question was considered by Lord Stowell in *The Tutela* (6 C. Rob. 177). That was a prize case, the vessel having been seized by the British for attempted breach of blockade. One defence set up that the master, although he had remonstrated with the shipper against pursuing his intended voyage, had been compelled to proceed by the shipper, as he had signed the charter party before knowing of the blockade. In giving judgment, Lord Stowell said: "He (the master) seems to have entertained no doubt upon that point (the blockade), but to have acted only under an opinion, that because he had signed the charter-party he was bound to proceed. I conceive the law is not so, but that he would have been justified in refusing to go on. As in all other contracts that become illegal, he might have protested against being any longer bound by the charter-party." The ship was condemned.

See also *The Isabella Jacobina* (4 W. Rob. 77).—ED.

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port, and of running the blockade with the said cargo, and of delivering the same at the said port whilst so blockaded; wherefore the defendants refused to carry out the said charter-party.

The plaintiffs demurred to these pleas, and the defendants joined in demurrer.

Cohen in support of the demurrer, contended that the facts stated in the pleas disclosed no defence to the action. The mere fear of the capture of their ship did not justify the defendants in throwing up the contract and refusing to send their ship to the port of loading. It is not a municipal offence by the law of nations for a neutral to carry on trade with a blockaded port. (*The Helen*, L. Rep. 1 Adm. & Ec. 1; 13 L. T. Rep. N. S. 305.) Prize courts have, no doubt, decided that if a vessel starts with the intention of going to a blockaded port for the purpose of running the blockade, she is liable to be captured; but it must not be assumed as a fact that if the defendants' vessel had left Newcastle she must of necessity have been captured. Restraint of princes does not mean fear of restraint. In *Hadley v. Clarke*, 8 T. R. 259, where the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn, and on the vessel's arriving at Falmouth in the course of her voyage, an embargo was laid on her "until the further order of council," it was held that the embargo only suspended and did not dissolve the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable in damages to the plaintiff for the non-performance of their contract. Lawrence, J., said: "It was incumbent on the defendants, when they entered into this contract, to specify the terms and conditions on which they would engage to carry the plaintiff's goods to Leghorn. They accordingly did express the terms, and absolutely engaged to carry the goods, 'the dangers of the seas only excepted.' That therefore is the only excuse which they can make for not performing the contract. If they had intended that they should be excused for any other cause, they should have introduced such an exception into their contract. In *Paradine v. Jane* (Al. 27) this distinction is taken: 'Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and both no remedy over, there the law will excuse him; but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.' So in this case, there was one accident against which the defendants provided by their contract; they might also have provided against an embargo, but we cannot vary the terms of this contract; and the defendant must be bound by the terms of the contract that they have made." That case decides that an impossibility of performing the contract for even two years will not rescind it altogether. An authority to the same effect is *Atkinson v. Ritchie* (10 East, 530). There the master and the freighter of a vessel agreed that the vessel should proceed to St. Petersburg, and there load from the freighter's factor a complete cargo of hemp and iron, and proceed therewith to London and deliver the same. The master, after taking in half a cargo at St. Petersburg, sailed away on a general rumour of a hostile embargo being laid on British ships by the Russian Government, and it was

held that he was liable in damages to the freighter for the short delivery of the cargo, though the jury found that he acted *bona fide*, and under a reasonable and well-grounded apprehension at the time; and a hostile embargo and seizure was, in fact, laid on six weeks afterwards. This case shows clearly that fear of the restraint of princes is a very different thing from actual restraint. "No exception," said Lord Ellenborough, C.J., "(of a private nature at least) which is not contained in the contract itself, can be engrafted upon it by implication as an excuse for its non-performance. It has been contended that the exception contained in this contract of 'restraint of princes and rulers during the voyage,' excuses the not taking on board a complete cargo in this case. But without considering whether this provision respecting restraint of princes, &c., be at all applicable by way of excuse for the non-performance of this part of the master's stipulated duty, viz., the taking on board a complete cargo; yet, at any rate, the restraint meant must be an actual and operative restraint, and not a merely expected and contingent one, as this at most only was." (*Lush, J.*—There was there only a mere apprehension on the part of the master. Here there was an actually existing blockade.) But at the time the defendant threw up the contract there was only a fear or apprehension that the blockade would last more than a reasonable time. Though as a matter of fact, the blockade did ultimately last an unreasonably long time, that cannot excuse the defendant; an event occurring after the breach of contract cannot excuse that breach. Such an event may, no doubt, seriously affect the question of damages, and may possibly reduce them to a merely nominal sum, but it cannot excuse or justify the throwing up of the contract. [*Cockburn, C.J.*—When it is perfectly clear to both parties that the blockade must last a longer time than either of the parties would consider reasonable, does not that justify the defendants' refusal?] That would no doubt be so if the matter were perfectly certain; but it is not stated that it was clear to both parties, and at the time of the defendants' refusal to go on with the contract it could not be said to be clear that the blockade would have lasted beyond a reasonable time. In *Spence v. Chadwick* (10 Q. B. 517) to a declaration alleging that plaintiff had shipped on board defendant's ship at Gibraltor, and bound for London, calling at Cadiz, certain goods to be carried to London, and there delivered, the act of God, the Queen's enemies, fire, all and every other dangers and accidents of the seas, rivers, and navigation, of whatsoever nature or kind soever, save risk of boats, &c., excepted, and further alleging a breach, the defendant pleaded that the ship in the course of her voyage called at Cadiz, and was then within the jurisdiction of the officers of customs there, and of a certain court of Spain; that while the ship was there, the goods were, according to the law of Spain, lawfully taken out of the ship by the said officers, against the will and without the default of the defendant, on a charge of suspicion of their being contraband, according to the law of Spain, and were confiscated by a decree of the said court upon the charge aforesaid. It was held on demurrer that this plea alleged no excuse within the express exceptions in the contract; that the decree of confiscation was in itself no answer, and that it did not appear to have been incurred

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through any default of the plaintiff. "In my opinion," said Lord Denman, C.J., "we should do very ill if we were to tamper with the rules of construction which have always been applied to such exceptions (as those contained in the contract). Those rules were laid down originally with reference to the interest of the individuals who are parties to these contracts, and not to any notions of general policy; and they are rules now well understood. I will merely refer to the judgment of Lord Ellenborough in *Atkinson v. Ritchie* (*ubi. sup.*), which completely disposes of this part of the argument." Patteson, J., observed, "At what time the law was made, and whether the goods were contraband *per se*, or because so by something done or omitted in respect of them, we do not know. But I disclaim minute considerations of this sort: it was for the defendant to bring himself within the exception in his contract; and he has not done so." So Wightman, J., "The defendant here was prevented by inevitable necessity from performing his contract. But he might have provided in his contract against the consequences of such a contingency; he has not done so, and is without excuse." [COCKBURN, C.J.—The act which caused the confiscation was one done in contravention of the local law: it did not come within the expression "restraint of princes," which is applicable to acts of state.] That was not the ratio *decidendi* in that case, but rather that impossibility of performance resulting from inevitable necessity does not excuse the breach of contract to deliver the goods. The law on the subject is thus stated in *Leake on Contracts*, p. 361: "Where the performance of the promise becomes absolutely impossible subsequently to the making of the contract, and there is no express provision in the agreement to meet such an event, the general rule seems to be that the contract remains binding notwithstanding the supervening impossibility. This is a rule of construction founded on the grammatical meaning of the general undertaking contained in the agreement, but it gives way to an implication of a contrary intention. . . . Accordingly it has been frequently laid down to the effect that where there is an absolute contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly hitherto, or even impossible."

BLACKBURN, J.—In the present case there is both an exception of restraint of princes and an actually existing restraint of princes. There was *res* in *Spence v. Hodswich*. It is submitted that there was no restraint of princes in the present case which could justify the defendants' breach of contract. It is not easy to see how a blockade can be so considered any more than an actual embargo, and that has been held not to excuse the breach of contract. [BLACKBURN, J.—But is not an embargo a restraint of princes as far as it goes?] Undoubtedly as far as it goes; and it is not contended that the defendants would not have been justified in refusing to carry the goods at once, if the plaintiff had insisted on their doing so. What is insisted on is, that they were not justified in throwing up the contract before a reasonable time had elapsed. [COCKBURN, J.—Where there is no good in waiting, cannot the matter be treated as if a reasonable time had elapsed?] The rescission of the contract must be

by consent of both parties. Suppose it had turned out that the blockade was put an end to in a short time, and the contract could then be performed within a reasonable time, would the defendant be justified in doing what he did? If not, why should he be excused, because it turned out afterwards that the blockade did last an unreasonable time?

Watkin Williams (with him *Blake Steele*) for the defendant.—On the essential question, as it appears on the declaration and pleas, it is submitted that the defendants have shown a good defence to the plaintiffs' claim. The contract is an entire one, to proceed to Newcastle, and thence carry a cargo of coals to Hamburg; and the breach alleged is that the defendants wrongfully discharged the plaintiffs from the contract. The defendants acknowledge the making of the contract, but say that before any breach of it a war broke out between France and Germany, the port of Hamburg was blockaded and it became practically impossible for them to go there without running themselves against the blockade. If it were proved that the defendants had gone to Newcastle and loaded, and then said, "we will not go further as we cannot do so without rendering ourselves liable to capture," that would be a complete justification of their conduct. The case is thus reduced to this narrow point, whether in a contract, which is one entire contract, if an impediment arises which excuses or prevents the performance of the entire contract, the defendant is nevertheless bound to go through the intermediate stages merely in order to bring himself face to face with the impediment which prevents him going further and completing his contract? It is submitted that he is not bound to do so by law any more than by common sense. This follows as a corollary from the decision in *Hochster v. De la Tour* (2 El. & Bl. 678). If it is clear that the initial steps would, if taken, be in the end nugatory, the law will not compel a person to take them. In *Avery v. Bowden* (5 El. & Bl. 714; in error 6 El. & Bl. 953) the defendant, by charter-party, agreed to load a cargo on plaintiff's ship at Odessa, and to a count for not loading the defendant pleaded that before cause of action arose war was declared between Russia and Great Britain, which rescinded the contract. It appearing that after the ship had arrived, and before declaration of war, defendant's agent had repeatedly told the master that he, the agent, had no cargo for the ship and that he had better go away; but the master continued to require a cargo till the declaration of war was known at Odessa, which was before the ship's laying days had expired. It was held that the refusal of the agent before the time for loading had expired, not being acted on as a renunciation of the contract, was not a cause of action, and that the plea was therefore proved. There are authorities to the effect that the mere existence of a blockade of itself dissolves the charter-party. In *Scott v. Libby* 2 Johnson's Reports (New York Supreme Court) 336, it is stated in the marginal note that "a blockade of the port of destination dissolves the charter-party and all claim for freight under it is gone." It is laid down in *Abbott on Shipping*, 11th edit. (p. 458) referring to this case, "With respect to blockade of the port of destination, it has been decided by the Supreme Court of New York that it operates a complete dissolution of the contract. That decision proceeded on the broad ground that what has become unlawful by the general law of

nations cannot be lawfully done by the subjects of any particular state." It must be confessed, however, that the case hardly bears out the broad proposition based upon it: the decision merely being that a shipowner who, owing to blockade of the port of destination, has not delivered the cargo, has not earned freight. The facts of the case were that a vessel was chartered on a voyage from New York to St. Domingo and back to New York, the charterer to pay an entire sum for the whole voyage in sixty days after the return of the vessel to New York. On arriving in eight of St. Domingo, the vessel was turned away by a British cruiser on account of the ports being blockaded; and the vessel therefore returned to New York with her original cargo. The owners of the vessel refusing to deliver the cargo until the freight was paid, it was held, in action of trover brought to recover the goods, that no freight was due. The blockade, in the present case, must be taken to be an effectual one. "The rule," it is said in Abbott on Shipping, p. 461, "is, that after knowledge of an existing blockade, it is not lawful to go to the very station of blockade under pretence of inquiry. Here in Europe, where the different states have constant intelligence, and may be said to live, as it were, under one roof, it never can be permitted that a ship shall sail with a knowledge of the blockade, under pretence of further inquiry at the spot blockaded; and, lingering near a blockaded port, when it shows an intention of entering the port, is as much a breach of the blockade as continuing in the course to it after notification;" citing the *Elizabeth* (1 Edw. 189.) Had the defendants set out on the voyage from Newcastle to Hamburg they would have run almost a certain risk of capture before reaching the latter port; and, where a contract is an entire one, whatever excuses a person from performing the whole of it ought equally to excuse him from performing a part. In *Medeiros v. Hill* (8 Bing. 231) the evidence showed that the blockade had ceased to be a real and effective one long before the charter-party was entered into. (*Naylor v. Taylor*, 9 B. & C. 718; and *Hadley v. Clark* (sup.) were also referred to.) It is laid down in Parsons' Law of Shipping, p. 332, that "If a blockade be formally notified to a nation, all the citizens thereof must take notice of it at their peril. No ship is bound to enter a port which is actually blockaded. If the blockade be only an intention, or by decree, it is only what is called a paper blockade; and it is now settled that it is no breach of the law of nations to enter the port, and a ship might insist upon its right to go there, and a shipper might insist that the ship should carry his cargo thither. But as a ship is bound not to break an actual blockade, and if it does is forfeited by the law of nations, so it is not bound to incur any actual and substantial danger in attempting to do so, if the port is imperfectly blockaded. Nor has it any right to incur such danger, and jeopardise the cargo, for the purpose of earning its freight. And it is no breach of law for a vessel to sail for a port which is known to be blockaded, with the hope of finding the blockade terminated, or with the purpose of waiting at sea or in a neighbouring port, until the blockade shall terminate; a ship, therefore, may do this. But we should doubt whether a ship would have a right to insist upon carrying a cargo to a blockaded port for such purpose, or

whether a shipper could insist that his cargo should be carried, unless the facts were such as showed clearly that the blockade would continue only for a short time, and that the sailing on such a voyage for such a purpose was clearly reasonable and prudent." And he adds: "These remarks apply to the case where the blockade becomes known after the contract of affreightment is made." After remarking that the danger from war having broken out between other countries, neither dissolves nor suspends the contract, he adds: "Perhaps it would have that effect if it became imminent and extreme, so as to make the execution of the contract involve the certain, or even the probable loss of ship and cargo," as was the case in the present instance. *Pole v. Celowich* (9 C. B. N. S. 430) is also an authority in favour of the defendants' contention: (*Hills v. Sughrue*, 15 M. & W. 253; *Paradise v. Jane*, Allyn's Rep. 26; and *Williams v. Lloyd*, Sir Wm. Jones' Rep. 179, were also referred to.) The English rule of law, that if a man contracts unqualifiedly to do a thing, he must do it or answer in damages, no matter what event may occur to render the contract impossible of performance, is opposed to that of all continental actions. This rule is thus stated by Pothier (tom. ii. p. 402, edit. 1781—"Charte-partie," s. 4, § 98), says: "Néanmoins si avant le départ du vaisseau, sans le fait ni la faute de l'une ni de l'autre des parties, mais par quelque accident de force majeure, le contrat ne pouvait plus s'exécuter, il seroit résolu de plein droit, sans qu'il fut besoin qu'il intervint aucun consentement des parties. L'Article 7, du Titre des Chartes-Parties (Ordonnance de la Marine, Louis XIV., Lib. III. Des Contrats Maritimes, tit. 1, Art. 7) en contient un exemple. Il y est dit: 'Si avant le départ du vaisseau il arrive interdiction de commerce, guerre, représailles ou autrement, avec le pays pour lequel il étoit destiné, la charte-partie sera résolue sans dommages et intérêts de part ni d'autre.' L'Équité de cette disposition est évidente. Cette interdiction de commerce avec le pays pour lequel le navire étoit destiné, empêche que la charte-partie ne puisse être exécutée, et par conséquent cet accident doit la résoudre de plein droit, aucune des parties ne peut prétendre contre l'autre des dommages et intérêts pour l'inexécution du contrat, cette inexécution ne pouvant être imputée à aucune des parties." The present case comes directly within the principle of *Bailey v. de Crespigny* (19 L. T. N. S. 618; L. Rep. 3 Q.B. 180). There the lessor of premises demised, covenanted with the lessee, that neither the lessor nor his heirs or assigns should, during the term, permit any messuage, dwelling house, &c. (certain specified erections excepted), to be built on the ground fronting the demised premises. To a declaration alleging, as a breach of this covenant, that the lessor afterwards assigned the land to a railway company, who erected on the ground fronting the demised premises certain buildings not amongst those excepted, the lessor pleaded that the land was compulsorily purchased by the railway company under the powers of their Act, and that the erections complained of were such as were reasonably required by the company for the purposes of their undertaking; and it was held that the lessor was not, under the circumstances, liable for breach of the covenant. "The substantial question raised," said

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Hannou, J., delivering the considered judgment of the court, "is whether the defendant is discharged from his covenant by the subsequent Act of Parliament which put it out of his power to perform it? We are of opinion that he is so discharged, on the principle expressed in the maxim, *Lex non cogit ad impossibilia*.

Cohen in reply.

COCKBURN, C.J.—I am of opinion that our judgment ought to be for the defendants. I won't say that the pleas are all and every one of them sufficient to raise a defence; but the main question to be decided is whether, upon the admitted facts of the case, the plaintiff is entitled to recover. The declaration is on a charter party, by which the defendants agreed to proceed with all convenient speed to Newcastle, the place of loading the coals, and there having loaded a cargo, to proceed as soon as wind and weather would permit to the port of Hamburg, and there deliver the same, "the act of God, Queen's enemies, restraints of princes," &c., excepted. The pleas show that after the making of the charter-party war having broken out between the French and German nations, the French Government proceeded to declare the port of Hamburg to be blockaded, and followed up that declaration by an effectual blockade; and the question is whether that brought about a state of things which justified the defendants in throwing up the charter party. Now, the charter party contains stipulations for the performance of several things by the defendants. They were first to go to a spot and load a cargo of coals there; then they were to proceed to Hamburg as soon as wind and weather should permit, and there deliver the cargo. Now it is quite true that the defendants might have gone to a spot, and there loaded a cargo; there was no obstacle to prevent their doing that. But there was an obstacle in the way of their proceeding thence to the port of Hamburg. Now, I do not consider it necessary on the present occasion to consider the larger proposition contended for by Mr. Williams, on the authority of continental codes, namely, that in the absence of such an express exception as "restraints of princes," we should by implication import such a term into the contract made by the parties. I base my judgment on the exception expressly contained in the contract, namely, on the exception of "restraint of princes." Is it a sufficient justification of the defendants' refusal to carry out the contract that a blockade existed of the port of Hamburg? Does that term come within the designation "restraint of princes?" I think it does. It is an act of a sovereign state, one of the belligerent parties. A person may succeed in running a blockade notwithstanding the efforts of the blockading squadron. Nevertheless, we must take it that in the eye of the law an effectual blockade existed of the port of Hamburg; that that did amount to a positive obstacle in the way of fulfilling the contract, and, arising from an act of state of one of the belligerent parties. I am of opinion that it constituted a "restraint of princes," which would apply to the exception contained in the charter-party. I think, therefore, that there was in this case a "restraint of princes," and that the defendants were justified in saying that they were not called on to perform the contract. But then Mr. Cohen says that the expression "restraint of princes" applies to the whole contract, and that the contract must be read thus: that whereas the

ship was to go to Hamburg when wind and weather permitted, subject to the restraint of princes, when that restraint, once existing, is removed, the vessel is to go when wind and weather permits. If we are to construe the contract in that way, I think the consequence would be monstrous—to hold that if a blockade should last for an unusually long time, the defendants would be bound to keep their vessel idle all that time until the blockade should cease. It must be taken, if you are to construe the contract in that way, that the restraint of princes must have an end within a reasonable time. The defendants meet the plaintiffs' claim by saying, "It was impossible in the present case that the contract should be performed within a reasonable time; granted that the restraint of princes must be only for a reasonable time, when I should be bound to start; but having lasted an unreasonable time I am not so bound." It may well be that if he failed to make out such a plea, he would have to answer for it; but as the case now stands, I think the defence a good one. Where there is no rational probability that the obstacles will be removed within a reasonable time, that furnishes, I think, a sufficient answer. Then it is further contended that the contract is divisible into two parts, and perhaps it is; and if the performance of the whole is impossible, looking at the reason and convenience of the thing it is quite obvious that that should excuse the performance of the part. What object could be attained, or what benefit be derived from the shipowners going through part of the undertaking when the whole could not be performed? The view I take of it is that the contract is one entire one, and that anything which justifies a breach of the whole will apply equally to a breach of part. It is admitted that the defendants could not, without violating the blockade, take the cargo to Hamburg, its destination; and the contract being one entire one, whatever justifies a breach of the contract to carry the cargo there justifies a breach of part of that contract. The case put by Mr. Williams by way of illustration in the course of his argument is, I think, much to the purpose. If I undertake to convey goods from London to York, which it is impossible to do if a certain bridge on the way is broken down and cannot be repaired within a reasonable time; if the bridge is actually broken down, and I know it, I am not bound to perform part of the contract by carrying the goods as far as the bridge, in order that at some future time I may be able to perform the rest of it. I think, then, the defendants in the present case could not be called on to load the cargo in question when there existed an insuperable obstacle to its being carried to the port of destination; and our judgment must, therefore, be for the defendants.

BLACKBURN, J.—I am of the same opinion. Upon all the substantial matters involved I agree that judgment must be for the defendants, and that they are right. I have some doubt, however, as to whether the fifth plea is good, and, indeed, I am inclined to think that on it judgment should be for the plaintiffs. But that is a mere question of form, and affects only costs. By the charter-party the ship is to proceed with all convenient speed to a spot and there load a cargo of coals, and then, as soon as wind and weather should permit—which means, I apprehend, nothing more than with reasonable speed and despatch—should pro-

ceed to Hamburg; and on this last the exception is engrafted on, amongst other things, the "restraint of princes." Whilst the contract was still executory, war broke out between France and Germany, and an effectual blockade of the port of Hamburg was effected by the French, so that the defendants could not bring the cargo to Hamburg without breaking the blockade and evading the restraint of the Emperor of the French. I have been unable to see how that blockade can be regarded otherwise than as a restraint of princes. Then comes another question. If whilst the blockade existed there was a "restraint of princes" which excused the performance of the contract, the moment the blockade was raised were not the defendants bound to carry out their contract? If the blockade had existed only for an hour or two, or for a very short time, I do not think it would put an end to the contract; but I cannot agree with Mr. Cohen's contention that, however long the blockade might have existed, even if it had lasted as long as the blockade of Tooten, some eight or nine years, I think, or as long as some of the blockades in the War of Independence between the United Provinces and Spain; that after that enormous time the owners of the ship and cargo should be obliged to have them ready in order that the contract might then be carried out. It seems to me monstrous and inconvenient to hold such a position, the consequence being to frustrate the very object of the contract, which is one for the prompt transport of the shipper's goods, and the remunerative employment of the shipowner's vessels. Such a state of affairs, in my opinion, not only produces a delay in the fulfilment of the contract, but puts an end to it altogether. The case of *Toutou and another v. Hubbard* (3 Bos. & Pull. 291), if I do not misapprehend it, is a decision to that effect. There the vessel, a Swedish one, was chartered in Dec. 1800, to sail in the island of St. Michael's, and bring home a cargo of fruit, the charter-party containing the usual exception against restraints of princes. As an embargo having been laid on Swedish vessels by the British Government, the vessel was detained till the 19th of the following June, after which time it went to St. Michael's, and then claimed to recover the freight against the British merchant; but the Court of Common Pleas, in its decision, said: "No, you are not entitled to it: the exception of restraints of princes is introduced into the charter-party not for the benefit of the merchant, but of the master." The object which the merchant had in view would have been altogether frustrated if the contrary had been held. It would be a monstrous thing if a party could, under such a contract, be obliged to load a cargo at any time whatever in *secula seculorum*. Whilst the contract is still executory, the object of both the parties to it depends very greatly upon time. The goods owner—it is hard to say when his period can be said to have come; but he is entitled to get his cargo within a reasonable time, that being a matter to be determined by a jury. It would be monstrous to hold that the time might last, in case a blockade should take place, for ten or twelve years. A cargo would inevitably deteriorate in that time. A cargo of coals would deteriorate; so would a cargo of corn, and still more one of fruit. On the other hand there would be the obvious hardship on the shipowner of making him keep his ship lying up in dock, waiting till the news should

come of the blockade having been raised, his ship meantime rotting. The intention of each party was to carry on a commercial undertaking within a reasonable time; and if the restraint of princes lasts beyond a reasonable time, it seems to me that a shipowner is entitled to sail away, and treat the contract as at an end. Taking this view of the matter the 6th plea puts the case thus: That the plaintiffs asked the defendants to take their cargo and go and break the blockade, that is to carry out the undertaking, notwithstanding that a restraint of princes did exist. Then comes the 7th plea, which says, in effect, that the blockade lasted so long that the defendants were not able to receive a cargo, or carry out the contract without running the blockade. This is the meaning of the plea, whether the fact, as therein asserted, be true or false. Mr. Cohen says that this plea does not answer the declaration, though it would affect the question of damages. It seems to me that as the events turned out, the plea would not be a bad one on general demurrer, but constitutes an entire defence to the action. For I take it that where a contract is still executory, the defendant may say, "I am not going to do what I bound myself to do, because I knew that you, the plaintiff, will never be ready and willing to perform your part of the contract." That, I take it, would be quite competent for the defendant to say and do, if it turned out in the end that he was right in his opinion. If the defendant says, "I am so confident that the blockade never will be raised within a reasonable time that I will chance the matter; I will take the risk of my opinion turning out correct"; then if the chances turn out against him, and the blockade is raised within a reasonable time, the plaintiff will have a good cause of action against him, he, the plaintiff, being then ready and willing to put his cargo on board. But in the present case it has happened that the defendants were right in their opinion, the blockade not having been raised within a reasonable time; and it having turned out that they were right in the judgment they formed, there never came a time when the plaintiffs would have the smallest benefit from the contract. Different considerations would influence our judgment in a case where the contract was executed, but whilst a contract is still executory I think time is of the essence of the contract.

LESH, J.—I am authorised by my brother Meller [who had just left court] to say that he entirely concurs in the judgment already delivered; and I have only to say the same for myself, having nothing to add to what has been said.

Judgment for the defendants.

Attorneys for the plaintiffs, John Scott.

Attorneys for the defendants, Gold and Son.

Tuesday, April 23, 1872.

MOSS v. THE MERSEY DOCKS AND HARBOUR BOARD.

Measurement of registered tonnage—Mistake—Payment under compulsion.

By the defendants' Acts of Parliament, all vessels entering into or leaving their docks are liable, according to the tonnage burden thereof, and are compelled to pay certain fixed dues to the defendants. By the Merchant Shipping Act 1854, s. 26, whenever the tonnage of any ship has been ascertained and registered in accordance with the provisions of that Act, the same shall thenceforth

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be deemed to be the tonnage of such ship, and be repeated in every subsequent registry thereof, unless any alteration is made in the form or capacity of such ship, or unless it is discovered that the tonnage of such ship has been erroneously computed; and in either of such cases such ship shall be re-measured, and the tonnage determined and registered according to the rules in that Act contained. By sect. 27 re-measurement may be made upon desire of the shipowner. By sect. 29, the Commissioners of Customs are empowered to make certain modifications and alterations in the tonnage rules prescribed by the Act. Under that section the Commissioners of Customs in 1860 made regulations, which had the effect of increasing the registered tonnage of the plaintiff's ships. In 1865 these regulations were, by the Exchequer Chamber, declared to be contrary to the Act of Parliament, and invalid.

This action was brought to recover the excess of rates paid in accordance with these invalid regulations, over the amount which would have been due under the Merchant Shipping Act.

Held, that the action could not be maintained.

This action was commenced on the 30th March, 1871, and was brought to recover from the defendants the sum of 143*l.* 4*s.*, which had been paid by the plaintiffs to the defendants under the circumstances hereinafter stated, and interest on such sum at 5*l.* per cent. per annum from the date of the writ until payment. By the consent of the parties, and by the order of a judge, the following case was stated for the opinion of the court without pleadings:—

1. The plaintiffs are the owners of a line of steam vessels trading between Liverpool and the Mediterranean.

2. The defendants are the trustees of the Liverpool docks, which are managed by the defendants as a public trust for public purposes exclusively.

3. By various Acts of Parliament the defendants are empowered to charge tonnage rates for harbour and dock purposes upon vessels using the said docks; the amount of such rates being proportionate to and estimated upon the registered tonnage of such vessels. The plaintiffs' steamers when at Liverpool use the defendants' docks.

4. By the 23rd section of the Merchant Shipping Act 1854, 17 & 18 Vict. c. 104, it is enacted that, "in every ship propelled by steam or other power requiring engine room, an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship ascertained as aforesaid (i.e., by section 21), and the remainder shall be deemed to be the registered tonnage of such ship, and such deduction shall be estimated as follows." The section then describes the mode in which such deduction shall be estimated.

5. By the 29th section of the same Act it is further enacted that "The Commissioners of Customs may, with the sanction of the Treasury, appoint such persons to superintend the survey and admeasurement of ships as they think fit, and may, with the approval of the Board of Trade, make such regulations for that purpose as may be necessary, and also with the like approval make such modifications and alterations as from time to time become necessary in the tonnage rules hereby prescribed, in order to the more accurate and uniform application thereof, and the effectual carrying out of the principle of admeasurement therein adopted."

6. On the 23rd Oct. 1860, the Commissioners of Customs, with the approval of the Board of Trade, issued the following order: "In pursuance of the powers granted by the 29th section of the Merchant Shipping Act 1854, the board, with the approval of the Board of Trade, direct, with a view to the more accurate and uniform application of the principle of granting a certain allowance to steamers for their propelling power, that, in lieu of the rule set forth in sect. 23 of the Merchant Shipping Act, and in paragraphs 4, 5, 6, 18, 20 of instructions to measuring surveyors of 1855, the following rule be adopted in future."

7. The said rule contained in the said order prescribed the manner in which the tonnage of the space occupied by the propelling power should be ascertained, and directed that the amount so ascertained should be deducted from the gross tonnage of the vessel, in order to ascertain the registered tonnage. Such rule is fully set out in the decision of the Court of Exchequer Chamber in the *City of Dublin Steam Packet Company v. Thompson* (1*l.* Rep. 1 C. P. 358-9; 3 Mar. Law Cas. O. S. 412); and in the court below (34 *L. J.* 317-8, C. P.; 3 Mar. Law Cas. O. S. 247.)

8. The effect of adopting the method of estimating the registered tonnage of vessels prescribed by the said rule of the 23rd Oct. 1860, was to allow a smaller deduction in respect of the space occupied by propelling power than the deduction allowed by the 23rd section of the Merchant Shipping Act of 1854, and consequently to increase the registered tonnage of steam vessels measured according to the said rule of Oct. 1860.

9. The plaintiffs' vessels were measured according to the directions contained in the new Customs House Order of the 23rd Oct. 1860; and only the exact space occupied or required to be inclosed for the proper working of the boilers and machinery was allowed the one-half; and three-quarters of the tonnage of the said space as directed by the 23rd section of the said Act was disallowed.

10. From the date of the publication of the said order until the date of the decision of the above-mentioned case of *The City of Dublin Steam Packet Company v. Thompson*, the plaintiffs from time to time paid to the defendants in respect of the use of the said docks by the plaintiffs' steamers rates calculated upon and proportionate to the registered tonnage of such steamers as stated in the register of the respective vessels, such tonnage having been ascertained in the manner prescribed by the said rule of Oct. 1860.

11. Such rates were estimated and paid by the plaintiffs in the following manner: The plaintiffs filled up a printed form stating the tonnage of the vessel in respect of which the rates were due, and the amount of the rates calculated on such tonnage, and they then sent to the defendants the form so filled up, together with the money so shown to be due.

12. The total amount so paid by the plaintiffs between the dates mentioned was 143*l.* 4*s.* in excess of the amount which they would have paid during the same period if the registered tonnage of such steamers had been ascertained according to the rule laid down in the Merchant Shipping Act 1854.

The question for the court is whether the plaintiffs are entitled to recover the said sum of 143*l.* 4*s.* and interest from the defendants.

If the court is of opinion that the plaintiffs are so entitled, judgment is to be entered for the plain-

tiffs for 143*l.* 4*s.* and interest from the date of the writ, and costs.

If the court should be of a contrary opinion, judgment is to be entered for the defendants with cost.

Butt, Q.C. (with him *Baylis*) argued for the plaintiffs.—Although these payments were made under a mistake of law, the plaintiffs acted under compulsion, and may recover; by sect. 253 of the Mersey Dock Acts Consolidation Act 1858, 21 & 22 Vict. c. xcii., "while any dock tonnage rates or harbour rates remain unpaid in respect of any vessel liable thereto, the collector of such rates shall not receive any further or other entry in respect of such vessel, and the board may cause such vessel to be detained until all such rates shall have been paid." In *Morgan v. Palmer* (2 B. & C. 729), the action was brought to recover from the Mayor of Yarmouth a sum of money which the plaintiff had paid him for granting his annual licence as a publican. It was argued that, even if the defendant were not entitled to this fee, the payment having been voluntary, it could not be recovered back in an action for money had and received. *Abbott, C.J.*, agreed, p. 734, "that such a consequence would have followed had the parties been on equal terms. But if one party had the power of saying to the other, 'that which you require shall not be done, except upon the conditions which I choose to impose,' no person can contend that they stand upon anything like an equal footing." Similarly in *Steele v. Williams* (8 Ex. 625), where the defendant, a parish clerk, demanded and received payment for liberty to search the register book, which demand he had no right to make, it was held that the payment was not voluntary so as to preclude the plaintiff from recovering the amount; and per *Pillat, B.*, and *Martin, B.*, when money is paid under an illegal demand *colore officii*, the payment can never be voluntary.

Gully for the defendants.—First, these charges were rightly made, although the measurement was erroneous. By sect. 26 of the Merchant Shipping Act 1854, "whenever the tonnage of any ship has been ascertained and registered in accordance with the provisions of this Act, the same shall thenceforth be deemed to be the tonnage of such ship, and be repeated in every subsequent registry thereof, unless any alteration is made in the form or capacity of such ship, or unless it is discovered that the tonnage of such ship has been erroneously computed; and in either of such cases such ship shall be re-measured, and the tonnage determined and registered according to the rules hereinbefore contained in that behalf." Now in the Mersey Docks Acts Consolidation Act 1858, the first section which treats of the rates to be paid by ships, viz., the 230th, enacts that "all vessels entering into or leaving the docks shall be liable, according to the tonnage burden thereof, to pay to the board," &c. The tonnage burden, therefore, upon which payment is to be made, must be upon the registered tonnage for the time being, whether correct or not. By sect. 27 of the Merchant Shipping Act 1854, re-measurement may be made upon desire of the owner. Secondly, assuming these were not the proper payments to make under the invalid regulation, it must be shown that they were obtained under some false pretence before they can be recovered; *Cox v. Prentice* (3 M. & G. 344.) Moreover, the defendants are a public body, and are bound to lay out their receipts for the

benefit of all ships which enter their docks. They have long before this expended all the sums which it is now attempted to recover, and it would be contrary to *equum et bonum*, as *Mansfield, C.J.*, said under similar circumstances in *Brisbane v. Dacres* (5 Taunt. 162), if the defendants were compelled to pay them back.

Butt in reply.

Cockburn, C.J.—I think our judgment must be for the defendants. The matter does not depend, in my opinion, upon a mistake at all, but upon the statutory power which the defendants enjoy to exact payment for tonnage. The local Act of 1858 makes all vessels liable to the defendants' board according to their tonnage burden. This means the registered tonnage, which by the Merchant Shipping Act 1854, s. 26, is to be deemed the tonnage of a ship, unless it is discovered that the tonnage of such ship has been erroneously computed. The erroneous computation in this case was not discovered until after the payment of these rates, the recovery of which is now sued for. Moreover, the ascertaining of the tonnage of ships coming into the docks is nothing with which the defendants have to do. It is for the shipowner to obtain a re-measurement of his ship if there is an erroneous computation, and the defendants carry out their duty by charging rates upon the ships which come into their docks according to the tonnage entered upon the register. This is the tonnage upon which the dues must be paid. If, as it has turned out here, the measurement has been erroneously computed, it is a matter between the owners of such ship and the customs authorities, and the owners should have got the computation corrected. It is certainly no business of the docks company. Independently of the fault of the shipowner, there does not seem to me to have been any mistake, either of law or fact, on the part of the persons who received this money; the mistake was made by a third party, the Commissioners of Customs, upon which the owners thought fit to act. This third party is the first to blame for the mistake; but the next is the shipowner, who represented an erroneous computation to the defendants as the true one. As I think, the tonnage of a vessel is a question of fact, and not of law; but it appears to be a matter entirely between the owners and the Customs, and, under these circumstances, the money which has been paid to the defendants cannot be recovered.

Blackburn, J.—I am of the same opinion. In 10 & 11 Vict. c. 27, a general mode of ascertaining tonnage rates is provided; that Act is not incorporated in the Mersey Docks Acts, but the words in the 230th section of the Consolidation Act 1858 make all vessels in the docks liable, according to the tonnage burden. These words have, I think, the same effect as the general provision of the other Act; and the certified tonnage in the register of each vessel is to be that upon which the rates are to be paid. By sect. 26 of the Merchant Shipping Act 1854, the tonnage of a ship ascertained and registered according to the provisions of that Act shall be deemed to be the tonnage of such ship, unless it is discovered that the tonnage of such ship has been erroneously computed. The parties have acted as if the tonnage of these ships, as it appeared upon the certified register of each, had been computed according to law. The computation now turns out

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to have been erroneous, but these payments were all made before that was discovered, and it is not necessary to determine whether the computation was a mistake of law or of fact. The fault was that of the shipowners, who neglected to correct the measurement, and to amend the register. The defendants are therefore entitled.

LUSH, J.—I am of opinion that this payment was made under no mistake at all. The plaintiffs paid the amount of rates which were due according to the certified register. That register was wrong, and the plaintiffs say it was no fault of theirs. Until the mistake was corrected, the register was to guide the charges of the defendants, and it was the business of the plaintiff rather than the defendants to amend the register.

Judgment for defendants.

Attorneys for plaintiff, Walker and Sons.

Attorneys for defendants, Gregory and Co., for A. T. Squirey, Liverpool.

COURT OF COMMON PLEAS.

Reported by H. H. HOEKING and R. A. KINGLAKE, Esqrs.,
Barristers-at-Law.

Wednesday, Jan. 31, 1872.

RICHARDS v. GELLATLEY AND OTHERS.

Practice—Inspection of documents.

In an action for making false and fraudulent representations with respect to a ship, whereby plaintiff was induced to take passage in her, and was afterwards obliged (as were many other passengers) to leave her on discovering the falsehood of the defendants' representations, inspection was refused of the letters which the other passengers, who had been obliged to leave the ship with the plaintiff, had written to defendants; also of letters of the captain of the ship to the defendants, written after plaintiff left the ship, relative to plaintiff and his leaving the ship; also of letters to defendants (who were agents for the ship) from the owner of the ship, written after plaintiff had left the same.

THE first count of the declaration was on a contract, by which, in consideration of a sum of money paid by plaintiff to defendants for a passage in a ship from London to Madras, the defendants promised the plaintiff that the said ship was in a fit state, tight, staunch, &c. Breach: that the said ship was not in a fit state, &c., whereby the plaintiff, after proceeding a short distance in her, was unable to go further, and so lost the benefit of the money paid.

The second count alleged that the defendants, by fraudulently representing that the said ship was in a fit state, &c., to go to Madras, induced the plaintiff to pay them a sum of money as passage money for himself and wife to Madras; whereas the said ship was not in a fit state, &c., whereby &c.

The third count was also for fraudulent misrepresentations as to the ship.

Pleas: First, *Non assumpt*; secondly, exoneration and discharge; thirdly a denial of the breach; fourthly, to second and third counts, not guilty.

Issue thereon.

It appeared that the plaintiff took his passage in the ship to proceed to Madras, but her fittings and arrangements were so bad, and she behaved so

badly at sea, that plaintiff, on the ship running in'to Cowes on her way down the Channel, left the ship on the 21st Dec. 1870. Some of the other passengers also left with him. The defendants were the agents for the ship, and plaintiff had negotiated with them for his passage money, and had paid them his passage money. Plaintiff and the other passengers on disembarking at Cowes wrote to the defendants complaining of the state of the ship, and demanding compensation. The plaintiff's affidavit stated that compensation had been paid to some of them. On the plaintiff and the other passengers leaving the ship, and subsequently, the captain of the ship had written to the defendants relative to the plaintiff and his leaving the ship; he had also forwarded to them a report of the pilot respecting the ship, dated 21st Dec. 1870. The defendants had also received two letters from the owner of the vessel, subsequently to the plaintiff leaving her. The defendants, in answer to interrogatories, admitted the receipt of these letters.

A summons having been taken out by the plaintiff, for inspection of these letters, Cleasby, B. made the following order:—"Upon hearing counsel on both sides, I do order that on payment of 6s. 8d. costs, and 4d. per folio for copy, the plaintiff or his attorney or agent, be at liberty to inspect and take a copy of, or extracts from the documents set forth in the defendants' affidavit in answer to interrogatories sworn herein, except letters of other passengers and letters of captain and owner subsequent to the 21st Dec. 1870, without prejudice to an application to the court in respect of letters of other passengers."

MURPHY now moved to vary this order by striking out that part which excluded the plaintiff from inspecting the letters of other passengers, and the letters of the captain and owner, subsequently to 21st Dec. 1870. The letters of the other passengers would afford materials for the cross-examination of the defendants and their witnesses, and would assist the plaintiff in establishing his case against the defendants on the second and third counts.

WILLER, J.—I think this application must be refused. There was at one time a notion that a person who had received a letter was bound to answer it, unless he was willing to have it assumed that he admitted the truth of the statements contained in it. But that has long ago been exploded. Lord Wensleydale, in one of his judgments, speaks of the absurdity of acting on any such rule, except in cases where some duty is created by the special relation between the parties, in respect of the matter dealt with in the letter; as in case where a passenger calls upon the carrier for an explanation for something connected with the carriage. The correspondence in this case between the defendants and other passengers is entirely apart from the contract on which the plaintiff is suing, and arose upon matters as to which every passenger had a right to address the defendants. I think that something more than the mere fact that other letters were written is required to oblige the defendants to produce those letters. I cannot, therefore, see that the learned Baron was wrong as to the letters of the other passengers. With respect to the letters written by the captain and owner, subsequently to the plaintiff leaving the ship, I think the learned Judge was also right in refusing inspection, as they fall within the rule laid down in *Woolley v.*

North London Railway Company (L. Rep. 4 C. P. 602; 20 L. T. Rep. N. S. 613).

BYLES, J.—I am of the same opinion. Letters written after the commencement of an action are not admissible. The same remark applies to letters written with a view to compromising claims made by other persons.

BRETT, J.—As to the passengers' letters, Mr. Murphy does not suggest that they would be admissible under the count in contract, but he says that they would bear upon the counts for fraudulent misrepresentation. What the plaintiff has to prove under these counts is, that the defendants made representations which were false in fact and false to the knowledge of the defendants; and what Mr. Murphy now suggests is, that the letters of the other passengers, complaining of the state of the ship, are admissible, and that the plaintiff has a right to inspect them, as they may be admissible in evidence. But they cannot be given in evidence to prove what it lies on the defendant to prove, and we ought not to allow inspection of them, merely because they might furnish the plaintiff with material for the cross-examination of the defendants. They cannot be wanted for any orthodox purpose, but solely for the purpose of creating a prejudice, by showing the jury that the defendants have paid some small claims made against them. As to the captain's letters, they were not letters written in the ordinary course of business, but letters written with especial reference to the matters now in dispute. It seems to me that the letters from the owner of the ship to the defendant are within the same rule. On this ground I think that the order of Cleasby, B. was right on this point also, and that it ought not to be disturbed.

Rule refused.

Attorneys for plaintiffs, Eyrss and Co.

EXCHEQUER CHAMBER.

Reported by J. SHORTT, Esq., Barrister-at-Law.

June 13, 1871, and Feb. 16, 1872.

(Before KELLY, C.B., WILLES, BYLES, and KEATING, JJ., MARTIN, CHANNELL and CLEASBY, BB.)

NOTARA AND ANOTHER v. HENDERSON AND OTHERS.

Ship and shipping—Damage to cargo—Duty of master as to goods damaged on voyage—Excepted peril.

Plaintiffs shipped on board the defendants' steamship a cargo of beans to be carried from Alexandria to Glasgow, under a bill of lading, excepting the usual "perils of the sea," &c. The vessel after calling at Liverpool, having been damaged by a collision in the Mersey, not caused by any default of the defendants, was obliged to run ashore to prevent her sinking, and the beans were wetted by the sea water in consequence of the collision, and the vessel had to remain for some days in a graving dock at Liverpool for the purpose of repairing the damage done to her. Plaintiffs, who were at Liverpool, requested the defendants' agent to give up the beans on payment of pro rata freight, but the defendants' agent refused to deliver them except on payment of the entire freight, and the vessel proceeded on her voyage to Glasgow, where the beans, on their arrival, were found to be greatly deteriorated in value in consequence of having been so long left in their state of saturation

with salt water. The beans might, at Liverpool, have been removed to warehouses for the purpose of being spread out and dried, and such accommodation might have been found within half a mile of the graving dock, and this would have materially checked the process of decomposition. The expenses of unshipping, drying, and reshipping would have been particular average payable by the owner of the cargo. An action having been brought by the plaintiffs to recover the amount of the damage caused to the cargo of beans by neglecting to do this:

Held (affirming the judgment of the Court of Queen's Bench) that the taking of the beans on to Glasgow was under the circumstances of the case, unjustifiable, and rendered the shipowners liable for the loss thereby occasioned to the plaintiffs; the facts of the case showing that the beans might have been taken out, dried and reshipped without unreasonably delaying the whole adventure.

There is a duty on the part of shipowners, through the master, to take active measures to prevent the cargo from being spoilt by damage originally occasioned by sea accidents without fault on their part, and for the proximate and unavoidable effects of which accident they are exempt from responsibility by the terms of the bill of lading; where the taking of such measures is reasonably practicable under all the circumstances of the case.

ERROR on a judgment of the Court of Queen's Bench on a special case. The facts of the case, and the arguments, are fully set out in the report of the case in the court below (22 L. T. Rep. N. S. 577).

Mileard, Q. C. (with him Dicey), for the plaintiffs.

Field, Q. C. (with him C. Hutton) for the defendants.

The following cases were referred to.

- The Gratitude*, 3 C. Rob. Adm. 240, 259;
- Tronson v. Dent*, 8 Moo. P. C. 419, 449;
- Blasco v. Fletcher*, 14 C. B., N. S. 147;
- Worne v. Storey*, 11 Exch. 427;
- Jordan v. Warren Insurance Company*, 1 Story, U. S. Rep. 342;
- Eubank v. Nutting*, 7 C. B. 797;
- Charleston Steamboat Company v. Bason, Harper* (Constitutional Court Reports, South Carolina), 262;
- Soula v. Rodocanachi*, 1 Newb. Adm. (Amer.) Rep. 504;
- Palmer v. Lorillard*, 16 Johns. U. S. Rep. 348;
- King v. Shepherd*, 3 Story, U. S. Rep. 340;
- Bird v. Cromwell*, 1 Miss. (Amer.) 81;
- Steamboat Lynx v. King*, 12 Miss. (Amer.) 272;
- Niagara v. Cordes*, 21 How. U. S. Rep. 7, 28;
- Laveroni v. Drury*, 8 Exch. 166.

Cur. adv. vult.

Feb. 16.—The judgment of the court was now delivered as follows by

WILLES, J.—This is an action by the shippers of beans on board a steamship called the *Trojan*, for a voyage from Alexandria to Glasgow, against the shipowners, for an alleged neglect of the master to take reasonable care of the beans by drying them at Liverpool, into which port the vessel was driven for repairs, by an accident of the sea, from the direct and proximate effect of which the beans were wetted; and from the remote effects of which, for want of drying, they were further seriously damaged. The bill of lading was subject, amongst other exceptions, to the following, viz.: "loss or damage arising from collision or other accidents of

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navigation occasioned by default of the master or crew, or any other accidents of the seas, rivers, and steam navigation, of whatever nature or kind, excepted;" and it gives "liberty during the voyage to call at any port or ports to receive fuel, to load or discharge cargo, or for any other purpose whatever." The vessel, in the course of her voyage, stopped at Liverpool, and on the 24th Oct. 1868, on her way out, came, without any fault, into collision with another vessel. The result of the collision was that she was driven ashore in an exposed place, where the beans became soaked with salt water, and the vessel herself received an injury which made it necessary that she should put back to Liverpool for repairs. She was there put into a graving dock for that purpose on the 27th, and temporarily repaired, in order to proceed to Glasgow. For the purpose of lightening the ship, and to facilitate the repairs, about one-fourth of the beans were transhipped into lighters, and for a like purpose other part was removed and spread out in the after part of the ship. When the ship was repaired, the beans were, without being dried, or otherwise looked after, replaced in their wet state. On the 30th Oct. the ship proceeded to Glasgow. The beans were materially damaged by not being dried at Liverpool. The beans might at Liverpool have been removed to warehouses, for the purpose of being spread out and dried, and such accommodation might have been found within half a mile of the graving dock. This would have caused a material benefit to the beans, and materially checked the process of decomposition. The expense of unshipping, drying, and reshipping, according to the finding in the case, which must be regarded as a finding in fact, would have been particular average, payable by the owner of the cargo; and that must be taken, therefore, to have been a reasonable and proper course to pursue, so far as the shippers' interest was concerned. It is not stated in the case what risk, trouble, expenses, or delay, the drying would have caused. In the absence of any statement that either was unreasonable, and acting upon the power of "drawing inferences," given by the special case, the court below appear to have arrived at the conclusion of fact, that the unshipping, drying, and re-shipping of the cargo were, under the circumstances, as to time and otherwise, reasonable and proper acts to be done by the person having charge of the cargo, assuming that there was any legal duty imposed upon him to take active steps for that purpose. During the stay of the vessel at Liverpool, the shippers, who were on the spot, called the shipowners' attention, through their agent, also on the spot, to the state of the beans, and to the fact that they would be seriously injured unless dried at once, and they requested that either the beans should be taken out and dried, and then reshipped for Glasgow, or that they should be delivered at Liverpool at a proportionate freight, so that the shippers might dry them for themselves. The shipowners refused to accede to either alternative. They offered to deliver at Liverpool, upon being paid the whole freight, but insisted that, unless the whole freight was paid, they had a right to retain and carry on the beans undried, and, getting worse for want of drying as they were, in order to earn the whole freight upon arrival at Glasgow, provided the beans arrived in specie, whatever might be their condition. The shippers

refused to pay more than the freight *pro rata*, and the shipowners took on the beans without drying them, and thereby occasioned further damage to the beans, which, quite exclusive of the damage proximately and necessarily caused by the collision, and limited to the consequence of the neglect to dry (of course calculated after allowing for the estimated expenses of unshipping, drying, and reshipping), has, by consent, been assessed at 666*l.* 1*s.* 5*d.* The value of the cargo at Glasgow, but for the collision and its results, proximate and remote, would have been 3500*l.* The value in the state in which it arrived was 1167*l.* 7*s.* 8*d.* The entire loss caused, whether proximately or remotely, by the collision was, therefore, 2332*l.* 12*s.* 4*d.*, out of which the remote loss caused by neglect to dry amounts to 666*l.* 1*s.* 5*d.* The shippers do not claim in respect of the damage necessarily caused by the collision and its unavoidable results, but only for the estimated aggravation of that damage by reason of nothing having been done in the way of drying to arrest or mitigate decomposition, and for that amount (666*l.* 1*s.* 5*d.*) they obtained judgment in the Court of Queen's Bench. Upon that judgment the shipowners have assigned error, alleging that they were entitled to retain and take on the beans in their wet state, and were not bound to do anything to check the damage occasioned by the collision. The case was very fully and ably argued by Mr. Field, for the defendants, and Mr. Milward for the plaintiffs, before the Lord Chief Baron, Martin, Channell, and Cleasby, B.B., and Willes, Byles, and Keating, J.J., and we took time to consider our judgment. The question thus raised is a compound one of law and fact; first, of law, whether there be any duty on the part of the shipowners, through the master, to take active measures to prevent the cargo from being spoiled by damage originally occasioned by sea accidents, without fault on their part, and for the proximate and unavoidable effects of which accident they are exempt from responsibility by the terms of the bill of lading; and secondly, of fact, whether, if there be such a duty, there was, under the circumstances of this case, a breach thereof in not drying the beans. The law, up to a certain point, is clear and well settled by authority. The shippers, though upon the spot, were not entitled to the possession of the beans for any purpose without paying the full freight to Glasgow. That freight was not due, but the shipowners were entitled to retain the goods as a security for earning it. The offer of *pro rata* freight may have been reasonable, but it was one which the shipowners were not bound to accept; and it must be treated as an attempt to compromise, not affecting the rights of the parties, though it may bear upon the reasonableness of the course pursued, assuming such reasonableness to be material in determining the question of neglect. It was argued for the shipowners, that the fact of the shippers being upon the spot negatived any implied duty on the part of the master, as agent of necessity to take care of the goods; but this argument will not bear examination. The shippers were present, but they could not lawfully touch the goods without leave. The shipowners refused to let them do so without payment of a sum not yet earned, and insisted upon retaining the goods, with the rights and consequently the duties of the original bailment, whatever those might be. The shippers thereupon insisted upon the goods being properly taken care

of by the shipowners, who retained the control of them as a pledge for their freight. That a duty to take care of the goods generally exists cannot be doubted, and the question raised is, whether it extends to incurring expense and trouble in preserving the cargo from destruction or serious deterioration from the consequences of sea accident, for which originally the shipowners were not liable, by unshipping and drying it, where that is a reasonable and ordinary course to take, and would certainly have been adopted by the shippers if the whole adventure had been under their control and at their risk. It is remarkable that, upon a question so familiar to persons conversant with maritime affairs, and which has so constantly to be considered from another point of view in settling claims upon policies of insurance, the reported authorities in this country, so far as regards the mutual rights and liabilities of shippers and shipowners, should be so rare. The only case in which it was much discussed is that of *Tronson v. Dent* (8 Moo. P. C. 419). That was an action by shipper against master for non-delivery of goods pursuant to a bill of lading. The vessel, the *Erin*, left Calcutta for Hong Kong partly laden with opium, suffered damage by collision, and was obliged to put into Singapore for repair. The repair lasted twelve days. Part of the opium was damaged by salt water to such an extent that the master, acting honestly, thought proper to sell it, and the amount realised by the sale was paid into court. The shipper, however, insisted upon recovering the value of the opium at the port of discharge, and proceeded to trial when evidence was given that the opium might have been carried on in specie—at least, if dried during the stay for repairs. The Chief Justice directed the jury in effect that, if the master could "with reasonable exertion" have brought on the damaged opium in the marketable state of opium, either in the *Erin*, or in some other vessel, he should have done so. The jury found for the plaintiff, and an appeal was brought to the Judicial Committee upon, amongst other grounds, misdirection, and that the verdict was against the weight of evidence. The direction was criticised in the judgment delivered by Sir John Patteson as follows:—"An objection that is made to his summing up is with respect to these words, 'with reasonable exertion;' and it is assumed that, by the words 'reasonable exertion,' he told the jury that it was the master's duty to have transhipped the goods, or at least, that it was his duty to have dried the opium, and if it took two months to have dried the opium, it was his duty so to have done after he himself had left the place, because he clearly was not bound to keep the ship there for the purpose of doing so. If the ship could have been repaired in twelve days, of course he could have gone on at the end of those twelve days; but he was bound to get somebody to attend to the drying of the opium, and then to forward it to Hong Kong. I think it is a great stretch of ingenuity to say the words 'reasonable exertion' means all that. I do not know what the words 'reasonable exertion' actually and necessarily import; but certainly there was some exertion, which it was the master's duty to have made on that occasion. It is stated, I think, by foreign authorities, that it is the master's duty to transship; but doubt is raised as to that, and in our courts it should seem to be considered that he is quite at liberty to do so, if it turns out, in the

opinion of the jury, that it was the proper course of dealing with the goods, but that he is not positively bound to do so. If his own ship cannot carry them on at all, he may either leave goods which are not perishable, or sell goods which are in their nature perishable, which cannot be carried on, which must, of course, be sold; but that is not the case here. But although he may not be bound to transship, he is at liberty to do so. In other cases it has been held that he ought to take all proper care of the cargo; but there is no authority that I know of which distinctly shows that he is bound to lay out a great deal of money in order to endeavour to repair the damage done to the cargo, either by drying or in any other way. While the cargo is there he may not have the means of doing so. He is bound to ventilate it, and so on; but that, I apprehend, is while it is on board the ship, and I think, if I am not mistaken, there is some case of a ship in Ireland where there was a cargo of corn, and the question was, whether it could be kiln-dried, and whether the master was bound to kiln dry it there. The case did not turn on whether he was bound to do so, but, if I remember the case, he had done it, and the question was whether he was at liberty to do so. It was clear he was at liberty to do so; and here he would have been at liberty to have taken steps to dry this opium during the twelve days he was at Singapore. Whether he was bound to do it or not, need not be determined in this case, nor do I find that it was laid down by the judge, at least, I cannot collect from his language here that he laid down to the jury that the master was bound to do any such thing, but merely that he was bound to use reasonable exertion to have brought the opium on. It is, in order to be carried on, taken out of the vessel. Therefore, if by reasonable exertion he could have dried the outside of the chests, and put them back into the vessel afterwards to be taken to Hong Kong, he was bound surely to use that reasonable exertion at all events." "On the whole question, I think we should be justified in saying that he really did tell the jury that he was not bound to transship or to lay out a great deal of money in the drying of the opium, but that he was bound to carry it on if it could be carried on in a merchantable state." Upon this construction the direction was sustained, and the judgment was affirmed. The judgment of the Judicial Committee, though it does not define the duty of the master, does not disaffirm his duty to take reasonable care, whether passive or active, to save and preserve a cargo damaged by sea accidents. The effect of the decision appears to be that the duty of the master to use reasonable exertion, to preserve the goods, if necessary, by drying them, so as to make them capable of being taken on in specie, was recognised, though the limit of the duty was left unsettled. It was suggested, indeed, that the duty of taking active measures, such as ventilating the cargo, ordinarily applied to doing so on board the ship, and that under no circumstances was the master bound to lay out a "great deal of money" (limit not stated), in drying the cargo. It was assumed that the master was not bound under the circumstances of the case, to delay beyond the time necessary for the repairs of the vessel. This assumption, however, can hardly be taken as intended for a proposition of law universally applicable, but rather as applicable to the

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circumstance that the opinm then in question was only a part of the cargo, and that delay would be unreasonable to persons equally entitled to consideration as the plaintiff. The existence of such duty to take active measures for the preservation of the cargo from loss or deterioration in case of accident is, however, distinctly recognised in the maritime law in one important particular, wherein it follows the civil law, which, though it be not recognised as *jus commune*, either here or abroad, in mercantile or maritime affairs (see Baldasseroni *Leggi e Costumi del Cambio*, 31) has been the source of many valuable rules, namely, that the master may incur expense for the preservation of the cargo, and may charge such expense against the owner of the cargo in the form of particular average. This maritime right is, in one point of view, analogous to that of salvage, and it may be urged that the services in respect of which it is rendered should, as in the case of salvage, be looked upon as optional, and not obligatory. There is, however, this marked distinction, that the master, as representing the shipowner, has the charge of the goods under contract for the joint benefit of the shipowner and shipper, and falls within the class of persons who are under obligation to take care of and preserve the goods as bailees: (Pothier, *Obligations*, Part I., Cap. II., Art. 1., § 1., No. 142, and *Naetivsemet*, Cap. I., Art. 2., No. 29, *et seq.*; and as to extraordinary expenses, Cap. III., Nos. 60, 61; and also under the special head of care imposed upon masters, *Longages Maritimes*, *Charte-partie*, Part I., Sect. 2, Art. 2, § 5, No. 31.) This obligation on the part of the master has been commonly recognised, both in respect of preserving goods on board in a state of safety by pumping, ventilation, and other proper means, and of saving goods which by accident have been exposed to danger. Thus, even in case of wreck, it is laid down, in a work on sea laws, approved by Lord Stowell (1 *Hagg. Adm.*, p. 232) that the master "ought to preserve the most valuable goods first, and by attention and presence of mind endeavour to lessen the evil, and save, or help to save, as much as possible": Jacobson, book II., chap. 1, p. 112. It is recognised in the French Code generally, in Art. 222, and as to the right to charge the cargo with particular average, for extraordinary expenses incurred to preserve it, in Art. 403; in the Spanish Code, in Art. 735, as to like expenses; and in the German Mercantile Code (see translation in *Maritime Legislation*, by Wendt: Longmans and Co.), with its usual good sense and fulness, in Art. 504; where the duty of the master to take care of and preserve the cargo for its owners, at their expense (Art. 722), in case of accident, and for avoiding or lessening the loss thereby occasioned, is specially enforced and provided for, to an extent, perhaps, beyond what our own law has yet been held to recognise. The master is to take every possible care of the cargo during the voyage, in the interests of all concerned. When special measures are required to avoid or lessen a loss, he is to protect the interests of the owners of the cargo, as their representative, under their direction, if possible, otherwise according to his own discretion, giving an account of what he has done. He is, in such cases, specially authorised to discharge all or part of the cargo. In extreme cases, to avert considerable (erheblicher) loss, on account of imminent deterioration or other

cases, he may resort to sale or hypothecation to procure means for its preservation or transport. He is to reclaim it in case of capture or detention, and to take all extra physical or judicial steps for its recovery, if otherwise taken out of his charge. There are unquestionably cases in which the exercise of such a duty would be incumbent upon the master, as representing the owners of the ship and for their interest, as, for instance, in the case of a perishable cargo so damaged by salt water that it could not, in its existing state, be taken forward in specie to the port of discharge, so as to earn the freight, but which could, at an expense considerably less than the freight, be dried and carried on. In such a case, to earn the freight, it might be for the interest of the owner of the ship to save the cargo by drying. To sell it, or abandon it, would give no right to freight, *pro rata*, against the owner of the cargo, nor any right to recover against the underwriter upon freight: (*Mordy v. Jones*, 4 B. & C. 394, recognised in *Philpott v. Swann*, 11 C. B. N. S., 281; 1 *Mar. Law Cas.* O. S. 151). In *Mordy v. Jones* (*ubi sup.*), the cargo was so damaged that it would have cost more than the freight, though less than the value of the cargo, to restore it, and no question arose as to the right of the owner of the cargo because he consented to the sale. But we are at present supposing a case in which it would have been for the shipowner's interest to dry and save the goods; as, if the freight were 1000*l.*, the expense of drying 100*l.*, and the rest of the voyage so long that, but for the drying, fermentation would destroy the specific character of the cargo before arrival. In such a case, if the process were also for the benefit of the owner of the cargo, the expenses would have fallen, according to the ordinary practice, upon the cargo as particular average. It is clear, therefore, that there are cases in which it is the duty of the master to save and dry the cargo, even as between him and his owner, though the expense of his performing that duty fall upon the cargo saved. Can it be that this duty of taking care of the cargo by active measures if necessary, at the expense of the cargo, is owing only to the shipowner, or that it is other than a duty to take reasonable care of the cargo, both in its sound state, and in arresting the damage to which it has become liable by accident of the sea, for the benefit of all who are concerned in the adventure. In the result it appears to us that the duty of the master in this respect, is not, like the authority to transship, a power for the benefit of the shipowner only to secure his freight (*De Quadra v. Swann*, 16 C. B., N. S., 772), but a duty imposed upon the master, as representing the shipowner, to take reasonable care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction, or deterioration by reason of accidents, for the necessary effects of which there is, by reason of the exception in the bill of lading, no original liability. The exception in the bill of lading was relied upon in this court as completely exonerating the shipowner, but it is now thoroughly settled that it only exempts him from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence, and care, which want is popularly described

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as "gross negligence." This is settled, so far as the repairs of the ship are concerned, by the judgment of Lord Wensleydale in *Worms v. Storey* (11 Ex. 430), as to her navigation, by a series of authorities collected in *Grill v. General Iron Screw Collier Company* (L. Rep. 1 C. P. 600; L. Rep. 3 C. P. 476; 18 L. T. Rep. N. S. 485; 2 Mar. Law. Cas. O. S. 362; 3 Td. 77), and as to her management so far as affects the case of the cargo itself, in *Laurie v. Douglas* (15 M. & W. 746), where the court (in a judgment unfortunately not reported at large), upheld a ruling of Pollock C. B., that the shipowner was only bound to take the same care of the goods as a person would of his own goods, viz., "ordinary and reasonable care." These authorities, and the reasoning upon which they are founded, are conclusive to show that the exemption is from liability for loss which could not have been avoided by reasonable care, skill, and diligence, and that it is inapplicable to the case of a loss arising from the want of such care, and the sacrifice of the cargo by reason thereof, which is the subject matter of the present complaint. It was also argued that, if there was any default of duty, it was the fault of the master exclusively, and not of the shipowners. This argument might have had some plausibility, if the vessel had been wrecked or abandoned, and the objectionable conduct of the master had not taken place in the course of his employment, and for the supposed benefit of his owners. The master is the general agent of the owner for the purpose of the voyage, and for the exercise of that agency is instructed with powers, to be used at his discretion, in which the owner who selects him is satisfied to confide. If, therefore, the master exercises a power which circumstances might justify, so that it is within the general scope of his functions, and it turns out that the facts do not warrant its exercise in the particular instance, as, for instance, if he unnecessarily throw goods overboard in a panic, or sell goods without justifying need, the owners are held liable for his acts, according to the rule *Omnia facta magistri debet prestare qui eum proposuit*, Pothier, *Louages Maritimes*, *Charte-partie*, Part I., Sect. 2, Art. 3, No. 48; *Evbank v. Nutting* (7 C. B. 797); and for a like reason they must be liable for his culpable omissions. For these reasons we think the shipowners are answerable for the conduct of the master in point of law, if, in point of fact, he was guilty of a want of reasonable care of the goods in not drying them at Liverpool. This raises, in the end, the question of fact, whether there was a breach of the duty thus affirmed; a question which, though properly one for a jury, we are, under the powers given in the special case, to draw inferences of fact, and the 32nd section of the Common Law Procedure Act 1854, bound to determine. It is obvious that the proper answer must depend upon the circumstances of each particular case, and that the question whether active special measures ought to have been taken to preserve the cargo from growing damage by accident, is not determined simply by showing damage done and suggesting measures which might have been taken to prevent it. A fair allowance ought to be made for the difficulties in which the master may be involved. The performance of such a duty, whether it be for the joint benefit of the shipowner and the shipper, or for the benefit of the shipper only, could not be excused by reason of

insignificant delay not amounting to deviation, and there are many cases of reasonable delay in ports of call, for purposes connected with the voyage though not necessary for its completion, which do not amount to deviation. It could not be insisted upon if a deviation were involved. The place, the season, the extent of the deterioration, the opportunity, and means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay, and inconvenience, must be taken into account. Nor ought it to be forgotten that the master is to exercise a discretionary power, and that his acts are not to be censured because of an unfortunate result, unless it can be affirmatively made out that he has been guilty of a breach of duty. In the present case the circumstances affecting the propriety of drying the beans are not stated in detail, and a good deal is left to our general knowledge and experience. It is common knowledge that beans are a cargo which specially suffers from damp, that the effects of the damp spread and are aggravated from hour to hour, that such a cargo, therefore, if damp, ought to be dried, if reasonably possible, and not sent on in a state of fermentation. It must be taken from the finding as to particular average, that such drying would have been a reasonable and prudent course in the interest of the shippers, and one which they would have been sure to take if they had been owners of the whole adventure. The facts stated are all in favour of the conclusion that the beans might have been dried during an insignificant delay, at a moderate expense, which there would have been no difficulty in providing from or upon the credit of the shippers; and no circumstance is stated to show any special risk, trouble, inconvenience, or other objection. The master thought proper, as he was entitled to do, to reject the offer of the shippers to take the beans out of his hands upon terms not unreasonable, and insisted, as he was entitled to do, upon keeping them in pledge for the future freight; and, having done so, he thought proper to reship and replace a large part of them, and put to sea with them in a state in which no prudent or reasonable man would have shipped or put to sea with them, taking the risk of their arriving at Glasgow just in the state of beans, so as to carry full freight for the shipowners, but largely deteriorated by the fermentation during the transit. We thus agree with the court below that the duty exists in law, and that, under the circumstances, the breach of duty is sufficiently made out in fact, and that the defendants, as shipowners, are liable in damages. The judgment of the Court of Queen's Bench must therefore be affirmed.

Judgment affirmed.

Attorneys for plaintiffs, Gregory, Rowcliffe, and Rawle.

Attorneys for defendants, Markby and Turry.

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COURT OF ADMIRALTY.

Reported by J. P. ASPIRALL, Esq., Barrister-at-Law.

March 11, 12, 13, and 22, 1872.

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Collision—Damages—Objection to registrar's report—Rule of consequential damages—Duty of master of injured vessel—Unjustifiable abandonment.

Where a collision takes place between two vessels by the negligence of the crew of the defendants' vessel, whereby the plaintiff's vessel is injured, and afterwards and before any effort has been made to save the plaintiff's vessel the master and crew unjustifiably abandon her, and she is consequently totally lost, the defendants will not be liable for such total loss of the plaintiff's ship, but only for the expense which would have been incurred in making good the actual damage occasioned by the collision.

The master and crew of a vessel injured by collision are bound to show ordinary courage and nautical skill in endeavouring to save their vessel from total loss, and the defendants will not, on a reference to the registrar and merchants to assess the damages, be held liable for any loss which might have been avoided by the exercise of such ordinary skill and courage.

Seemly, that in the Admiralty Court the burden of proving that the total loss resulted immediately from want of ordinary nautical skill and courage, and not directly from the collision, lies upon the original wrongdoers.

Seemly, that where an exorbitant claim is made before the registrar and merchants for the value of the injured vessel, and the abandonment is held unjustifiable, the plaintiffs will be condemned in the costs of the reference.

Although it is the duty of every vessel, whether British or foreign, to render assistance to another which she has injured in collision, the rule will not compel a ship to remain alongside another so injured, so as to run risk of capture by an enemy's fleet.

The *T.*, a North German steamer, ran into the *W.*, a British steamer, eighteen miles off the coast of Heligoland. The crew of the *W.* immediately got on board the *T.*, but some of them returned and found that the *W.* was injured, and was making water. The *W.* was built in watertight compartments, and the water did not reach her engines or fires. The *T.* lay by her for an hour, and then observing a French man of war approaching (France was then at war with Germany), hailed those on board the *W.*, and they at once abandoned her, and the *T.* steamed away. The *W.* was approached by the French ship, and was seen by her astoop for three or four hours after the collision; the *T.* was found to blame for the collision, and the usual reference was made to the registrar and merchants to assess the damages, and they found that the plaintiffs (the *W.*) were only entitled to such sum as would have been required to repair the vessel if she had been taken to a place of safety, and to compensation for loss of contracts during the time of repair.

Held (affirming the report), that the abandonment of the vessel was unjustifiable, and that the master and crew had shown a want of ordinary nautical skill and courage in not attempting to

save the *W.*, and that her owners were therefore only entitled to recover as for a partial loss.

This was an appeal on objection to the registrar's report in a suit of damage by collision instituted by the owners of the British steamship *J. B. Watt*, and of her cargo, against the North German steamship the *Thuringia*. The collision cause was heard on the 19th Jan. 1871, and the *Thuringia* was found solely to blame, and the cause was referred to the registrar and merchants to assess the damages, and the reference came on for hearing on 26th May, and again on 2nd June 1871, and evidence was heard on both days.

The plaintiffs claimed as for a total loss, alleging the value of the vessel herself to be 18,480*l.*, and the loss of contracts, goods, and sailors' personal effects to be 961*l.* 6*s.* 2*d.*, making a total of 19,441*l.* 6*s.* 2*d.* The defendants resisted this claim, on the ground that the master and crew of the *J. B. Watt* improperly abandoned her, and that if she had not been so abandoned she might have been brought into a place of safety, and would not have been totally lost; and that her owners were, therefore, entitled only to such sum as would have been sufficient to restore their vessel to the state she was in before the collision, and to compensate them for loss of her services during the time it would have taken to repair her. On 13th June the registrar reported to the court that there was due to the plaintiffs the sum of 2750*l.* with interest, and that the plaintiffs should be condemned in the costs of the reference. This sum was made up of 250*l.* for temporary repairs, 1750*l.* for permanent repairs, and 750*l.* for compensation during the period of the vessel's detention whilst undergoing repairs. To this report the registrar annexed his reasons. The report fully sets out the facts of the case, and is as follows:

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"The main question which we have to decide is, whether the master and crew of the *J. B. Watt* were or were not justified, under all the circumstances of the case, in abandoning their vessel after the collision. If they were, the owners will be entitled to full compensation for their losses; if not, they can only claim the amount which it would have cost them to restore the vessel to the state in which she was previous to the collision. In the latter case, we should have to inquire whether salvage assistance would or would not probably have been required to get the vessel into a place of safety, what would have been a reasonable amount to pay for those services, what the cost of the repairs, and what a proper compensation to the owners for the loss of the services of their vessel during the time the repairs were going on, and until again she was in a fit state to undertake a new voyage. All these, I need hardly observe, would be very difficult questions to decide, seeing that we have in fact no reliable evidence before us, no survey, nothing but the somewhat loose statements of unskilled witnesses as to the nature and extent of the damage sustained; and the estimate that we could form on the subject would of necessity be of a very rough and unsatisfactory character.

"The question, however, which we have first to consider is, whether the abandonment of the *J. B. Watt* was or was not justifiable.

"It seems that the *J. B. Watt* was a screw steam vessel of 777 tons gross, or 500 tons net, and that she belonged to the port of West Hartlepool. She was a comparatively new vessel, having been com-

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pleted in the month of March 1870, and was on her return voyage in ballast from Hamburg, where she had discharged a cargo of coals, when at about half-past one in the afternoon of the 14th Oct. in the same year the collision in question in this cause occurred.

"The *Thuringia*, on the other hand, was a very large steam vessel of 1944 tons, and belonged to the Hamburg and American Steam Packet Company. She was bound to Hamburg, and approached the *J. B. Watt* for the purpose of obtaining information as to the position and movements of the French fleet. In doing so she rounded to under the *J. B. Watt's* stern, and came up under her port side; and by some mismanagement, into the particulars of which it is not necessary to enter, she ran with her stem into the *J. B. Watt's* port quarter about 6 ft. abaft the bridge. A good deal of evidence was given as to whether it was a hard blow or a soft one; the witnesses on board the *J. B. Watt* declared it to have been a very severe blow; on the other hand, those on board the *Thuringia* says that it was very slight, that it was little more than a graze, and hardly perceptible to those on board. This discrepancy in the evidence of the two sets of witnesses is not very difficult to understand, when we remember the very great difference in size between the two vessels, and the fact that it was with the stem that the blow was given by the *Thuringia*, and that it was in the side that it was received by the *J. B. Watt*. But, however this may be, it is admitted by both parties that the side of the *J. B. Watt* was cut through down to from one to two feet of the water's edge, the hole being in the shape of the letter V, narrow at the bottom and widening upwards.

"So far both sides are agreed, but it is here that the difference between them arises; the witnesses for the *J. B. Watt* representing the damage to the ship's side to have been very extensive, and to have extended below the water line; the witnesses from the *Thuringia* representing it as being a clean cut, well above water mark, and at the lowest point so narrow that it was only possible to introduce the hand edgewise into it. And it may make the evidence of the witnesses more intelligible if I here describe generally the construction of the *J. B. Watt*.

"According to the evidence and the plans which have been laid before us, it seems that the *J. B. Watt* was divided into five compartments by four watertight bulkheads. The centre compartment contained the engines and boilers; forward of this were two compartments, a small one in the bows called the forepeak, and between it and the engine room, the forehold; abaft the engine were also two compartments, first a large one called the after hold, and behind it the lazaret; running fore and aft along the middle line of the after hold was a square box or tunnel, called by the witnesses the tunnel or screw alley, containing the shaft which connects the engine with the propellers. Under the fore and after holds were large iron tanks, the tops of which formed the flooring of the fore and after holds respectively; they were intended to hold, and at the time of the collision did hold water for ballast. The tanks did not extend under the engine compartment.

"I will now proceed to state, so far as my notes will enable me to do so, the tenor of the evidence given by the witnesses, who were produced on behalf of the *J. B. Watt*. The first witness examined

was the master, George Dixon. He stated, that at the time of the collision he was on the forepart of the bridge, that he came aft, ordered the engines to be stopped, and then looked at the damage over the side, and from what he saw thought that she was cut right down to the water's edge. He then looked down the fore hatch of the after hold and saw the water coming in at the ship's bilge, and he says that the top of the tank was broken and was sticking up. He says that he then went on deck and ordered the boats out, as he thought the vessel could not swim long. The crew left in two of the vessel's boats, and shortly afterwards the master left in the third boat, but before doing so he says that he took a second look at the damage, and he then observed that everything was beginning to get covered, and that the water was nearly but not quite up to the top of the screw alley.

"On his way he met a boat coming from the *Thuringia*, with the first officer and second engineer of that vessel, and a pilot named Irvin. He pulled alongside the *Thuringia*, and asked the master of that vessel to take the *J. B. Watt* in tow, but which it seems could not have been done without incurring the risk of capture by the French fleet, which was in the neighbourhood. Dixon then returned with his chief mate and engineer to the *J. B. Watt*, where they found the three persons belonging to the *Thuringia*, who had preceded them. What the master then did he does not say, further than that he got together some of his things, some silver spoons, forks, cigars, &c.; and on the mate of the *Thuringia* being hailed from that vessel to return they all left the *J. B. Watt*, and as soon as they were on board the *Thuringia*, that vessel steamed away as fast as she could to avoid capture by one of the French ships of war, which was seen to have been detached in pursuit of her.

"On cross-examination, Dixon admitted that it was a little time, a very short time, after the collision when he ordered the boats to be got out. He stated that his vessel steamed between eight and a half and nine knots an hour, that he had left Heligoland at 11.30 a.m. that day, or about two hours before the collision, that the weather was fine and bright, the sea smooth, and that there was a light wind from the north. He said also, for the first time, on cross-examination, that the bulkhead, which separated the engine-room from the after hold, appeared to be started away from the ship's side; he could not say what was the size of the rent, but it appeared to be wider than would be just sufficient to enable you to get your hand through. He said also on re-examination that the water went through the rent into the engine-room; but to what extent he could not say, and it was clearly impossible for him to do so, as he admitted that he had not been in the engine-room at all.

"I think that I have stated all the material parts of the master's evidence, except that he was cross-examined a good deal in regard to certain statements in the protest, where it was said, that 'when they left the vessel first the bottom of the gash on her port side was two and a half feet from the water line,' and 'that when they left her the second time the water was washing into the gash.' The master had also stated before us that the *J. B. Watt*, when they finally left her, was drawing nearly fifteen feet of water, and he was asked to reconcile it with the statement in the protest that

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she then drew only thirteen and a half feet aft. He admitted that he had given instructions for the protest, and that it had been drawn up by Mr. Turnbull, the plaintiff's solicitor, but he could give no explanation of the difference between the statements in the protest and his present evidence.

"The next witness examined was Thomas Smith, the chief officer. He speaks to the extensive nature of the damage in the ship's side about six feet abaft the bridge. In contradiction, however, to the master, he said, that the bottom of the rent or cut did not extend down to the water's edge, but was about one and a half feet above it, and that below that point and under water the bilge was smashed in. He also said that the bulkhead, which separates the engine room from the after hold, was started away from the ship's side; that the joints and rivets were started; but he gives no more information than the master as to the extent of this damage. He said that, as soon as he had inspected the damage, he went on deck to help to get the boats out, and that then he took a second look at the damage through the hatch in the after hold, and saw that the water was nearly level with the top of the tunnel alley, and he left in the boat with the master. This man afterwards returned with the master and engineer to the *J. B. Watt*, and he and the engineer appear to have gone down into the engine room, and to have there found the chief mate and engineer of the *Thuringia*. He says, indeed, that the water was coming into the engine room, between the end of the bulkhead and the ship's side, but not so far as appears in any great quantity, nor is it pretended that there was ever at any time much water in the engine compartment. All that the mate ventures to say on this point is that, before he left the *J. B. Watt* the first time, he raised one of the stoke hole plates, and saw the water nearly on a level with the plate; but he does not say that he found any more water there when he returned. He asserts very positively that the donkey engine was set on before they left the vessel the first time, but admits that it was stopped when they got back to her. He says also that, when they left her the last time, the water in the after hold was about four feet above the top of the screw alley; but he does not say that he took any soundings; he only says that he judged it to be about four feet above the screw alley.

"The other witnesses examined on behalf of the *J. B. Watt* were William Pencock, the carpenter, John Tiplady, the boatswain, Frederick Erle, a seaman, and John Goldsmith, a master mariner and pilot, who was a passenger on board the *J. B. Watt* at the time of the collision. All these witnesses speak to the extensive nature of the damage in the afterhold and to the water coming in there; and the last witness, who left the ship with the master says that the water was nearly to the top of the tunnel. But none of these witnesses apparently went into the engine room, and none of them returned to go on board the *J. B. Watt* after the *Thuringia*'s people had boarded her.

"Such, then, was the evidence produced before us on the part of the *J. B. Watt*. In reply, three witnesses were produced from the *Thuringia*, viz., John Peter Neilson, chief mate, Henry Averharg, the second engineer, and Mathew Lamont Irvin, the pilot. These were the three persons who went from the *Thuringia* to the *J. B. Watt* to inspect her condition.

"Neilson, the chief mate, says, that when they boarded the vessel the rent or hole in the ship's side was from eight inches to one foot above the water line; that he did not see any damage in the bilge below the water mark. He very properly declined to swear that there was not any damage there; all that he would say was, that he saw no appearance of there being any. He admits that there was a good deal of water in the after hold, but swears positively that it was not 4 ft. above the top of the tunnel, as had been stated by the mate of the *J. B. Watt*, for he says that he could see the top of the tunnel. He adds that he took a shovel, and having fastened a piece of string to it, dropped it on the starboard side of the tunnel, and found the water to be four spans or about 2 ft. 8 in. deep. The mate farther stated that he saw the water wash in as the vessel heeled over, but he admits that this could hardly account for all the water that he saw in the after hold. He says that the pilot Irvin called his attention to the vessel's helm, and that they lashed the helm to port in order to bring the vessel's head up to the wind. He can't say whether the donkey engine was going when they got on board, but he distinctly says that it was going when they finally left her. This was about three-quarters of an hour after the collision. He says that when they left her she was about 3 ft. or 4 ft. down by the stern.

"Henry Averharg was the next witness examined, and his evidence was very important, more especially when taken in connection with the evidence, of the first and second engineers of the *J. B. Watt* at the former trial, but who, I may observe, were not produced before us at the reference. Averharg says that as soon as he got on board he went into the engine room; that he found the door of the mouth of the tunnel open, and that there was a little water coming in from the tunnel into the engine room. He says that he shut the door, that the flow from it was thereby stopped, and that no more water came into the engine room after that. He says that he examined the state of the engines, and found that there was a pressure of 80 lbs. to the inch, that there was no water in the gauge, and that the donkey engine was not going. He says that the engineer of the *J. B. Watt* came down about ten minutes after him; that he showed him the state of the engines; that the engineer then set on the donkey engine; that there was no difficulty in doing this, and that it was set on for the purpose of filling the boilers. He further says that he went down into the stokehole; that there was no water there, and that he called the attention of the engineer of the *J. B. Watt* to the fact; that he blew off the steam from the boilers, the pressure being dangerously high, and that they left the donkey engine going. When asked on cross-examination, he declined to swear that the bulkhead was not started from the ship's side; but he stated that no water came from the after hold through the bulkhead into the engine room, and that what water came in was through the mouth of the tunnel, and that that ran on to the floor of the engine room, and thence down into the bilge; but that when the door was shut no more water came in.

"The third witness was Irvin, the pilot. He stated that he went on board with the chief mate and second engineer of the *Thuringia*; that on getting on board he immediately went with the

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engineer into the engine room. He speaks to the door at the mouth of the alley being open, and to the water 'lipping in,' as he calls it, through the opening. but he says, that when the door was closed no more water came in, either there or at any other place; he also speaks to the furnace doors being shut, and to the pressure of steam in the boilers being very great. He then says that he went on deck and saw the master of the *J. B. Watt* coming on board; that he spoke to the engineer of that vessel, and that they went down together into the engine room; that they had some conversation, and that the donkey-engine was set going. He says that he went up on to the bridge and lashed the helm to port; that he then went with the mate of the *Thuringia*, and sounded the water in the after hold with a shovel, and found it to be four spans or 2 ft. 8 in. deep. He adds that he could just see the top of the tunnel, and that they sounded by the side of the tunnel, but on the starboard side: and in cross examination he says that he saw about 6 in. of the tunnel. The way he explained the presence of water in the screw alley was, that probably it was not water tight, and that the water in the after hold would consequently find its way into the alley, and thence out of the mouth into the engine room. This, I am informed by the merchants, is not at all improbable.

"All the witnesses on both sides speak to the vessel being still a float when they last saw her, which would be for some two hours after the collision, for it is clear that it was about an hour after the collision before the *Thuringia* finally steamed away, and she continued in sight for nearly another hour, sufficient, at all events, to see whether she was still afloat or not. But the matter does not rest here, for we have an affidavit on the point from a Mons. Senex, a commander in the French navy, which I had no hesitation in admitting. This gentleman's evidence is, that on the 14th Oct. last he was second in command of the French ship of war *Heroine*, which was then cruising in company with the French fleet in the neighbourhood of Heligoland. He says that between two and three o'clock in the afternoon, owing to certain manœuvres which appeared suspicious on the part of a large steam vessel, the *Heroine* was ordered by the French Admiral to proceed toward her. On their approach the steam vessel, which could have been no other than the *Thuringia*, steamed off at full speed, and they then observed another vessel, which proved to be the *J. B. Watt*, which had apparently been damaged in a collision. He says that on the way they picked up the boat of the *J. B. Watt*. He describes the injury as being in the form of a V, and extending to between forty and fifty centimetres of the water, and says that the stern was deep in the water, but not to an extraordinary degree. He says that the *Heroine* remained for about twenty-five minutes near the *J. B. Watt*, and then steamed away again to rejoin the French fleet. He says that he continued to watch the *J. B. Watt*, and that at half-past five o'clock, at which time they were about twelve miles away from her, she was still afloat, and that as the night was approaching, and they were distancing her, he lost sight of her.

Commander Senex adds that he asked to be allowed to go on board the vessel, but that the captain refused his permission, saying that he

was afraid she was in a sinking condition, and that on his repeating his request Captain Bruat put him off to the following day, saying that the night was coming on, and that they must rejoin the fleet. On the following day they returned, but could find no traces of her. Now, a good deal was made of this in the arguments of counsel; it was said that Captain Bruat, having refused to allow Commander Senex to go on board the vessel, saying that he was afraid she was in a sinking state, shows that the appearance of the vessel at that time was such as to lead him to think that she was momentarily in danger of sinking; but I do not think that this is a necessary inference. It may be that Commander Senex's application was, or that Captain Bruat may have understood his application to be, not simply to go on board and inspect the vessel, but to go on board and endeavour to navigate her into a port of safety; and he may very naturally have hesitated, looking at the nature of the duty on which the French fleet was employed, to allow his second in command to go on board an unknown and disabled vessel, night, as he says, coming on, and being under orders to rejoin the fleet. At all events, the evidence of Commander Senex is precise upon the point, that in his opinion she was not then in a sinking state; and the natural inference from Captain Bruat having returned on the following morning to look for the vessel is that in his opinion she might have ever then been still afloat. Commander Senex further states that the weather was at the time very fine, that the sea was calm, that there was hardly any wind, and that the same kind of weather continued during the night and the following day; and that the place where they fell in with the *J. B. Watt* was about eighteen miles to the north-west of Heligoland.

"It is not necessary that I should do more than very briefly refer to the evidence of Captain Petley, who is a retired captain in the Royal navy, and was formerly commander of Her Majesty's yacht. All that he was apparently produced to prove was that, if the vessel could have been got to Heligoland, means could there have been obtained either to repair her, or at all events to stop the leak sufficiently to allow of her being taken to a port where the repairs could have been completed.

"I have now carefully examined the whole of the evidence that has been produced before us, and I will produce to state what appears to us to be the fair inference to be drawn from it.

"First, then, we think that it is clearly established that the blow which the *J. B. Watt* sustained was of a much more serious character than those on board the *Thuringia* are prepared to admit. The discrepancy, as I have already observed, can readily be understood, if we remember the great difference in size between the two vessels, and the fact that the *Thuringia*, with the stem, struck the *J. B. Watt* on her port side, or the strongest part of the former against the weakest part of the latter vessel. The witnesses from the *J. B. Watt* speak positively to the fact that the water was coming in in a steam at the bilge, and, indeed, it would be difficult to account for so much water being in the vessel if there had been no damage below the water line, and none beyond a clean cut, varying in breadth from a few inches to about a couple of feet, and the lowest part of which was between one and two feet above the water line

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On the other hand, we are not disposed to charge the witnesses from the *Thuringia* with deposing falsely when they state that they could see no evidence of any damage to the bilge, or any appearance of water coming in at that part. It is to be observed that the witnesses from the *J. B. Watt* saw it, when the damage had only just been done, and when the water would probably have been seen rushing up in a stream. When, however, the witnesses from the *Thuringia* saw it, the water had risen considerably, and it might very possibly be that there would then be not only no rush, but probably no perceptible flow of water into the hold. For all these reasons we are inclined to think that there must have been more or less damage done below the water line, sufficient to allow a very large body of water to get into the vessel.

"The next point to be considered is the precise spot at which the damage was done. The evidence shows that the vessel was struck about 6ft. abaft the end of the bridge. Now it appears from the plan before us, and it was so stated by the master in his evidence, that the end of the bridge aft was directly over the bulkhead which separates the engine compartment from the after hold. The rent or hole in the ship's side would consequently be about 6ft. abaft that bulkhead; and as the damage to the bilge, and from which the water may reasonably be supposed to have come in, is described as having been directly under and in a line with the rent in the ship's side, it follows that the leakage from the outside would be into the after hold, and this agrees with what all the witnesses say, that it was into the after hold that the water flowed.

"Now to determine what was the amount of danger in which this vessel was, and how far therefore the abandonment was or was not justifiable, it becomes important to ascertain what quantity of water there was in the vessel when they finally left her, and this I think we shall not have much difficulty in doing. The evidence of the witnesses from the *J. B. Watt* is that when they left her the first time the water was nearly over the tunnel, but not quite; the master says that before getting into the boat he took a look, a second look, into the hold, and observed that everything was beginning to get covered over; he says that he could see the top of the tunnel or screw alley, but that the water was nearly above it. To judge from the plans which have been laid before us, it would seem that the top of the tunnel was about 4½ ft. above the floor of the after hold, and I am informed by the merchants that this was probably its height. We may take it then, that according to the evidence of the master and crew of the *J. B. Watt* there were about 4ft. of water in the after hold when they abandoned her the first time, 4ft., that is to say, above the top of the water tank.

"Turning now to the evidence of the people from the *Thuringia*, we find that the first thing that they did when they got on board was to go to the engine room and to see in what state that was. After a time Irvin came up, and he and the mate looked down the fore hatch of the after hold, and sounded and found 2ft. 8in. of water. It is true that they sounded on the starboard side, and that the vessel having a list to port it is probable that the depth would be somewhat greater on the port side; but both these witnesses say, that they could distinctly see the top of the tunnel, and that the water was nearly but not quite over it; if, then,

the top of the tunnel was only 4½ ft. above the floor of the after hold, it is clear that on neither side of the tunnel could there have been much more than about 4ft. of water. I dismiss at once the statement of the mate of the *J. B. Watt*, that the water was 4ft. above the tunnel, as it is wholly unsupported, and he does not say that he ever sounded, or that he looked into the after hold when he returned to the *J. B. Watt*, so that we have nothing to show us upon what grounds he formed his opinion. It is possible that the mate may have meant that it was 4ft. above the top of the ballast tank, in which case his evidence would be quite consistent with that of the witnesses from the *Thuringia*, he measuring the depth on the port side, and they on the starboard side of the tunnel. The statement, too, in the protest, that when they left the *J. B. Watt* the first time there were 7ft. of water in her, and that when they finally abandoned her there were about 9ft., seems to point to the same conclusion; for the top of the ballast tank having been broken it might very well be said that there was this depth of water in her, including that in the tank and after hold together. If, however, the water had been 4ft. above the top of the tunnel, the plans of the vessel show that it would have been some 2ft. above the hold beams, a fact which could hardly have escaped the attention of the mate of the *J. B. Watt*, or the witnesses from the *Thuringia*.

"I think then that the fair result of the evidence on both sides is that, when the vessel was finally abandoned the water was not higher than the top of the tunnel, and that it had not risen much. If at all, from the time when the master had first left his vessel. Now this is what might naturally have been expected from the fact that this vessel was divided into water tight compartments. The object of water tight compartments, it need hardly be stated, is to enable a vessel, even when one of her compartments is filled with water, to float by the buoyancy of the others; and in the present case, the vessel being in ballast, and the fore hold and fore and after peaks being empty, the floating power must have been very great. So far, therefore, we see nothing which should have induced a master of 'ordinary nautical skill and resolution' to abandon his vessel.

"Let us now see what was the condition of the engine room, and whether there was anything in this compartment or in the state of the engines and machinery which would necessitate the abandonment of this vessel. It was said that the force of the blow started the bulkhead, which separated the engine room from the after hold, away from the port side of the ship, that it started the joints and rivets. The only witnesses from the *J. B. Watt* who speak to this fact are the master and mate. They could not say to what extent it was started, but they say that the water found its way from the after hold past the end of the bulkhead into the engine room. Seeing, however, that the master, according to his own evidence, never went into the engine room at all after the collision, we can hardly place much reliance upon his statement; and the mate, although he says that water was coming through into the engine room, does not say that it came through in any great quantity. On the other hand we have the evidence of the engineer of the *Thuringia*, and of Irvin the pilot, who, although they will not swear that the end of the bulkhead was not started from the ship's side,

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swear very positively that no water, or at all events none that they could discover, entered the engine room in that place. They say that the only water that entered the engine room was from the tunnel; that they found the door of the tunnel into the engine room open; that they closed it; and that from that time no more water came into the engine-room. It is perfectly clear from the evidence of these two persons, as well as from that of the mate of the *J. B. Watt*, who joined them in the engine room when he returned to the vessel, that there was very little water even at that time in the engine room. The mate of the *J. B. Watt* indeed says that, before he left her the first time, he lifted one of the stokehole plates, and that the water was then nearly on a level with the plate; but he does not say that when he returned the water was above the plate; and the two other witnesses from the *Thuringia* say that they looked into the stokehole, but did not see any water in it. Either then the mate must have been mistaken the first time, when he said that the water was nearly on a level with the stokehole plate, or the water must have ceased to rise in the engine room between the time of his having looked into the stokehole and the time of his return to the vessel, a period of at least a quarter of an hour. No one pretends that it ever at any time was on a level with the floor of the engine room. I may add that the vessel being, by the concurrent testimony of all parties at that time very much down by the stern, the water which is usually found in the bilges would naturally flow towards the after part of the vessel, and would thus rise rather higher in the stokehole. We are, however, of opinion that there is no evidence to show that the amount of water in the engine room compartment was such as to have induced a master of ordinary nautical skill and resolution to have abandoned his vessel.

"I now come to a matter which appears to us to be of very great importance to the decision of this case, namely, the state and condition of the engines when she was finally abandoned. Whether the donkey engine was or was not set on before the master and crew left the vessel on the first occasion, it is certain that it was not going when they returned to her. The engineer of the *Thuringia* and Irvin both say so, and they are confirmed in that statement by the mate of the *J. B. Watt* himself. The engineer of the *Thuringia* and Irvin state further, that when they got into the engine room they found the water in the boilers very low, and a pressure of steam of about 80 lb., a pressure which I need hardly observe is, for a marine and low-pressure steam engine, highly dangerous. They state also that the furnace doors were closed and the safety-valve shut down. If their statement is to be believed, and I can find no contradiction to it, the state in which the engines were left might have led to the boilers very soon exploding. They say that they immediately set the donkey-engine to work to pump water into the boiler, that they opened the safety valve and furnace doors, and took the proper measures for obviating any accident from this cause; they could do no more, for to put the principal engines in motion they would have required other hands to assist them. The conclusion then from this evidence is, that the engineers, instead of taking the proper and necessary precautions to avoid a catastrophe, left the engines in such a condition as might not unnaturally have led to the speedy destruction of the vessel.

And here I cannot but express my surprise that neither the first nor the second engineer of the *J. B. Watt* were produced before us for examination; it might have been thought that, at all events, the first engineer, who was in the engine room with Irvin and the mate of the *Thuringia*, would have been produced before us. I am aware that they were both produced on the principal trial, but with a view rather to show that the blow was a very severe blow, and that incidentally some evidence was given as to the state in which the engines were left; but I do not think that the somewhat loose statements made by them on that occasion can weigh against the positive and direct evidence of the witnesses that have been produced before us, supported as they are on several points by evidence from the *J. B. Watt* herself.

"What then appears to have been the state of this vessel when she was abandoned? She had about 4 ft. of water in her after hold above the top of the ballast tanks. The other four compartments were free, save perhaps that in the engine compartment there may have been a little water, but not sufficient to cover the floor of the engine room, and very very far from extinguishing the fires, or interfering in any way with the action of the engines, which so far as the evidence goes, appears to have been in perfect working condition, steam having been turned on to set the donkey engine in motion just before they finally abandoned her. Under these circumstances, what ought to have been the duty of a master of 'ordinary nautical skill' and of 'ordinary courage and resolution'? Why, surely to have stopped up the rent in the ship's side with sails, bedding, or anything at hand, to have stopped the flow, if any flow there was, of water from the after hold into the engine room, to have put the engines in motion, and to have taken the vessel to Heligoland, where, according to the evidence of Capt. Petlay, means could readily have been procured to stop the leak sufficiently to take the vessel to a port where the necessary repairs could have been completed. Instead, however, of taking any of these obvious measures, the master, immediately the collision takes place, looks over the vessel's side, concludes that she had been cut down to the water's edge, a conclusion which it is clear was not founded in fact, and which, if it had been, was not alone sufficient to justify the abandonment of the vessel; he then orders the boats out, and without going into the engine room or doing more than merely look down into the after hold, he and his crew collect their private effects, or at all events a good portion of them, and abandon their vessel. The engineers, too, seem equally to have neglected their duty, and to have left the engines in a state which might possibly in a short time have resulted in the total destruction of the vessel. And all this, too, with a smooth sea, fine weather, a favorable wind, Heligoland, at a distance of only about eighteen miles off, and a vessel from the French fleet approaching them, from whom they might naturally have expected to receive assistance, had it been needed. More gross and culpable neglect of duty on the part of the master and crew it would be difficult to imagine. The vessel at her ordinary rate of steaming would have reached Heligoland in about two hours and a half, her engines were so far as appears from the evidence in perfect working order, and according to the evidence of Commander Senex, she was still afloat at half-past five o'clock

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or for about four hours after the collision, and this, too, without her having been pumped at all during that time. Under all the circumstances of the case we are of opinion that the master and crew of the *J. B. Watt* did not show that ordinary nautical skill and courage which might reasonably have been expected of them; they seem to have been taken with a groundless panic, and to have shown presence of mind only in one point—namely, in saving their own clothes and private effects.

"On the authority, then, of *The Flying Fish* (3 Moo P. C. C., N. S. 77; Bro. and Lush. 436; 12 L. T. Rep. N. S. 619; 3 Mar. Law Cas. O. S. 221), and of the judgment of Dr. Lushington in the case of *The Linda* (8 Wa. Rep. p. 306), I must hold that the master, having shown a great want of 'ordinary nautical skill and resolution,' the owners are not entitled to recover as for a total loss; all that they can properly claim is the amount which would have been necessarily expended by them to restore this vessel to the same state in which she was previous to the collision. To ascertain what this should be is by no means an easy inquiry, nor, I fear, can it be a very satisfactory one, owing to the want of sufficient materials on which to form a sound opinion. It is a question, however, which must be faced, and as both parties have agreed to leave the matter to us, and have expressed their intention not to produce any further evidence on the point, we must form as fair an estimate as the materials before us will enable us to do.

"First, then, I should observe that from the view that we have taken of this case, the vessel could easily, by the unaided efforts of her own crew, have been taken into a place of safety. No reward, therefore, for salvage assistance would be admissible as a part of the claim. She would on her arrival at Heligoland, or perhaps even at Cuxhaven, have undergone some temporary repairs sufficient to enable her to reach a port where her repairs could have been completed; possibly, even, the port of her owners in this country. These expenses we should be disposed to estimate at the sum of 250*l.* On her arrival at Hartlepool, say, she would have had to be docked, the plates in her side and bilge replaced, the hull head, if started, refastened, and generally put into a state of repair. This we estimate at the sum of 1750*l.* To this would have to be added the compensation due to her owners during the period of her detention whilst undergoing repairs. This we consider would be fully covered by a sum of 750*l.* The total amount therefore, which we should allow to the owners as sufficient to enable them to restore this vessel to the condition in which she was previous to the collision would be 2750*l.* with interest thereon, say, from the 1st Jan. 1871.

"With regard to the claim of the master and crew for their private effects, seeing that in our opinion this vessel not only ought to, but might easily have been taken into a place of safety, and that no damage appears to have been done in the collision to the cabin or quarters of the master and crew, or to any of their effects, we think that it must be rejected *in toto*. And the same observation applies to the claim for two cases of goods stated to have been on board, and which are valued together at 30*l.*

"The last item of the claim relates to the loss alleged to have been sustained by the owners of the *J. B. Watt* in respect of certain charter-parties.

It appears that the owners had, on the 29th Sept. 1870, entered into a charter-party to carry two cargoes of coal from West Hartlepool to Hamburgh at a certain rate of freight. She had performed one voyage, and was returning to Hartlepool to take on board the second cargo under this charter-party when the collision occurred. In the meantime, however, and just previous to the collision, the owners had on the 11th Oct. entered into a further charter for the conveyance of two other cargoes of coals between the same ports to commence after completing the delivery under the first charter. There were, consequently, three voyages uncompleted, and the owners claim a sum of 731*l.* 12*s.*, being the net profit which they say they should have made on those three voyages, or at the rate of 243*l.* 17*s.* 4*d.* for each voyage. No evidence, however, was given that the owners had not by means either of their own or of some other vessels completed the charters and thus earned the freights; and it is clear that, if by the exercise of ordinary care and diligence they could have done so, this claim could not be allowed. It was with this view that I put the question to Mr. Wilkinson, the managing owner, as to the number of screw steam vessels of this description which they had in their employ. It is, however, not necessary to say more on the subject, as, on my asking whether the item was seriously contended for, Mr. Butt, on behalf of the plaintiffs, immediately withdrew it.

"It only remains that I should say a few words on the question of costs. In an ordinary case of this description, where the claim was reasonable, and made *bona fide*, even though I might under all the circumstances have held the abandonment to have been unjustifiable, I should perhaps have been inclined to leave each party to pay his own costs of the reference. But in the present case there are some circumstances which would lead me to come to a somewhat different conclusion. The claim for the value of the vessel is 18,480*l.* Now Mr. Wilkinson, the managing owner, in an affidavit which had been filed in the proceedings, had stated that her market value at the time of the collision was 16,900*l.*; when, however, he was examined before us he admitted that her cost price had not exceeded 15,000*l.*, but he said that, although she had been ten months afloat, the value of such vessels had risen to that extent between the times of her being built and her loss. He further stated that the difference between the alleged market value 16,900*l.*, and the amount of the claim 18,480*l.* was due to freight. But it was pointed out to him that he had received the freight on the first voyage, and that the estimated profit on the three subsequent voyages contracted for under the charter-parties formed a separate item of the claim. No other explanation was given by him of the difference. Mr. Wilkinson admitted that there had been a contract for the price of the vessel, and undertook to produce it, and when that was subsequently done, it turned out that the contract price was for 14,000*l.* only, and moreover, that the terms of sale were 'to be considered as on the basis of half cash on completion, and half six months from date of completion,' which is a very different thing from what we had been given to understand was the cost price of the vessel.

"On the whole, looking at the very unjustifiable manner in which this vessel was abandoned, the exorbitant claim for the value of the ship, and the

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claim for the alleged loss on the charter-parties which could not be sustained at the hearing; looking also at the fact that the amount claimed was 19,441. 6s. 2d., and the amount reported due is only 2750l.; we think that the plaintiffs ought to pay all the costs of the reference. And I shall so report. "H. C. ROTHERT, Registrar.

"June 13, 1871."

From this report the plaintiffs appealed to the court, and filed a petition in objection to the report, objecting on the following grounds:—First, because the *J. B. Watt* had received such injury in the collision that it would have been impossible to have navigated her to a place of safety; secondly, because the abandonment of the *J. B. Watt* by her master and crew was not, under all the circumstances of the case, such an abandonment as would work a forfeiture of her owner's right to recover as for a total loss; thirdly, because on the facts found in the said reasons of the registrar, he has erroneously held that the plaintiffs are not entitled to recover as for a total loss; fourthly, because on the hearing before the registrar, after all the witnesses on behalf of the plaintiffs had been examined, an affidavit of one M. Senex, an officer in the French navy, which had been until that time kept back by the defendants, was produced by them and tendered in evidence; and though objected to by the plaintiffs, was admitted by the registrar. Such affidavit went to show that the *J. B. Watt* continued to float for a long time after she was abandoned, and that she might have been saved by her master and crew; fifthly, because the registrar found that the *J. B. Watt* might have been taken to Heligoland and there temporarily repaired; whereas, in fact, even if she could have been taken to Heligoland, there was not at Heligoland any place where she could have been put in safety, or any place where or means by which she could have been temporarily repaired; sixthly, because the findings in the report are against the weight of evidence.

An answer was filed on behalf of the defendants, supporting the report, denying the reasons, and submitting that the admission of the affidavit of M. Senex was in accordance with the practice at these references, and alleging that the fifth reason was unsupported by evidence. On this answer the plaintiffs concluded. As to the admissibility of M. Senex's affidavit, see ante, p. 166.

March 11 and 12.—*Butt, Q.C.*, and *Clarkson* for the plaintiffs.—There are two questions: first, was the *J. B. Watt* so injured by the collision that she must have perished? secondly, was she improperly abandoned? The vessel had disappeared before the next morning. The law has been wrongly applied by the registrar; the case of *The Flying Fish* (3 Moo. P. C. C., N. S., 77; Bro. & Lush, 436; 12 L. T. Rep. N. S. 619), cited by him, differs widely from this case. The *Thuringia* abandoned the *J. B. Watt* and refused all assistance, and they have no right now to say that there was undue haste and want of care on our part in quitting our vessel, and that they are therefore liable only for a partial loss. They stood off with our crew within an hour of the collision. In the *Flying Fish* (sup.) it is said that in an emergency great allowance is to be made for errors of judgment, and this is applicable here, where a violent and dangerous collision had just occurred. The crew of the *J. B. Watt* were compelled to leave her because the *Thuringia* would

not stay for fear of the French fleet. No moral blame attaches to our crew; the *Thuringia* was bound to have remained by her or to have left our crew on board if they thought she could be got into safety, or to have taken her into tow if her own crew were insufficient to take her to Heligoland. At common law the rule as to contributory negligence is that a plaintiff can recover nothing if his own acts have in any way caused the injury, but this is qualified by the case of *Lynch v. Nurdin* (10 L. J. 73, Q. B.; 1 Ad. & Ell. 29). That was a case of injury to a child of tender years; and it was held that as the original misconduct of the defendant's servant led to the accident, even the subsequent misconduct of the plaintiff did not disentitle him to recover, as he could only be required to exercise ordinary care, and that care was to be measured by his capacity. Analogous to this is the case where a tortious act of the defendants has caused such a panic that the plaintiffs are incapable of exercising their ordinary judgment and abandon their vessel. The plaintiff is not disentitled because the master has by the accident become so morally incapable that he cannot exercise ordinary nautical skill. The onus of proof in such a case lies upon the wrongdoer, who seeks to rid himself of his liability (*The Kingston by Sea*, 3 W. Loh. 157); he must show that the loss was not wholly caused by his default. In *The Penaker* (Swab. 211) it is held that a plaintiff may recover unless he be guilty of gross negligence, and this is laid down in *The Countess of Durham* (9 Monthly Law Mag. 279). *The Penaker* (sup.) is contrary to *The Flying Fish*. The facts in the *Linda* (Swab. 306), cited in the report, are very different from these. In *The Flying Fish* (sup.) there was no emergency, whilst here there was only a short time to deliberate, and at the end the master was bound to decide hurriedly. Was the *Thuringia* justified in deserting the *J. B. Watt* merely because a French fleet was seen some distance away? She ought to have towed the vessel. Her duty to assist is none the less binding because she is a foreign vessel. Where was the ship to go? There were no lights left on the German coast on account of the war. It is clear from the evidence that there was a large quantity of water already in her when she was left. No negligence in point of law was committed by the master as long as he remained by his vessel, and then he was suddenly called upon to determine whether he would go or stay. It is always held that if men leave a vessel immediately after collision, and whilst they are in a panic caused by it, they may still recover. This sudden call to leave placed us in a similar emergency. The French admiral was clearly of opinion that the vessel was sinking, as he would not allow M. Senex on board. The admission of M. Senex's affidavit was contrary to practice and to rule 108 of the Admiralty Court Rules.

March 13.—*Sir J. Karslake, Q.C.*, *Benjamin*, and *W. G. F. Phillimore*, for the defendants.—Although the facts in *The Flying Fish* (sup.) differ, the law as laid down there is applicable, as it shows the duty of a master. The case of *Lynch v. Nurdin* (sup.) proceeds exclusively on the ground that the plaintiff, being a child of tender years, could not be considered as causing any part of the injury sustained, and even the law there laid down is questionable *Lloyd v. Newbold*, 9 Ex. 302). Here the master was well capable of judging what ought to be his own conduct. He no doubt came

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to a conclusion, but it was not a right conclusion. The vessel was only two hours from Helligoland and four hours from the Elbe. The French fleet was near. The crew had plenty of time to get over their panic. If the *Thuringia* had steamed away at once there might have been good excuse for their act, but she remained for an hour. It cannot be said that she was bound to remain with the *J. B. Watt*, and so run risk of capture. The master was bound to exercise ordinary nautical skill in forming a judgment. The rule as to contributory negligence is, that if the accident was caused proximately by the negligence of the defendants, they are liable so long as the acts of the plaintiffs only remotely brought about the accident (*Tuff v. Warran*, 2 C. B., N. S., 740); but here the actual total loss was proximately caused by the plaintiffs. But the cases of contributory negligence are not really in point, as they all relate to acts done at the time of the accident, whilst here the negligence on the part of the plaintiff took place after the act done. They claim for a total loss, and therefore must show that we caused it; but even if the onus is upon us, the evidence clearly shows that the vessel might have been saved. *The Flying Fish* (sup.) lays down that the criterion of the right to recover is not whether the vessel could have been saved, but whether the master made proper efforts to save her. We have shown that there was reasonable probability of saving the vessel, and therefore submit that the onus is now shifted upon them. A master must have a certain amount of constancy. Even if the *Thuringia* did leave, the French man-of-war was then coming up.

Butt, Q.C., in reply.—An erroneous judgment formed by the master would not prevent us from recovering. The onus is cast on the wrong doer of proving that the abandonment was unjustifiable.

Cur. adv. vult.

March 22.—*Sir R. Phillimore*.—*The J. B. Watt*. A screw steam ship of 770 tons, came into collision on the 14th Oct. 1870 with the *Thuringia*, a steam ship of 1944 tons, and for this collision the court pronounced in Jan. 1871 that the *Thuringia* was alone to blame, and made the usual reference to the registrar and merchants to assess the amount of damages for which the *Thuringia* was liable. It appears that the owners of the *J. B. Watt* preferred a claim before the tribunal of the sum of 19,441 l. 6s. 2d., such sum being the alleged entire value of the vessel—in other words, they claimed for a total loss of that vessel. The registrar rejected the claim founded upon a total loss, and awarded the sum of 2750 l., estimating at that sum the probable expenses necessary to restore the vessel to the condition in which she was previous to the collision. It is admitted by both parties that this estimate is fair and proper, if the claim for a total loss was properly rejected. The main question raised before the registrar was whether the master was justified in abandoning her—in other words, whether her total loss was legally a necessary consequence of the collision, or whether, by the exercise of ordinary skill and courage, she might have been saved. The registrar found, and has reported to the court, that the vessel was improperly abandoned, and that her total loss was owing to a want of ordinary skill and courage on the part of those to whom her navigation was intrusted, and from this finding of the registrar there has been an appeal to this court. The whole case has been most

fully and ably argued before me, and I hope it will not be supposed that I am at all insensible to the merit of that argument, because I omit it in detail and confine myself to a brief statement of the principal points upon which my judgment is founded; and I will first say a word as to the law applicable to the case. The law as to the liability of a wrongdoer, who, as in this case, has without malice or intention, but through negligence inflicted a wrong upon the property of another, appears to be much the same in all systems of jurisprudence. Such a wrongdoer is liable not only for the immediate, but for certain consequential damages of his act. Not, however, for all damages which in common parlance may be called consequential, but for such as are the legal, or, as it is sometimes said, the natural consequences of the wrongful act, and here two questions arise: first what are the *criteria* of legal consequences; and, second, upon which party is cast the burden of proving such *criteria* to exist in the particular case? With regard to the first question, I will borrow the language from the judgment of Lord Wensleydale, founded upon an earlier decision. "The rule of law," that learned judge says, "is, that although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong" (*Bridges v. Grand Junction Railway Company*, 3 M. & W. 244, 248). "One person being in fault," Lord Ellenborough says, "will not dispense with another using ordinary care for himself": *Butterfield v. Forrester*, 11, East, 60, 62). To the ordinary care here mentioned must be added ordinary courage and resolution, for whether or not the latter element be required in the driver of a carriage in the case of a collision on land, it is certainly required, and so it has often been decided, in the master of a vessel in the case of a collision at sea: (*The Kingston-by-Sea*, 3 W. Rob. 157; *The Penzance*, Swa. 213; *The Linda*, Swa. 308; *The Flying Fish*, 3 Moo. P. C. C. N. S., 89; Bro. & Laish. 436; 12 L. T. Rep. N. S. 619.) The law does not exact the utmost care or skill, but the care and skill of a competent person; neither does it exact heroic courage, but such courage as belongs to the ordinary exercise of the profession, or calling of the party complaining—says Doanellus (*Comm. de Jure Civili*, lib. xv., c. xxxix., s. 8): "Justus metus definitur non vani hominis metus; sed qui merito in hominem constantissimum cadat. Hoc recte, cum queritur quis dicatur justus metus. Non minus incertum est quis sit metus qui cadat etiam in constantem virum. Id autem ex genere mali et periculi formidati aestimandum est." If the party complaining be a sailor, he cannot succeed in his suit if it be shown that the danger which has caused his loss could have been avoided by a sailor's ordinary courage and skill. With respect to the second point, it appears to me that the decisions at common law incline to the position that the burden of proving that ordinary skill and courage could not have averted the loss lies upon the party complaining. Mr. Sedgwick (*Sedgwick on Damages*, 4th edit., p. 539) sums up the law to be deduced from a variety of cases, as follows: "A party in an action on the case for negligence cannot recover damages which have resulted from his own negligence and want of care. He must show

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himself to be in the right, and the defendant in the wrong; that he has performed his duties, and that the defendant has neglected his, and that the damages are the legitimate consequences of the negligence of the defendant." The decisions in this court, however, seem to throw the burden of proof upon the original wrongdoer, who alleges that the injured vessel was unnecessarily abandoned. I will now consider the leading facts of the case to which these principles of law must be applied. The damage inflicted on the *J. B. Watt* was of a serious character. The stem of the *Thuringia*, a very large and powerful steamer, struck the *J. B. Watt* on her port side about six feet abaft the end of the bridge. The rent made in her was in the form of the letter V, and it was found, I think rightly, that there must have been some damage done below the water-line, probably to the extent of three feet, sufficient, however, to allow the entrance of a large body of water into the vessel. The counsel for the *J. B. Watt* stated that he was willing to rest his whole case upon this point; on the other hand, the counsel for the *Thuringia* did not dispute that this fact had been rightly found by the registrar. I accept this finding, but it seems to me by no means conclusive as to the merits of the case. The *J. B. Watt* was in water ballast, and—here I borrow the accurate language of the report—"was divided into five compartments by four watertight bulkheads. The centre compartment contained the engines and boilers; forward of this were two compartments, a small one in the bows called the forepeak, and between it and the engine rooms the forehold; abaft the engine were also two compartments, first, a large one called the afterhold, and behind it the lazaret; running fore and aft along the middle line of the afterhold was a square box or tunnel, called by the witnesses the tunnel or screw-alley, containing the shaft which connects the engine with the propellers. Under the fore and afterholds were large iron tanks, the tops of which formed the flooring of the fore and after hold respectively; they were intended to hold, and at the time of the collision did hold, water for ballast. The tanks did not extend under the engine compartment." The depth of the water tank was three feet, that of the tunnel four feet six inches. It is admitted that the water was not higher than the top of the tunnel; it is also admitted that, whatever water there was, it was below the plates of the stokehole; it was never at any time on a level with the floor of the engine room. The engines were in good working order; the water in no way interfered with their action; the donkey engine had been set in motion just before the vessel was abandoned; the pumps were in good order, and this most strange and discreditable fact appears by the admission of the master of the *J. B. Watt*, namely, that he deserted his ship without even himself going into the engine room, while the conduct of those on board the *J. B. Watt* with respect to the condition in which they left their engines before the arrival of the men from the *Thuringia* is, to say the very least, fraught with suspicion. It hardly requires nautical knowledge or experience to pronounce that ordinary energy would have discovered the means of temporarily stopping the rent in the side of the vessel. After a careful consideration of the facts which are fully set out in the report, and which I will not repeat, I entirely agree with

the opinion of the registrar and merchants, that the condition of the vessel with respect to the state of the water in her did not justify the abandonment of the vessel. It has been argued, however, that this conclusion does not relieve the original wrongdoer from liability for the loss of the ship; that he is responsible for the panic which his act had caused, and under the influence of which the vessel was abandoned. In the *Flying Fish* (sup.) the Privy Council said: "It is to be observed that this was not the case of a sudden emergency, leaving no time for deliberation, when great allowances should be made for any error in judgment which may occur." In the present case more than an hour elapsed between the collision and the abandonment of the vessel; the master was advised by competent persons to remain by her, which, I think the evidence shows he had from the first moment after the collision determined not to do. Then what are the other circumstances of the case? The weather was perfectly fine, the sea quite calm, the vessel empty provided with boats—more than sufficient to carry all her crew, capable of steaming between seven and eight knots an hour; Heligoland, upon which the *J. B. Watt* had come that morning, was within a distance of sixteen or eighteen miles, where, even if the vessel could not, as I think she might have been beached upon Sandy island, she might have obtained sufficient aid to make the necessary repairs to take her some fifteen or sixteen miles further to Cuxhaven. The French fleet was within sight at the time when the *Thuringia* sailed away, and the *J. B. Watt* is proved to have been afloat for about three hours after the collision. There remains one other portion of the argument on behalf of the *J. B. Watt* which should be noticed. It has been urged that the *Thuringia* was bound to have stayed by the vessel with which she had come into collision, or to have attempted to have towed her into a place of safety. I do not deny that such an obligation, upon ordinary principles of humanity, attaches to a ship which had severely damaged another, and which can but will not afford to her the assistance requisite for her preservation. This doctrine appears to me inapplicable to the present case. The *Thuringia* entertained a reasonable apprehension that further delay might cause her to be captured by the French fleet then in sight—an enemy to her, but a friend of the *J. B. Watt*, and, moreover in my opinion the *Thuringia* had ascertained that the *J. B. Watt* might be saved by her own captain and crew if they chose to abide by her. Upon the whole I have no hesitation in pronouncing that the evidence, assuming the burden of proof to lie upon the *Thuringia*, leads to the necessary conclusion that the abandonment of this vessel was an improper act on the part of the captain and crew, one that led to a total loss, which by ordinary skill and ordinary courage might have been avoided, and I confirm the registrar's report, with costs.

Proctor for the plaintiffs, *H. G. Stokes*.

Proctors for the defendants, *Pritchard and Sons*.

ADM.]

THE BUSY BEE.

[ADM.]

Tuesday, April 23, 1872.

THE BUSY BEE.

Appeal from County Court—Admission of evidence on appeal—Insufficiency of notes of evidence—County Court Rules—Reporters.

The Court of Admiralty is extremely reluctant to admit evidence at the hearing of an appeal from a County Court, but will do so under special circumstances.

By Rule 32 of the General Orders for the County Courts Admiralty Jurisdiction, it was intended that a shorthand writer, or at least a reporter, should be employed in all Admiralty causes in the County Courts, where there is a probability of appeal, to take down the evidence, so that the appellant might be in a position to bring up at the hearing of the appeal a transcript of the notes of evidence.

The insufficiency of notes of evidence in the court below is some ground for the admission of evidence at the hearing of the appeal, but the fact that a reporter has not been employed to take down the evidence below must always be a circumstance to be inquired into when an appellant applies for leave to produce evidence on appeal.

This was a motion in an appeal from the decision of the County Court of Northumberland (Admiralty Jurisdiction) in a cause of collision. The steamship *Wallachia* came into collision in the Bosphorus with the steamship *Busy Bee* and the owners of the *Wallachia* on the arrival of the *Busy Bee* in Newcastle instituted a cause against her in the County Court there. The cause was heard before the judge, assisted by assessors, and the court pronounced that the *Wallachia* was solely to blame. From this decision the owners of the *Wallachia* appealed to the Admiralty Court, and gave security for costs to the amount of 20*l.*, and deposited that sum in the registry of the County Court in lieu of bail. At the hearing in the County Court no shorthand writer was employed, but the judge took down the evidence, and his notes were copied and were filed in the Admiralty Court. There were no reasons given for the judgment, and it only appeared that the court had pronounced for the plaintiff. The notes of the evidence did not contain the questions asked nor the full answers given to the questions, but were only abbreviated notes of what had been given in evidence, and apparently were notes made by the judge only for the purpose of aiding his own memory. The evidence of some of the witnesses as taken down, was very short, and appeared not to have been taken down in full, but only as the answers seemed important to the judge.

The case now came before the court upon a motion by the respondents for an order of the court "to direct the proceedings herein to be stayed until security for costs be given by the appellants in a sufficient amount, and to fix the amount of such security;" and on a motion by the appellants "for liberty to examine witnesses on the hearing of the appeal, and that the notes taken by the judge in the court below be also receivable as evidence on the appeal."

Clarkson for the appellants contended that on the evidence as it was before the court it would be impossible to arrive at any conclusion, as the notes were scarcely comprehensible. The court has no power to make an order for further security for costs. The County Courts Admiralty Jurisdiction

Act 1868 (31 & 32 Vict. c. 71), s. 26, gives the power to the registrar of the County Court, and he has already fixed the sum at 20*l.*

W. G. F. Phillimore, for the respondents.—The notes are sufficient, and the court will not without grave reason admit further evidence. As to security for costs, if this evidence is admitted the court has power to make the order upon the terms of further security being given. The court ought not to admit fresh evidence.

Clarkson in reply.—We shall be content to have two witnesses already examined before the County Court.

Sir R. Phillimore.—I am most reluctant to allow witnesses to be examined at the hearing of appeals from County Courts, but in the peculiar circumstances of the present case I feel that I must accede to the prayer of Mr. Clarkson's motion, though the conclusion at which I have arrived must not be considered as affording a precedent for similar applications. In this case two things concur to render it impossible for the court to come to any satisfactory conclusion with reference to the merits of the case on the materials now before it. First, the notes of evidence filed in the registry are very brief, they appear to be merely rough notes taken by the learned judge of the court below for his own guidance, and although no doubt they were sufficient for his purpose, they cannot be regarded as satisfactory for the purpose of an appeal. Secondly, I am without the assistance which in many cases of this kind I have derived from a statement of the reasons which influenced the court below in arriving at the decision appealed against. I have not before me any statement of the grounds upon which the judgment of the court below proceeded. I wish to call attention to the 32nd rule of the general orders for regulating the practice and procedure of the Admiralty Jurisdiction of the County Courts 1869. By that rule it is provided that "at the request of either attorney, and at the cost in the first instance of the plaintiff, the evidence of witnesses examined in court shall be written down by a shorthand writer or reporter, appointed by the court, and sworn in each case faithfully to report the evidence." I think the meaning of this rule is that the evidence should be taken by some reporter at least, in every Admiralty cause where there is a probability of an appeal. It may well happen that it may be unnecessary that the notes should be transcribed, but I think it was intended that, in the event of an appeal, the appellant should have it in his power to bring up a satisfactory report of the whole of the evidence. And certainly I am of opinion that the fact, that the rule has not been followed, must always be a circumstance to be inquired into when an appellant comes to this court for leave to be allowed to adduce further evidence. In this case I shall, as has been suggested, give leave to each party to produce, at the hearing of the appeal, two of the witnesses examined on his behalf in the court below, but I shall only do this upon the terms that the appellants give further security for costs. The present security is insufficient. The appellants must give further security for costs in the sum of 100*l.*, and it may be given in this court.

Solicitors for the appellants, *Nethersole and Speechly*, for J. W. Carr, Liverpool.

Proctors for the respondents, *Deacon, Son, and Rogers*.

ADM.]

THE DUE CHECCHI—THE JENNY LIND.

[ADM.]

THE DUE CHECCHI.

Salvage—Pleading—Statement of amount paid for salvage by one defendant struck out.

In a cause of salvage against ship, freight, and cargo, the shipowner, after the institution of the cause, paid a sum in settlement of the claim against him, which was accepted by the plaintiffs. The plaintiffs proceeded against the cargo, and pleaded in their petition the payment of this sum by the shipowner, and stated the amount.

Held, that the plaintiffs were not entitled to plead the amount so accepted by them, although they might plead the fact that they had so settled with the shipowner.

THIS was a cause of salvage instituted on behalf of certain boatmen of Gorleston, in the county of Suffolk, and on behalf of the steam tugs *Pilot* and *Pioneer*, their masters and crews, against the Italian harque *Due Checchi*, her cargo and freight. The case now came before the court on motion to reject part of the plaintiff's petition.

From the petition it appeared that the boatmen were members of the Storm Company of Beachmeo, associated together at Gorleston for the purpose of rendering assistance to vessels in distress in the neighbourhood of Yarmouth, and that the tugs belonged to the Great Yarmouth Standard Steam Tug Company; that the *Due Checchi* was a barque of 395 tons register, and was bound on a voyage to Leith with a cargo of barley, and that on the 26th Dec. 1871, she got ashore on the Corton sand, about two and a half miles from Gorleston; that in consequence of signals of distress displayed by the harque, the plaintiffs went off to her, and some of them succeeded with great difficulty in getting on board of her; that the plaintiffs were employed to use their best endeavours to get the vessel afloat, and it was agreed that question of remuneration should be left for future settlement; that, after a service of considerable difficulty and duration, and of danger to the salvors, they succeeded in getting the harque off the sand, and into Yarmouth harbour; that the value of the *Due Checchi* was 1650*l.*; of her cargo, 3060*l.* 16*s.*; and of her freight, 700*l.*

The 21st article was as follows:—

21. The owners of the barque have paid to the plaintiffs in discharge of the proportion of salvage due from the ship and freight in respect of the above-mentioned services the sum of 300*l.*

The motion was to reject this last article of the petition.

Phillimore, for the defendants, in support of the motion.—The suit is now against the cargo only, as the shipowner has settled the claim against the ship and freight. The object of the article is to induce the court to make an order for the payment of salvage upon that basis. It is a rule that the court will not allow the amounts awarded by arbitrators or other tribunals to be given in evidence in a case that is before it, and this is introducing evidence of the same character. If this article is allowed, we shall be compelled to plead to it, and to show how the sum is estimated.

Clarkson, contra.—It is right that the court should know what the whole amount is that the salvors will recover. This suit was instituted against ship, cargo, and freight, and since the institution of the suit the shipowner has settled with us. If the owners of cargo should have awarded

against them a less sum than 300*l.*, it will be necessary for the court to have before it the amount paid to us for ship and freight, as otherwise we might be condemned in costs. In considering the question of costs, the whole sum recovered must be looked at, and what we have had paid to us is part of what we shall have recovered.

Phillimore in reply.

Sir R. PHILLIMORE.—I am of opinion that this article must be struck out, or at least must be amended by leaving out the amount paid to the plaintiffs, and this is in accordance with the practice of the court. This court cannot be governed by what an arbitrator may choose to award, or by what other persons may think proper remuneration for salvage services. There may be a great many reasons why a different award should be made in this court, as different views may be taken of the facts. A new issue is raised by this article, and if it is allowed, it will compel the defendants to attempt to show why such a sum was agreed upon. If the article were merely to state that a certain sum was awarded, without stating the amount, it would stand in a different light, and that, I consider, will be the best course to adopt here. I shall strike out the amount and then the court will be in possession of the fact that this claim is against the cargo only (a).

Proctor for the plaintiffs, Coote.

Solicitors for the defendants, Walton, Bubb, and Walton.

April 23 and 30, 1872.

THE JENNY LIND.

Master's wages—Necessaries—Priority of lien—Suit by master—Appearance and answer by material men.

A master of a foreign ship, who is also part owner, and upon whose orders necessaries have been supplied, is not entitled to claim priority over the material men, as he himself is personally liable to them for the necessaries supplied.

Seem, that a master who is not part owner would not in such case be entitled to priority over a material man or he also would be liable for the necessaries supplied by his orders as agent for his owners.

In a suit for master's wages and disbursements certain material men appeared and filed an answer alleging that they had supplied necessaries at the order of the master, who was part owner, and that a balance was due to them in respect of those necessaries. On motion to reject the answer it was.

Held, that the answer disclosed a good defence and that the material men were entitled to priority.

THIS was a motion to reject the defendant's answer in a cause of wages (5915), instituted against the Norwegian ship *Jenny Lind* on behalf of Johan Abrahamson, late master of that vessel. The cause was instituted by the plaintiff to recover a sum of 151*l.* 2*s.* 9*d.*, for wages and disbursements, as shown by an exhibit annexed to his petition, together with certain moneys alleged to be due to the plaintiff by the law of Norway, in consequence of his having been

(a) The article as amended was as follows:—"21. Since the institution of this suit the owners of the barque have settled with the plaintiffs for the proportion of salvage due from the ship and freight in respect of the before-mentioned services."

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discharged in a foreign country. The plaintiff was appointed master in March 1871, and in Sept. 1871 he arrived in the port of London. On the 10th Oct. the vessel was arrested in a cause of necessities, and on the 10th Dec. a suit was instituted on behalf Messrs. C. and C. J. Northcote, shipbrakers, in the city of London, to recover for necessities supplied. The master's wages suit was instituted on Dec. 5th, and an appearance was then entered on behalf of Gnetav Lorenzen, the managing owner, but nothing further was done by that defendant in respect of that appearance. On 11th April, 1872, an appearance was entered in the master's wages suit by Messrs. C. & C. J. Northcote, the present defendants. Other suits had been instituted against the vessel, and she had been sold, and the proceeds brought into court, and certain sums had been paid out in those other suits. An answer was filed on behalf of the defendants claiming a balance of 28l. 15s. 4d. for necessities. The sum in court was about 100l., and therefore insufficient to satisfy both claims. The answer filed was as follows:

1. In or about the month of Sept. 1871, the plaintiff, who was then part owner as well as master of the said vessel *Jenny Lind*, employed the said defendants to act as agents for the said vessel, and to do the necessary business of the said vessel, and to make the necessary advances in respect of the said vessel in the port of London, and the said defendants accordingly did the necessary business of the said vessel, and made the necessary advances of money on behalf the said vessel, and thereby supplied the said ship with necessities. The exhibit hereto annexed marked A is a true copy of the account of the said defendants in respect of the said supply of necessities, and the balance or sum of 28l. 15s. 4d., thereby appearing, is still due and owing to the said defendants, and the plaintiff is liable to the said defendants for payment of the same.

The exhibit referred to in the answer contained items which were undoubtedly within the meaning of the term "necessaries," but it also contained a claim for "cash to owners," 20l.; for "draft to G. Lorenzen," 85l.; for "draft to G. Lorenzen," 50l. From the account it appeared that the total amount that had been due was 267l. 16s. 5d., of which the sum of 239l. 1s. 1d. had been received by the defendants out of freight coming into their hands.

The case now came before the court on motion to reject the defendants' answer.

W. G. F. Phillimore for the plaintiff, in support of the motion.—As the fund in court is insufficient to pay both claims, this is really a question of priority. There are two questions: First, whether a master's claim for wages and disbursements has priority over the claim of a necessary man, even though the master be part owner; secondly, whether the claim of the defendants, even supposing they might have priority in some cases, can be upheld here? A master has the same priority for wages as a seaman by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 191, and he has, therefore, a maritime lien. He takes precedence over a mortgagee: (*The Mary Ann*, L. Rep. 1 Adm. & Ecc. 8; 13 L. T. Rep. N. S. 384; 2 Mar. Law Cas. O. S. 294.) In *The Feronia* (L. Rep. 2 Adm. & Ecc. 65; 17 L. T. Rep. N. S. 619; 3 Mar. Law Cas. O. S. 54) it was held that a master, even though a part owner, took precedence over a mortgagee. In *The Salacia* (32 L. J. 41, Adm.; 7 L. T. Rep. N. S. 440; 1 Mar. Law Cas. O. S. 261) it is ruled that both seamen and master have priority over a bottomry bondholder, and that the fact of

the master having signed the bond makes no difference so long as he has not bound himself personally by the bond. There is no case where it has been decided that a master's wages take priority over a claim for necessities, but as mortgage and bottomry bonds stand higher than necessities, I submit that a master's wages also takes precedence over the latter. *The Jonathan Goodhue* (Swab. 524) will be cited against me, but in that case the master bound himself personally by the bottomry bond, whilst here the master is not in any way bound. The defendant supplied the necessities in the credit of the ship, and not of the master; secondly, the account annexed to the answer shows that part of that account has been settled, and that a balance only remains. Certain items of that account are for money advanced to the owners and for drafts cashed for G. Lorenzen, the managing owner, and the defendants are not entitled to claim those sums as necessities: (*The Riga*, ante, p. 246; 26 L. T. Rep. N. S. 202.) Those sums are larger in amount than the balance now due, and the plaintiff is therefore entitled to say that the defendants have been paid for all necessities, and that their present claim is for a sum which is not necessities. The drafts to G. Lorenzen, the managing owner, are clearly not necessities.

Clarkson for the defendants, contra.—The master is part owner, and is therefore personally liable to the defendants for these necessities. He is liable to the defendants as master also, and is therefore personally bound within the meaning of the cases cited. By the Merchant Shipping Act 1854, sect. 191, a master has the same maritime lien for his wages as a seaman, but in *The Salacia* (sup.) Dr. Lushington held that a master must rank next after the seaman, and put his decision upon the ground that as it was an established rule that seamen might recover their wages from a master, it would be unjust to allow a master to take from a fund, against which the seamen have a lien, to their detriment, when the master is bound to pay them whether the fund be sufficient or not. Here the master is bound to pay for these necessities, whether the fund in court be sufficient or not, and he ought not therefore to have priority. In *The Feronia* (sup.) the master, although a co-owner, had not mortgaged his own shares, and was therefore not personally bound. If he had mortgaged his shares he could not have claimed priority. Over a bottomry bond a master has *prima facie* priority, but if he has personally bound himself, he cannot claim to the injury of those to whom he is liable: (*The Jonathan Goodhue* (sup.)) It can make no difference whether the master is bound by a bond or by an ordinary contract debt. The master is liable both as master and part owner. The transaction in this case was between the defendants and the master acting for the owners, and the drafts must be taken to have been for the purpose of assisting the master in the business of the ship. This was a foreign ship, and everything done must have been done by the authority of the master; and whether the drafts were drawn by him or his co-owner, can make no difference. This is within the terms of the decision in *The Riga* (sup.), a transaction which the master had authority to enter into.

W. G. F. Phillimore in reply.—These advances were not for the master's benefit, and he should not be held liable for anything which was for

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THE CHARLES.

[ADM.]

another's benefit. The drafts appear on the face of the account to have been for the co-owner's benefit only.

Cur. adv. vult.

April 30.—SIR R. PHILLIMORE.—This is a question between two claimants, each possessing a maritime lien, as to the right to priority of payment out of a fund inadequate to satisfy the demands of both. The master of this foreign ship, the *Jenny Lind*, claims in his petition 151*l.* 2*s.* 9*d.* as due to him for wages and disbursements; certain material men who, in England, have supplied this ship with necessaries have intervened and prayed that the sum of 28*l.* 15*s.* 4*d.* may be paid to them in priority to the claims of the master. Both parties have annexed an exhibit to their pleading, the master setting forth an account of his wages and disbursements; the material men an account of their supplies to the ship. No case has yet been decided by the court, as to whether the master or the material man is entitled to priority of lien. In this case, however, the master is also part owner; it must be taken that he ordered the necessities that were supplied, and made application for the advances of money which are granted. The contention on behalf of the master has been, first that he has a priority of lien, as master, of which he is not deprived by the fact that he is also part owner. It has been urged that as the statute, 17 & 18 Vict. c. 104 s. 191, has given him the same lien as to his wages which the common seamen possess, his claim ranks next to theirs, and that his claim has been decided to take precedence over that of the mortgagee and of the bottomry bondholder. The case of *The Feronia* (*sup.*) decided by me, has been cited, as an authority for the first proposition. In that case it was ruled that the master, who was also a part owner, was entitled to priority of payment over the mortgagees. I adhere to my decision in that case, but I do not think the analogy of it governs the case which is now before me. In the *Feronia*, the master, though part owner, had not mortgaged his share in the vessel, and I held that the mortgagee in possession, being obliged to acknowledge the lien of an ordinary master for his wages, was not discharged from his obligation by the fact that the master happened also to be a part owner; but this case would have assumed a very different aspect, and the master would have stood in a different relation to the mortgagee, if he had been also one of the mortgagors. So with respect to the bottomry bondholder, it has been ruled that where the master has signed the bond so as to bind himself he cannot obtain a preference for his wages over the claim of the bondholder. The master who has given the order to the material men is personally liable as on his own contract and has also rendered his owner liable, for whom as agent he made the contract; and in both capacities, as master and owner, he is liable in this case to the creditors. As part owner his ship had had all the advantage from the supply of necessities, and it would be a great injustice if he could cause that ship so advantaged to pay his wages, while by so doing, he left unpaid his share of the debt for the necessities which he had ordered. It has been urged that he is not solely liable for this debt, and that is true; but it seems to me far more equitable that this foreign part owner should be left to recover the proper contribution from the other foreign part-owners, than that I should make a decree which

would have the effect of sending the English material man to hunt out his remedy, and bring his action in a foreign country against the foreign owners, including the present claimant. Secondly, it has been contended on behalf of the master that the exhibit of accounts shows that advances have been made to the managing owner to an amount exceeding his claim, and that such advances were decided in the recent case of *The Riga* (*sup.*) not to be necessary. But in the present stage of this case, and on these pleadings, I think I am bound to assume that these advances were made with the sanction of the master as part-owner, and also that he will be entitled as part-owner to his share of the advances from the managing owner. In the circumstances of this case, I think the material men ought to have priority, and I so decide. The technical form which that decision takes is to admit the answer which has been objected to.

Proctors for the plaintiffs, *Rothery and Co.*

Proctors for the defendants, *Deacon, Son, and Rogers.*

Monday, May 6, 1872.

THE CHARLES.

Salvage—Putting hand on board—Agreement to pay expenses—Apportionment.

Putting additional hands on board a vessel in distress, which has been driven out to sea by stress of weather northward, to assist in bringing her into port, is a salvage service.

The men so placed on board the distressed vessel are the principal salvors, but the owners, master, and crew of the salvaging vessel are entitled to share in the reward; the owners, however, are entitled only to a small proportion as their vessel itself does not under such circumstances render assistance, and the only risk they run is, that she may be short-handed in bad weather.

An agreement entered into between the master of the salvaging ship and the officer commanding the distressed vessel, by which the latter acknowledges the receipt of the men and undertakes "to pay all expenses attached thereby, as my vessel is in distress for want of men, and I cannot bring her in without help" is not such an agreement as will oust the right of the salvors to reward, but is an agreement to pay expenses in all events. (a)

Scemle, even if the agreement did oust the right of the others, it would not affect the right of the men placed on board the distressed vessel.

A brig was driven out to sea northward, and after she had been eighty days at sea and much damaged, with only four men on board, two of them disabled, a ship placed on board of her two hands, who assisted in working her till she was brought off twelve days into port. The brig and her cargo were of the value of 817*l.*

Held, that this was a salvage service. An award was made of 400*l.*, and it was apportioned, to the

(a) In *The Luette* (3 Hagg. 154), a king's ship went to the assistance of a merchant vessel by order of the admiral on the station, upon the express stipulation that "the owners and underwriters would be answerable for the payment of all expenses or damages." It was contended that this agreement barred the right of the officers and men to recover salvage; but Sir John Nicholl held that they were not bound, because they were in the king's service, to run risk of life on salvage, and that they were, therefore, entitled to reward.—Ed.

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owners 50*l.*; to the master 50*l.*; to the crew 100*l.*. To the men placed on board the brig 200*l.*

THIS was a cause of salvage instituted on behalf of the owners, master, and crew, of the American ship *Jairus B. Lincoln* against the English brig *Charles* and her cargo. The *Jairus B. Lincoln* was a ship of 1814 tons register, belonging to Freeport, in the United States and manned by a crew of twenty-two hands, all told. In Oct. 1871 she sailed from the Chincha Island with a cargo of guano, her boatswain being disabled. The *Charles* was a brig of 246 tons register, belonging to the port of Liverpool, and on the 12th Nov. 1871 she sailed from Banana Creek, Congo River, on the West Coast of Africa, bound for Liverpool, laden with a cargo of palm oil and nuts; she was then, according to her protest, "tight, staunch, strong, well found, and tackled, and in every respect fitted, manned, and provided for her voyage." She had on board a crew of nine hands, all told. She proceeded down the Congo River, but did not go to sea, the wind being light. On Nov. 15 her master and four hands went ashore to obtain provisions for the voyage, and whilst he was away she dragged her anchor, and was carried out to sea with the mate and only three hands on board. The mate made several attempts to get back, but as two of the men were ill of scurvy and fever he could not do so. Owing to the illness of these men, he was unable to heave in the anchor, and the vessel drifted to the northward, and the mate, finding it impossible to get back, continued his voyage to Liverpool. The *Charles* continued her voyage for eighty days, sometimes meeting with bad weather, and sometimes light winds, when the mate, finding that the two men continued ill, one of them dying shortly after, and that it was impossible to work the ship, and that she was in danger from the condition of her rigging, spoke the ship *Jairus B. Lincoln*, and requested the master of that ship to let him have two hands to assist. The chief officer of the *Jairus B. Lincoln* went on board the *Charles*, and after some difficulty this was agreed to, and two hands were sent on board. Before this was done, the master of the *Jairus B. Lincoln* wrote out, without the knowledge of the hands, a document, which was read by the mate of the *Charles*, and was signed by him. The document was as follows:—

I hereby acknowledge to have received two men from the ship *J. B. Lincoln*, and that I will pay all expenses attached thereby, as my vessel is in distress for want of men, and I cannot bring her in without help.

At sea, Jan. 28, 1882.

Master of the brig *Charles*, of Liverpool.

(Signed) WILLIAM EVANS, in charge of the brig; master's certificate No. 6186.

Men's names
 } GEORGE KENNINGTON.
 } WILLIAM McDONNATT.

These two men volunteered to go on board the *Charles*, and on doing so found the mate and the steward exhausted with extra work and watching. The standing rigging of the brig was in bad order, and many ratlines were gone and her running gear very bad, and required constant splicing, and the foretopmast staysail had been blown away, and she was badly found in provisions and had no lime juice, vinegar, or vegetables on board, nor any medicine. The brig proceeded on her voyage, meeting with bad weather, and the two men put on board had very severe labour and ran some risk, owing to the brig's lamps being short of oil and

not burning all night; but they arrived safely in Liverpool on 9th Feb. 1872. The *Jairus B. Lincoln* also met with severe weather, and her crew had heavier work in consequence of the absence of the two men. With respect to the document above set out the owners of the *Charles* pleaded in their answer as follows:

9. The chief officer of the *Jairus B. Lincoln*, after communicating with his captain, returned to the *Charles* and told the mate that he could have two men. The said chief officer then told the mate that the two men would have to be paid by the *Charles*, as also the expenses of the men in rejoining the ship, to which the mate assented. The chief officer then produced a piece of paper on which he said was an undertaking on the part of the mate of the *Charles* to pay the expenses of the two men, and asked the mate to sign it. The mate thereupon signed and handed the piece of paper to the chief officer of the *Jairus B. Lincoln*, believing at the time that it contained such undertaking and nothing else.

The value of the *Charles* and her cargo was agreed at 8174*l.*

The owners of the *Charles* and the owners of her cargo appeared separately, the former pleading to the facts and denying that any salvage service was rendered to the *Charles*, and the latter alleging ignorance of the circumstances and denying salvage services to have been rendered. Witnesses were called for the plaintiffs, but none for the defendants.

Butt, Q.C. (T. H. James with him), for the salvors.—This was a salvage service (*The Brig J. L. Bowen*, 25 L. T. Rep. N. S. 136; 1 Asp. Mar. Law Cas. 106), and the owners, master, and crew, are entitled to salvage reward, but the two men who went on board were the principal salvors.

Milward, Q.C. (Phillimore with him), for the owners of cargo on board the *Charles*.—There was no salvage service. These men were sent on board the ship by the order of their master, and were bound by the terms of the agreement entered into by him. That agreement shows that the parties did not intend this to be taken as a salvage service. It was an agreement to render assistance on condition of the expenses of the men being paid by the owners of the *Charles*. The men had no other duties to perform than they would have had on their own ship. They ran no risk.

Myburgh for the owners of the *Charles*.

Sir R. PHILLIMORE.—This is a salvage suit against the vessel *Charles*. The history of this suit is not a little extraordinary. The vessel against which it is instituted is a brig, &c. (His Lordship here proceeded to set out the facts as above.) After the chief officer of the *Jairus B. Lincoln* returned to that vessel, her master consented to put on board the *Charles* two of his men; but before doing so he wrote out the agreement which has been given in evidence in the course of the case, and that agreement, with the exception of the signature, is in his handwriting. This agreement was taken on board the *Charles* by the chief officer of the *Jairus B. Lincoln*, and was shown to the mate of the *Charles*. It was signed by him, and he appended to it the number of his registered certificate. The defendants have submitted that this paper is in itself sufficient to disprove the plaintiffs' case, so far as their right to salvage remuneration is concerned, for the defendants say that the paper was clearly an agreement entered into by the master of the *Jairus B. Lincoln* to render assistance to the *Charles* upon the terms expressed in the agreement,

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namely, that the expenses of the men transferred to the *Charles* should be borne by the owners of that vessel, and the defendants contend that this stipulation as to the payment of their expenses excludes the notion of salvage reward. I cannot take this view, and I consider that the document was merely intended as a security that, whatever happened, the expenses of these two men should be paid by the owners of the *Charles*. Even if this were not so, I could not hold that this agreement ousted the right of these two men to salvage reward, and I consider that they would be entitled notwithstanding. The defendants have tried to make out that the mate of the *Charles* understood the agreement in the sense for which they contend. But their answer is inconsistent with this contention, for it clearly shows that the mate understood that the agreement related to the payment of the men's expenses and that only. That the mate understood the matter at that time is clearly shown by the evidence. He read the paper aloud and then signed it. I therefore think that as far as this document is concerned, it may be entirely laid aside in considering the question of salvage. Now, as to the question of whether this is to be considered a salvage service, I am clearly of opinion that the putting these two men on board the *Charles*, under the circumstances shown in the case, gives a right to salvage reward to owners, master, and crew, in due proportions according to their respective merits. With respect to the owners, the court is not inclined to think that they are entitled to a large reward, as the ship itself did not render any assistance. Still the court considers they are entitled to some reward, as the ship and crew seem to have been subjected to very bad weather, and the period of the year at which the service was rendered made the risk of parting with two of the crew very considerable. Then the master is also entitled to share, as it was upon his responsibility that the two men were sent on board the *Charles*. It cannot, however, be doubted that the principal salvors were the two men who went on board the *Charles*, and it is impossible to read the protest of that ship, and to hear the evidence, without being convinced that a material service was rendered. The two men had to put up with great discomfort from the want of food and medicine; their labour was exhausting, and they ran risk from the ill-health of others on board the *Charles*. The value of ship and cargo was £1744. I shall award in respect of this service the sum of 400*l*. Of this, I consider the two men who went on board the *Charles* are entitled to 200*l*; and to the crew left on board the *Jairus B. Lincoln* I shall apportion the sum of 100*l* to compensate them for the extra labour thrown upon them by the absence of the other two. To the owners I give 50*l*, and to the master 50*l*.

Solicitors for the plaintiffs: *Bateon, Robinson, and Morris*.

Solicitors for the owners of the ship: *Thornely and Archer*.

Solicitors for the owners of cargo: *Wallons, Bubb, and Walton*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Jan. 30; Feb. 3 and 21, 1872.

(Present: The Right Honrs. Sir JAMES W. COLVILLE, Sir ROBERT J. PHILLIMORE, Sir JOSEPH NATHIE, Sir MONTAGUE SMITH, and Sir ROBERT P. COLLIER.)

MESSINA v. PETROCCHINO.

Foreign judgment—How far conclusive—Greek Consular Court—Bottomry—Average statement.

A cargo, belonging to a Greek owner, and shipped on board a Greek ship, was consigned to the appellant to be delivered at Malta. On the voyage bad weather was encountered, some of the ship's boats and apparel were jettisoned, and the ship arrived at Constantinople in a damaged state. The captain made a protest before the Greek Consular Court there, and applied for a survey of the ship and cargo. The surveyors, appointed by the Court, reported and recommended a transshipment of the cargo, and the appointment of a curator thereto. A curator, whose agent was the respondent, was accordingly appointed by the court. The captain further petitioned for the appointment of average staters. The average staters, appointed by the court, decided as to the expenses to be put in particular and general average, &c., and advised that power should be given to the curator to contract a bottomry bond to pay freight, average expenses, &c., under hypothecation of the cargo.

The decision of the average staters was confirmed by the Greek Consul-General, who declared it to have the force of a thing adjudicated, and a bottomry bond was ordered and given. On arrival of the cargo at Malta, the respondent refused to deliver the cargo without payment of the bottomry bond, and the appellant at last paid under protest, and instituted proceedings in the courts at Malta:

Held (on appeal from the Court of appeal at Malta) that, as the Greek Consular court at Constantinople was a competent court to exercise jurisdiction in such matters, it must be presumed that that Court rightly interpreted and applied the Greek law; that by that law the court had the power and duly exercised it of deciding that Constantinople should be considered as the port of destination, and that the average should be adjudged at that port; that the bottomry bond was necessary and valid, though made without communication with the owners of the cargo, or their agent; that the court had power to appoint the average staters, and that their decision gave authority to the curator to transship the cargo and to contract the bottomry bond; and that this decision was rightly confirmed by the Greek Consul-General.

Dent v. Smith, 3 Mar. Law Cas. O. S. 251, approved. This was an appeal from a decision of the Court of Appeal at Malta, reversing two judgments of the Court of Commerce at Malta. The suit was instituted to contest the validity of a bottomry bond upon a cargo of wheat belonging to the appellant, given at Constantinople under a decree of the Greek Consular Court at that place. The ship *Evangelistria* carrying the cargo put into Constantinople damaged, under circumstances set out in the judgment of the Privy Council, and the master made a protest in the Consular Court, and

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applied for the appointment of surveyors, who were appointed by the court. The master carried a letter of recommendation to one Cosnudi as agent for the shipper at Constantinople, but did not apply to him for assistance. Cosnudi, however, was aware of the ship's arrival, for eight days after her arrival he wrote to the appellant, enclosing the charter-party, which had been forwarded to him by the shipper, and announcing the ship's arrival, and saying that she was still there, and that she had suffered some damage, viz.: "he has lost the boat cordage," &c. The surveyors sent in a first report, to the court, which is set out in the judgment of the Privy Council and a curator, one Dimitrisopolis was appointed, who chartered the *Otto Sorelle* under the double condition to serve as store, or to send, in case of need, the cargo to its destination. The cargo was transhipped on board the *Otto Sorelle*, and on 23rd Jan. 1867, the surveyors again surveyed the ship, and reported that as "the repairs to the hull of the *Evangelistria* cannot be but greatly delayed in this rather advanced winter time," and as "it would not suit the parties concerned in the cargo to cause it to wait for the repairs above-named and overcharge it with enormous expenses of storage," it would be more suitable to send the cargo on to its destination in the *Otto Sorelle*, and they fixed the amount of damage sustained by the *Evangelistria*. This report was confirmed by the Greek Consul-General, and thereupon the master applied on 25th Jan. 1867, for average or judicial staters to fix the amount of average in respect of the injuries received, and the freight due for the part of the voyage performed. They were appointed by the court and made their settlement or sentence in the terms set out in the judgment, but also alleged as reasons for their report, that "the cargo of the *Evangelistria* being sent to its destination by another vessel, its voyage must be considered as finished in this port, and in this manner is to be fixed the freight due for the voyage performed;" that "by a constant practice adopted in this city to ships coming from Azoff, bound for the Mediterranean, were always granted two-thirds of the freight and prime, and the entire gratuity" (to the master); that "the curator of the cargo having to pay the freight that shall be adjudicated due to the vessel *Evangelistria*, the expenses of the present average, &c., power must be given to him to contract a bottomry bond under hypothecation of the cargo sent to its destination;" that "in general averages, contribute, the value of the cargo less freight, and the vessel at half its value and half its freight." In this sentence under the head of general average was inserted the whole of the damage sustained by the ship, caused both by jettison and by injury sustained during the act of jettison by one of the boats being struck by a sea and so getting loose and breaking the bulwarks. The sentence was submitted to the Greek Consul-General and he endorsed it. "Having seen the present sentence and general average settlement we confirm it to have the force of a thing adjudicated, and send it to the Chancellerie for its due communication and execution," and he signed it. The sentence was in the usual form of a French or Greek judgment. The proceedings thereon are set out in the judgment of the Privy Council. The curator had acquainted the shipper with the fact of his appointment immediately

after the first survey, by telegram. Negroponte, the shipper, thereupon wrote to the master of the *Evangelistria* complaining that he had not applied to Cosnudi, who had in hand funds of the shipper, but took no steps to upset the proceedings in the Greek Consular Court.

On the receipt of the bottomry bond, bill of lading, and the average statement by the respondent as agent for the curator and the leader on bottomry, the appellant refused to pay the bond, and protested against the non-delivery to him of the bill of lading, but on 27th Feb. 1867, deposited in the Court of Commerce at Malta the amount of the bond as security till it should be decided whether the bond was valid, and asked the court to order the bill of lading to be delivered up to him. On 6th March 1867, the appellant consented that the respondent should take out of court the amount paid in conditionally, and bound himself to bring forward, within a time to be fixed by the court, his claim to be released from the bond. The Court of Commerce thereupon ordered the bill of lading to be delivered up on condition that the appellant should, within two days, bring forward in a suit by way of citation the grounds on which he disputed the validity of the bond. The suit mentioned in the judgment of the Privy Council was thereupon instituted and proceeded as there set out, and on appeal the appellate court held, on 16th Dec. 1867, that the Court of Commerce had jurisdiction as to the average acts, but that the decision as to the invalidity of the bottomry bond must be set aside until the question as to the average acts had been decided. The question again came before the Court of Commerce, and that court dismissed the respondent from the suit as set out in the judgment of the Privy Council. From this decision both parties again appealed to the appellate court the respondent alleging as a ground of appeal that the Court of Commerce should have decided for the absolute exclusion of the appellant from all claim to recover the amount of the bond, and not merely that the proceedings were irregular.

The appellate court at Malta, thereupon, reversing the decision of the court below, delivered on the 20th July 1868, a judgment, the substance of which is set out in the judgment of the Privy Council, holding, *inter alia*, that the proceedings in the Greek Consular Court, had been in accordance with the provisions of the French Code de Commerce (Articles 245, 247, 254, and 312), which was adopted as the law of Greece by ordinance in April 1835, and deciding—

"For the exclusion of the demanded declaration that the acts made in Constantinople are null, irrelevant, and of no validity, and to which the citation refers, inasmuch as they might concern the said bottomry bond; and also for the exclusion of the demanded nullity of the said bottomry bond, and revoking the two sentences delivered by Her Majesty's Court of Commerce, one upon the merit on 22nd June 1869, and the other about the said acts on 26th May, 1868.

"Costs of first and second instance to be paid by the plaintiff."

From this judgment the plaintiff appealed.

Manisty, Q.C., and Baylis, for the appellant contended that the proceedings in the Greek Consulate were irregular and invalid, no notice of the proceedings having been given to the owners of the cargo or their agent at Constantinople. This court may review the proceedings in the Greek

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court for error on the face of those proceedings:

Simpson v. Fogo, 1 Mar. Law Cas. O. S. 312; 8 L. T. Rep. N. S. 61; 32 L. J. 249, Ch.;

Scott v. Pilkington, 6 L. T. Rep. N. S. 21; 31 L. J. 81, Q. B.;

Bank of Australasia v. Nias, 16 Q. B. 717.

It must be admitted that there is a Greek Consular Court having jurisdiction in maritime questions, but the court has done acts contrary to maritime law; the respondent asserts that the Greek court had jurisdiction to do something which the maritime law does not sanction, and he must, therefore, show positively that such jurisdiction exists. A master selling his ship under the authority of vice-admiralty courts can give no title, as they have no jurisdiction:

Reid v. Darby, 10 East, 143;

Morris v. Robinson, 3 B. & C. 196.

The average statement was erroneous and untrue on the face of it, inasmuch as the cargo is made to contribute its full value (freight being deducted), and the ship on half its value and half its freight; and because the statement includes many items which are not the subject of general average, and to which the cargo was not bound to contribute. Freight *pro rata* was not due. The master could have repaired, and he was bound to do so. If he could not repair, he ought to have sent the cargo on at his expense; or he could have no claim for freight.

Fletcher v. Blasco, 14 C. B. N. S., 162;

Code de Commerce, Art. 296;

Abbot on Shipping, 11th edit. pp. 327, 365;

Kent's Commentaries, 11th edit. tit. 211;

Hunter v. Princep, 10 East, 378;

Skipton v. Thornton, 9 Ad. & El. 314.

The statement should have been made at Malta, which was the place of discharge:

Fletcher v. Alexander, L. Rep. 3 C. P. 375; 3 Mar. Law Cas. O. S. 69;

Simonds v. White, 2 B. & C. 805.

The adjustment, therefore, should be in accordance with English law: (*Pover v. Whitmore*, 4 M. & Sel. 141.) There was no necessity to raise money on bottomry; nor had the curator any right under the circumstances to hypothecate the cargo, without communicating with the owners or their agent, more especially as they had an agent with funds in hand at Constantinople. The lender was bound to see that there was a necessity for hypothecation, and that the owner had been communicated with:

The Aurelia, 3 Hagg. 75;

The Royal Stuart, 1 Jar. N. S. 1116; 2 Spinks' Adm. Rep. 258;

Heathorn v. Darling, *The Etina*, 1 Moo. P. C. C. 5;

The Hamburg, 2 Mar. Law Cas. O. S. 1; 8 L. T. Rep. N. S. 175; 2 B. & L. 233; 9 Jar. N. S. 445.

The bottomry bond was therefore invalid, or, if held valid in part, then it must stand as security for that part only.

Butt, Q.C. and *Clarkson*, for the respondent, contended, and the proceedings taken under the direction of, and confirmed by, the Greek Court, had been judicially determined, and could not be questioned: (*Castrigue v. Imrie*, 3 Mar. Law Cas. O. S. 454; 23 L. T. Rep. N. S. 48; L. Rep. 4 H. of L. 414.) This court is not a court of appeal from a Greek consular court. There is nothing contrary to law maritime, or natural justice, in the decision, but it is quite in accordance with the practice of the consular courts in the Levant, and with the provisions of the French code. The powers of those consular courts are necessarily

large, as they have jurisdiction in all matters affecting the interests of persons of their own nationality resident in Mahomedan countries:

The Laconia, 1 Mar. Law Cas. O. S. 378; 9 L. T. Rep.

N. S. 37; 2 Moo. P. C. C. N. S., 161;

Dent v. Smith, 3 Mar. Law Cas. O. S. 251; 20 L. T.

Rep. N. S. 868; L. Rep. 4 Q. B. 414;

Wheat Int. Law, 2nd edit. by Lawrence, 224, note.

The bottomry bond was necessary. The average statement was made, and the bottomry bond was given under the directions, and with the sanction of a competent court, and with all requisite formalities. If the formalities prescribed by the French code had been complied with, a *bond fide* lender acquires, by French law, a right to recover his money even in case of fraud on the part of the master. (n)

Emerigon Traité des Contrats à la Grosse, c. 4, s. 8;

Bonlay-Paty, tom. 2, p. 80, *et seq.*

The appointment of a curator is a thing well known in continental courts. (b) This must be presumed to be the judgment of a competent tribunal, by which not only was a curator appointed but was ordered to bottomry. The cargo and the bond cannot, therefore, be impeached. The average expenses were duly and properly settled at Constantinople, which was the place of transshipment or separation of the ship and cargo:

1 *Parsons on Shipping*, 465;

2 *Phillips on Insurance*, 134.

Even if the average statement is bad, it does not follow that the bottomry bond is bad. The lender taking the bond under the authority of the court was absolved from inquiring as to the necessity. If the appellant objected he should have gone to the proper appellate tribunal at Athens.

Manisty, Q.C. in reply.—*Dent v. Smith* (sup.) was decided upon evidence showing the jurisdiction of the consular court. Here, there is no evidence of jurisdiction, and as the respondent is really claiming the payment of the sum lent on bottomry, it is for him to show that such jurisdiction existed. *Our. adv. vult.*

Judgment was delivered by SIR ROBERT PHILLIMORE:—This is an appeal from the Court of Appeal at Malta, in the matter of a bottomry or hypothecation bond. In Oct. 1866, Negroponte, a merchant at Tegenag, shipped, at Berdianski, a cargo of wheat belonging to a Greek owner, on board a Greek ship, the *Evangelistria*, and con-

(a) The formalities required by the French Code de Commerce to be observed by a master requiring to raise money on bottomry, are that he should, when abroad, go before his consul and receive an authorisation to contract the loan, when at home, before the Tribunal de Commerce or the *juge de paix*. This is prescribed by Art. 234 of the code, but it has been laid down by the Court of Cassation in Paris, that the neglect to observe the formalities prescribed by that article does not prevent a loan upon bottomry from being obligatory upon the shipowner when entered into by the lender *bond fide*, and that this ruling holds good even when the loan has been contracted abroad by a foreign master with a French lender who seeks to recover in France the repayment of his loan. See Dalloz, *Jurisprudence Générale*, tom. xviii., tit. "Droit Maritime," Nos. 442, 443, and Dalloz *Jurisprudence Générale Année 1845*, Prem. Partie, *Contré de Cassation*, p. 313.—Ed.

(b) There does not appear to be in the Code Civil of France any express power to appoint a curator, although by Art. 112, the courts are empowered to arrange for the administration of the property of absent persons who have no appointed agents, and it is the universal practice to appoint a curator where necessary: (Code Civil, Art. 112; Dalloz, *Jurisprudence Générale*, vol. 2, tit. "Absence," No. 92).—Ed.

signed it to Messina (the appellant), to be delivered to his order at Malta, or at such ports as the consignee should there order. The captain, Frutta, had letters of recommendation to Cossudi, the agent at Constantinople for Negroponte. Negroponte and the appellant are jointly interested in the shipment. The charter-party was sent by Negroponte through Cossudi to Messina, the appellant. The *Evangelistria* sailed, she encountered bad weather, and was obliged to jettison some of her boats, sails, chains, and other apparel. She put back to Sebastopol, but made no protest in that port; she sailed again, and again encountered bad weather, which necessitated further jettison, and arrived in a damaged condition at Constantinople on the 27th Dec. Upon the 30th Dec. the captain went before the Greek Consular Tribunal (or the Greek Royal Commercial Chancery, as it is called) at Pera, made a protest, and applied for the survey of the ship and cargo; the court appointed surveyors, who drew up "a sentence and average settlement." In their first report the surveyors, after stating various reasons, said:—"Whereas, for the above reasons, the cargo of the *Evangelistria*, must be transhipped on another vessel, to be chartered under double condition, to serve as store, or to send, in case of need, the cargo to its destination: Whereas, there being in this town no legitimate representative of the owner of the cargo, a curator to the same must be named by the competent authority: Moved by these reasons, we have unanimously agreed that the Royal Greek Commercial Chancery should appoint a curator to the cargo, who, with the knowledge of the representative of the underwriters, will charter a vessel of the same burden as the *Evangelistria*, with the double condition to serve as store, or, if necessary, for carrying the cargo to its destination, and to commence without loss of time the transshipment of the cargo in question." A Greek merchant, by name Dimitriacopulo, was appointed curator by the court; his agent is Petrococcchio, the respondent. In their second and last report the surveyors recommended that the cargo should be forwarded to its destination on board a vessel called the *Otto Sorelle*; the captain further petitioned for the appointment of "average or judicial staters;" they were appointed by the court, and decided, among other things, as follows:—"First, that the expenses of transshipment made by the curator to the cargo, his commission, the interest of the bottomry bond, and the remaining freight to be paid to send the cargo to its destination, must be classified in particular average to be suffered by the cargo alone; secondly, that in the general average must be put the damages of the vessel, fixed by the surveyors at 44,558 piastres, the expenses of survey and towing, &c., incurred by the captain, the fees of Chancery, the fees of the legal adviser and compiler of several acts, the fees of the judicial staters, of the representative of the underwriters, and the compiler of the present decision and average settlement, for which expenses the cargo will contribute with its value, freight deducted, and the vessel with half its value and half its freight, as it is to be seen by the settlement prospects which is to form an integral part of the present sentence; thirdly, that the freight of the vessel *Evangelistria* is fixed to two-thirds of the freight agreed on in the charter-party, to two-thirds of primage, and the gratuity entire, free of contribution; fourthly, that power should be given

to the curator of the cargo to contract a bottomry bond for the sum necessary to pay the freight of the *Evangelistria*, average expenses, &c., under hypothecation of the wheat cargo, sent to its destination by the vessel *Otto Sorelle*." This decision was confirmed by the Greek Consul-General, who declared it to have the force of a thing adjudicated: a bottomry bond was also ordered and was given to M. Fracher as a security for 35,760*l*, 5*s*. The bill of lading, the average statement, and the bottomry bond, were sent by the curator to Petrococcchio, at Malta. The *Otto Sorelle* arrived with her cargo at Malta on the 26th Feb. 1867. Petrococcchio refused to deliver the cargo without payment of the bottomry bond. Messina, the appellant, refused to pay, and at last paid under protest, and litigation ensued. A suit was instituted by the appellant against Petrococcchio in the Court of Commerce. The appellant called upon him to show cause why, in the first place, the pretended "Average Acts," made at Constantinople, should not be declared irregular, null, and of no validity on account of inherent faults, for want of authority and jurisdiction, and for the errors they contained, and for other reasons to be orally alleged, and why as a consequence, the said pretended bottomry bond should not be declared null and void, and if necessary, annulled without prejudice to the right of the parties, or whomsoever else it might concern, including the said Captain Giovanni Frutta, to proceed to a regular average statement in the place where the voyage of the *Evangelistria* ought to have terminated, and claimed damages against Dimitriacopulo (without prejudice to an action against him for fraud) with costs against the respondent. The Court of Commerce decided against the appellant on the ground that it had no jurisdiction in the matter of the average, but in his favour as to the bottomry bond, declaring it void. Both parties appealed to the Appellate Court at Malta, which decided that the inferior court had jurisdiction as to the average, but gave no judgment as to the bottomry, and remitted the case. The Court of Commerce, on the 26th May 1868, gave judgment that the said suit, so far as it related to the demand for the nullity of the said average acts, had been "illegally observed," by reason of the appellant not having summoned all the parties concerned in the said average acts, and especially Captain Frutta, of the brig *Evangelistria*, and that nothing was proved sufficient to make Dimitriacopulo liable in damages, and decided for the discharge of the respondent *nomine* (that is, in the character in which he was sued) *ab observantia Judicii*, with costs; the effect of which judgment was equivalent to a nonsuit. Both parties again appealed; and on the 20th July 1868, the Appellate Court decided that the "Captain of the *Evangelistria*, having taken the legal course in going before the Consular Tribunal at Constantinople, and that court having, on the report of experts of the necessity for reloading and transshipping the cargo in order to repair the ship, appointed Dimitriacopulo curator of the cargo, and declared the voyage of the *Evangelistria* ended at Constantinople, and authorised Dimitriacopulo to give a bottomry bond, he must be considered by a third party as the attorney for the owners of the goods, and had authority to hypothecate them. That where the formalities of a consular authority and verbal

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process justifying the expenses necessitating the loan are observed, the lender on bottomry is exonerated from seeing the necessity of the loan proved. That in the present case the sentence of the court supplied the consular authority, and the expenses having been incurred under the control of the consul, and sanctioned by the sentence, the production of verbal process was not important, and that substantially the formalities were to be taken as complied with, and that the lender was not bound to make inquiry as to the facts causing the necessity of the loan. That there was no proof of any fraudulent collusion between Facher, the lender of the money, and Dimitriacopulo, or that Dimitriacopulo stimulated expenses, or committed any irregular or deceitful acts to the damage of the cargo, or even, if he had himself acquired an interest in the bond, would that have affected its validity, and that any omissions on his part, even if they resulted in damage, and gave a cause of action, would not nullify the bond, and that it was not necessary to summon Captain Fratta, the master of the *Evangelistria*. From this decision the appeal has been prosecuted to this tribunal. It has been strongly urged upon their Lordships that all the proceedings in the Greek Consular Court, which were in substance upheld by the Court of Appeal in Malta, were invalid; and principally upon the following grounds: that, with regard to the bottomry bond, no adequate necessity is shown for having recourse to it, and also that it is bad because not preceded by any communication or attempt at communication with the owner of the cargo; and, with regard to the general average, that the proper place for the adjustment of it was Malta, the port of destination, and not Constantinople. Their Lordships are called upon now to pronounce a judgment in favour of these propositions, sitting as an appellate tribunal from the Court of Malta; in other words to give that judgment which it is alleged that the court appealed from ought to have delivered. Their Lordships are not sitting as an appellate tribunal from the Greek Consular Court at Constantinople. It is necessary to make this statement in limine, however obvious it may appear, for the following reason. If the Greek Consular Tribunal was a competent court, having jurisdiction over the ship and cargo, then the sentence of that court was not open to examination by the court at Malta, but would be properly enforced by it, or, to borrow the clear language of Lord Ellenborough in *Power v. Whitmore*, "By the comity which is paid by us to the judgments of other courts shrood of competent jurisdiction we give a full and binding effect to such judgments, as far as they profess to bind the persons and property immediately before them in judgment, and to which their adjudications properly relate"—4 *Mau. & Sel.* 150 (1815). And it is to be observed that, though the earlier cases exhibit some fluctuation and variety with respect to the application of this doctrine, it has become firmly established by a series of later cases as an unquestionable maxim of our jurisprudence. The strongest and the last case is that of *Castrique v. Jurie* decided by the House of Lords in 1870: (L. Rep. 4 H. L. Cas. 414; 23 L. T. Rep. N. S. 48). The foreign judgment of a competent court may indeed be impeached, if it carries on the face of it a manifest error; if it is shown to have been attained by fraud, or to be wanting in the conditions of natural justice; and it cannot be supplied to persons other

than those who were parties to the litigation decided by it, except in cases where the judgment is *in rem*. No such infirmities can in this case be predicted of the decree and orders of the Greek Court, and therefore the consideration as to the competency of that court alone remains to be considered. It has been much pressed upon us that there is no evidence of such competence, and that the acknowledged rules of the general maritime law applicable to bottomry bonds on cargo have been violated by the proceedings of the court. Now this was the sentence of a Greek Consular Court sitting at Constantinople upon a Greek ship, and a cargo owned by Greek subjects. The holder of the bottomry bond was a stranger who, acting *bonâ fide*, advanced his money on the bond. That the Ottoman Porte has given to the Christian Powers of Europe authority to administer justice to their own subjects according to their own laws within its dominions is a fact *publici juris*, which their Lordships are not now called upon for the first time to take cognisance of, and which they fully recognised in the case of the *Laeonia* (*sup.*). It would be strange, indeed, if it had been otherwise, inasmuch as Her Majesty has established a Supreme Consular Court at Constantinople and provincial courts, with rules for the exercise of civil and criminal jurisdiction. This kind of jurisdiction exercised by the consuls of Christian states in Mahometan countries is to be carefully distinguished from the ordinary powers exercised by foreign consuls in Christian states. Judicial cognisance being therefore taken by their Lordships of the fact that a Greek tribunal, capable of exercising jurisdiction in this case, existed at Constantinople, it is the duty of their Lordships to apply to such a tribunal the ordinary principles which regulate the reception of the judgment of a foreign tribunal by other courts. During the course of the argument our attention was properly drawn to the case *Dent v. Smith* (*sup.*), in which the competence of the Russian Consular Court at Constantinople was placed upon this footing by the Court of Queen's Bench. In that case, the particulars of which it is not necessary to mention, Cockburn, C.J., said:—"The facts lie in a very narrow compass. The ship, having become a Russian ship, is wrecked in Turkish waters; the gold, the subject matter of this insurance, is saved by being immediately sent on shore, the captain taking advantage of having to send his boat, and thinking it best to save this portion of the cargo, which, of course, was by far the most valuable part, and, from its small bulk, the part most easily saved. He deposits it, or causes it to be placed in the hands of the Russian consul. It is unnecessary to follow these proceedings in any detail through their course; but afterwards a claim is made in respect of the expenses which were incurred in endeavours to save the ship, and the rest of the cargo on the gold in the consul's hands; and in the end, the matter having been investigated by persons appointed by the Russian consul, judgment is given as to the amount which shall be contributed by the owners of the gold to satisfy the claim for contribution in respect of the expenses. That judgment is ratified, as it is necessary it should be, by the Russian Minister at Constantinople, and being so ratified, and not being appealed against within a certain time, the judgment became a binding judgment upon the parties concerned. That being so, the owners of the gold being shown

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to have no alternative in order to get the gold, but to submit to the payment of this percentage, and in the meanwhile they or someone, having given security, in the end they were obliged to pay the money themselves. Now, it has been contended, on the part of the defendants, that the proceedings of the tribunal by which this judgment was given were wrongful in many respects. In the first place, that, having to apply the Russian Commercial Code, they applied the French. I think there is quite a sufficient answer to that. It appears that, in matters relating to maritime law in which the jurisdiction of the Russian Consulate has to be exercised, they have not at Constantinople the presence and assistance of Russian advocates to explain the law, whereas there are French advocates resident there, and the laws of the two countries being with reference to these matters almost the same, they had recourse to the French law, and applied it in this instance. Whether this is strictly right or wrong, I do not take upon myself to pronounce, for I think it is a matter with which we have nothing to do; but if in this case they applied the French law as a substitute for the Russian, I think we must take it that they did it with proper authority. Then it is said that they applied the law erroneously. Again, I think we have not to deal with that. We are not to sit here as a court of appeal against any judgment pronounced by a court, which must be taken to be one of competent jurisdiction in the administration of Russian law, and whatever was substituted became for the time Russian law in respect of matters of maritime law. The proper tribunal to appeal to, if there was any ground of appeal, was to the Court of St. Petersburg. With the principles of this judgment their Lordships are disposed entirely to agree. They think it must be presumed that the Greek court rightly interpreted and applied the Greek law; that by that law they had the power, and duly exercised it of deciding that, in the circumstances, Constantinople should be considered as the place of the ship's destination, and the average adjusted according to the Greek law in force at that place; and that the bottomry bond was necessary and valid, though entered into without citing M. Cassudi, the agent of the owners of the cargo, who was, however, their Lordships must remark, aware, as is proved by his letter, of the arrival of the ship in a disabled state at Constantinople, and, it must be presumed, of the proceedings in the Greek Court, though he did not appear and take any part in them. It must also be presumed that the court had power to appoint the average or judicial staters, and that their decision gave authority to the curator of the cargo to contract the bottomry bond in question with Fischer, and to tranship the cargo on board the *Otto Sorelle*; and that this decision was rightly confirmed by the Greek Consul-General. Their Lordships do not feel themselves at liberty to enter into the discussion into which they were invited by counsel for the appellants, or into the question whether the Greek law be or be not at variance with the general maritime law upon these points. They would be properly raised on an appeal to the Greek Appellate Court, whether sitting at Athens or elsewhere; and could not properly be discussed either before the court at Malta or before this tribunal. Their Lordships must, therefore, humbly advise her Majesty that the judgment appealed

from be affirmed, and the appeal dismissed with costs against the appellant.

Judgment affirmed.

Solicitors for the appellant, *Redpath and Holdsworth*.

Solicitor for the respondent, *Thomas Cooper*.

COURT OF QUEEN'S BENCH.

Reported by J. SUGGAT and M. W. MCKELLAR, Esqrs.,
Barristers-at-Law.

Thursday, May 9, 1872.

HARRISON v. GARTHORNE.

Charter-party—Dangers excepted during voyage—Ship to arrive within specified time.

By a charter-party, plaintiffs, as owners, agreed with defendants, as charterers of a good screw steamship, name to be given up as soon as known, expected to carry from 1100 to 1200 tons cargo, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, should, with all convenient speed, sail and proceed to Alexandria, to arrive within a margin of three weeks from 15th Nov. 1870; and with liberty to take a cargo out for owner's benefit, either direct or from or to any neighbouring ports; and there load a cargo from charterer's agents, and proceed to Hull or London at certain rates in full of all pilotages and port charges during the said voyage, all dangers and accidents of the seas, &c., "during the said voyage always excepted." The plaintiffs alleged, as a breach of the charter-party, that the said steamship, although duly named by the defendants, did not arrive at Alexandria within the stipulated period. Defendants pleaded dangers of the seas after the name of the ship was given up by the plaintiffs, and whilst on her voyage to Alexandria pursuant to a charter-party, which presented her reaching her destination at Alexandria:

Held, upon demurrer, that this plea was good.

THIS was a demurrer to a plea.

The action was brought by charterers, described in the charter party as "James Harrison and Sons," against shipowners, described as "Hornstedt and Garthorne;" the declaration set out the charter-party as follows:—

Hull, 8th Oct. 1870.

It is this day mutually agreed between Hornstedt and Garthorne, agents of a good screw steamship or vessel, name to be given up as soon as known, expected to carry from 1100 to 1200 tons cargo, and Messrs. James Harrison and Sons, of Hull, merchants; that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Alexandria, to arrive within a margin of three weeks from 15th Nov. 1870, and with liberty to take a cargo out for owner's benefit either direct or from or to any neighbouring ports, or so near thereto as she can safely get, and there load from the agents of the said freighters a full and complete cargo of cotton seed or other grain or seed at proportionate rates, merchants finding masts and the ship wood for damage. The cargo to be brought to and taken from alongside the vessel at merchant's risk and expense, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and, being so loaded, shall forthwith proceed to Hull or London as ordered on signing bill of lading, or so near thereto as she can safely get, and there deliver the same on being paid freight, at and after the rate of 25s. per ton delivered if to Hull; 27s. 6d. per ton delivered if to London, in full of all pilotages and port charges during the said voyage (the cost of God, the Queen's enemies, fire, and all and

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every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever during the said voyage always excepted). Freight to be paid on unloading and right delivery of the cargo as follows, say in cash. Steamer to be loaded in Alexandria with utmost customary steamer dispatch, and to be discharged as fast as she can deliver; and to be discharged over and above the said lying days at 35s. per day. The owner or captain to have a lien on the cargo for all freight, dead freight, and demurrage. A commission of 5 per cent. on the amount of freight, prime, and demurrage is due by the owners to Hornstedt and Garthorne on the signing of this charter-party, ship lost or not lost; and the vessel on her return to the United Kingdom to be reported at the Custom House by them or their Agents. Penalty for non-performance of his agreement estimated amount of freight and demurrage. Ship free of address.

JAMES HARRISON AND SONS,
HORNSTEDT AND GARTHORNE.

The declaration averred that the said charter-party having been made and entered into, the defendants duly gave up to the plaintiffs the name of the *Asarte* as the screw steam ship or vessel by which the voyage in the said charter-party mentioned was to be performed, and all conditions were performed, and all things happened and existed, and all times elapsed necessary to entitle the plaintiffs to have the said ship or vessel sail and proceed to Alexandria, and arrive there within a margin of three weeks from the 15th Nov. 1870, being the time in that behalf stipulated for by the said charter-party. Yet the said ship or vessel did not arrive at Alexandria aforesaid within the time stipulated for by the said charter-party, but on the contrary thereof arrived there a long time after the expiration of the said time so stipulated for her arrival there as aforesaid. Whereby the plaintiffs were hindered and prevented from loading the said ship or vessel, and dispatching her from Alexandria aforesaid with her agreed cargo so soon as they might and otherwise would have done. In consequence thereof the plaintiffs were hindered and prevented from receiving the said cargo at her port of destination so soon as they ought and otherwise would have done, and were thereby hindered and prevented from using and disposing of the said cargo as they otherwise might and would have done, and were put to and incurred great expense in and about providing other cargo in the place of the said cargo; and lost and were deprived of great gains and profits; and the said cargo became and was of much less value than it would have been if the said ship or vessel had arrived at Alexandria aforesaid as agreed.

To this declaration the defendants pleaded, secondly, that the said ship or vessel was prevented from arriving at Alexandria aforesaid within the time stipulated for by the charter-party by reason of perils and casualties excepted in the said charter-party, that is to say, by dangers and accidents of the seas, rivers, and navigation, which happened after the name of the said ship or vessel was given up to the plaintiff as alleged [and (a) whilst on her passage to Alexandria pursuant to the charter-party], and not otherwise.

Kemplay, Q.C. for the plaintiffs, urged that this plea was bad. The exceptions of dangers and accidents in the charter-party relate only to the voyage from Alexandria to Hull, or London, for which the vessel was chartered. In the case of *Crookevill v. Fletcher* (1 H. & N. 893), the words

of the exception were "the act of God," &c., "throughout this charter-party always excepted." The contract was concerning a ship "now at Amsterdam, and to sail from thence for Liverpool on or before the 15th of March next." The ship was prevented from sailing from Amsterdam by the act of God; yet it was held that the sailing as agreed was a condition precedent to the charterer's obligation to load. In *Crow v. Falk* (8 Q. B. 467), the contract was that a ship, then at Liverpool, should there receive and load a cargo from the charterers, and proceed to Stettin, "restraints of princes, &c., during the said voyage always mutually excepted." It was held that this exception was applicable only after the ship quitted Liverpool. Although in *Brace v. Nicolopulo* (11 Ex. 129), the contract being that the ship should after discharging her outward cargo, proceed to Galatz or Ibraila, as ordered at Constantinople, it was held that the restraints of princes, "during the said voyage always mutually excepted," applied whilst the ship was at Ibraila, that is no authority in favour of this plea. In *Valente v. Gibbs* (6 C. B. N. S. 270), the ship was lying at Genoa, whence she was to sail to Monte Video, and the Chincha Islands, from the latter of which she was to take a cargo of guano to the United Kingdom. After provision for days of loading, the charter-party arranged for the payment for unnecessary detention at any other period of the voyage. It was held that detention at Genoa before sailing was not at any period of the voyage, within the payment clause. In the more recent case *Barker v. McAndrew* (2 Mar. Law Cas., O. S. 205; 18 C. B. N. S., 759), the ship was at the time of the charter-party at Newcastle, and was prevented by excepted dangers from receiving on board more than part of her cargo; the voyage was in fact commenced from the commencement of the loading, and the exceptions during the said voyage were properly held to apply; the circumstances of this case are very different from that.

Day, Q.C., for the defendants, was not called upon.

BLACKBURN, J.—We need not trouble Mr. Day. *Barker v. McAndrew* (sup.) is, as I think, exactly in point. I think, too, that decision is very good sense, and we could have no object in overruling it; this we must do if we decide for the plaintiff here. Willes, J., is reported to have said (18 C. B., N. S., 771): "The first [question] is in effect whether, where a charter-party stipulates that the vessel shall proceed to a particular port for the purpose of receiving a cargo, and proceed thence to the port of destination, the exception of perils of the seas, &c., applies only to the voyage of the vessel with the cargo on board, or to the preliminary transit also." He proceeds on the following page: "When one considers, therefore, the origin and the object of the exception, there can be no reason why it should be held to apply to one part of the transit rather than to the other. In truth it comes to this,—was the preliminary transit a part of 'the voyage?' I apprehend the voyage is nothing more than the passage of the vessel on the transit. The commencement of the voyage is the commencing to do that for which the shipowner is to be paid freight." Applying that interpretation to the commencement of this voyage, the exceptions began when this particular ship, which had been named, began to proceed to Alexandria; and it makes no

(a) These words in brackets were here inserted in the plea by order of the court.

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difference that the ship has no definite place from which to start on her voyage. The plea as amended, is, I think, a good answer to the action.

MELLOR, J.—I am of the same opinion. When one considers Mr. Kemplay's argument, it seems to depend upon the commencement of the voyage mentioned in the charter-party being the period at which the ship proceeds from Alexandria with her cargo on board. Now that would be clearly in conflict with the decision of the Court of Common Pleas in *Barker v. McAndrew*, and I consider that we are bound by that decision.

LUSH, J.—I am of the same opinion, and I should have been so, even if it were not for *Barker v. McAndrew*.

Judgment for defendants.

Attorney for plaintiffs, F. W. Blakes, for Sazellbyes and Sharp, Hull.

Attorney for defendants, W. H. Farnfield.

Friday, April 26, 1872.

CHRISTOFFERSEN v. HANSEN

Charter-party—Agent for foreign freighters—Cesser of liability clause—Construction.

By a charter-party made between the plaintiff and defendant it was agreed that the defendant should load the plaintiff's ship at Sunderland in regular turn, with a full cargo of coals to be delivered at Kiel for a certain freight . . . "and that the said charter-party being concluded by the defendant on behalf of another person resident abroad, all liability of the defendant should cease as soon as he had shipped the said cargo." To an action for delay in loading the defendant pleaded the last mentioned clause, averring a shipment of cargo. The plaintiff demurred on the ground that the clause did not apply to liabilities accruing prior to or during shipment of cargo, but to liabilities accruing subsequently to the shipment.

Held, on the true construction of the agreement, and also on the authority of *Pederson v. Lotinga* (28 L. T. Rep. 267), that the defendant was liable for breaches of the charter-party committed before the shipment of cargo by him, but that upon the completion of the loading he was absolved from all future liabilities.

DECLARATION, that the plaintiff and defendant agreed by charter-party that the plaintiff's ship called the *Karen Elias*, should proceed to Sunderland, and that the defendant should there load the ship in regular turn with a full and complete cargo of coals; that the ship being so loaded should proceed to Kiel, and there deliver the same to the freighter or his assigns on being paid certain freight, that neither merchant nor freighter were to be held accountable for delay or detention of the ship in loading or discharging occasioned by frosts, floods, strikes of workmen, or other cause beyond their control, "and that the said charter-party being concluded by the defendant on behalf of another person resident abroad, all liability of the defendant should cease as soon as he had shipped the said cargo."

Averment of performance of condition precedent not prevented by the excepted causes.

Breach, that the defendant wholly neglected to load the said ship, and delayed the ship nineteen days in proceeding on her voyage to Kiel, whereby the plaintiff was put to great expense, &c.,

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Plea: (3) That the said charter was in fact concluded by the defendant on behalf of another party resident abroad, and that the defendant before this suit shipped the agreed cargo under the said charter-party, whereupon and whereby, according to the terms of the charter-party, all liability of the defendant ceased.

Demurrer, on the ground that the clause of the charter-party relied on in the plea did not apply to liabilities accruing prior to or during shipment of cargo, but that it applied to liabilities accruing subsequently to the said shipment.

Holker, Q.C. (*Lewers* with him) in support of the demurrer.—The clause pleaded only applies to a cause of action accruing after the shipment of cargo. Why should the owner of the vessel insert a provision freeing the agents in this country from all liability, without deriving any equivalent advantage from so doing? If a lien had been given to the shipowner, his release of the agent would be reasonable enough: and there are cases in which the charterer has, by such a clause, been held to be relieved from all liability, antecedent and subsequent. In *Pederson v. Lotinga* (28 L. T. Rep. 267), there was a clause very similar to that now under discussion in a charter between the shipowner and the agent for an unnamed principal. It ran thus: "The charter-party being concluded by N. S. Lotinga on behalf of another party, it is agreed that all liability of the former shall cease as soon as he has shipped the cargo, the owners and masters agreeing to rest solely on their lien on the cargo for freight and demurrage," and an action having been brought for demurrage at the port of loading in the Tyne against the agent, the Court of Queen's Bench held that the clause meant only that he should incur no further liability after he had fully loaded the vessel, and that he was not absolved from the liability which attached to him for demurrage previously incurred. The learned judges who decided that case thought that the lien given for demurrage afforded good ground for supposing that the parties meant the charterer to be relieved from liability. And *Pederson v. Lotinga*, is recognised as an authority in *Ogelsby v. Yglesias* (31 L. T. Rep. 234; E. B. & E. 930). No doubt *Bannister v. Breslau* (2 Mar. Law Cas. O. S. 490; 16 L. T. Rep. N. S., 418; L. Rep. 2 C. P. 497) will be cited for the defendant. There an absolute lien on the cargo was given which the captain was bound to exercise. It would be too much to argue that because a lien is given the liability is discharged, but the fact of the lien being given is an element of consideration. The intention of the parties here could not have been to relieve the agent from all liability simply because he was an agent. In *Gray v. Carr* (*ante*, p. 115; 25 L. T. Rep. N. S. 215; L. Rep. 6 Q. B. 522), Brett, J., said (*ante*, p. 120), "With all respect to the judges who decided *Bannister v. Breslau* (*sup.*), I think that their interpretation of the charter-party was too severe. The case was decided on demurrer. The judges relied much on the lien given in respect of demurrage which they assumed was for delay at the port of loading. But if by other terms of the charter-party than those which were before the court, demurrage was stipulated for in respect of delay in unloading at the port of discharge, the chief ground on which they based their interpretation would be out away." And Bramwell, B., after giving his opinion on the construction of

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the charter-party seemed to doubt the case of *Bannister v. Breslauer*, saying however, "But it is to be observed that every case such as that where no general principle of law is involved, but only the meaning of careless and slovenly documents, must depend on its own particular words:" (*ante*, p. 124.) Decided cases have not certainly much application, but of those nearly in point *Pederson v. Lotings* is most like the present, save that this is a stronger case. The whole question turns on the meaning of the clause on which the plea is founded.

Gainsford Bruce (*Watkin Williams* with him), *contra*.—The contracting parties could not have used wider words to protect the charterer from all liability. [BLACKBURN, J.—The clause in *Pederson v. Lotings* (*sup.*) is the same as the one before us, down to the words "shall cease;" but the following words make an important addition.]-Which distinguishes that case from the present. In that case the demurrage was payable and accrued due "day by day," and it therefore was held that it could not have been the intention of the parties to divest themselves of a right of action already accrued by reason of an event happening after. Here there is no such clause. But first, apart from decisions, the intention of the parties was not to exclude the liability of the agent; if they had wished to do so they would have used express words. [COCKBURN, C. J.—The agent says, "I make myself liable as to that part of the contract which is to be performed in England, but will protect myself as to responsibilities accruing after the vessel has departed." There would probably be a lien on the ship abroad given by foreign law for all claims. [COCKBURN, C. J.—For claims there arising possibly but not for matters in this country.] In *The Patria* (*ante*, p. 71; L. Rep. 3 Ad. & E. 448), is set out a portion of the German mercantile code, fifth book, of which Art 563, translated into English, is as follows: "When the voyage has been commenced . . . the charterer can only withdraw from the agreement, and demand the unloading of the goods, on paying the full freight as well as all other claims of the shipowner. . . . In case of such unloading, the charterer shall not only pay the additional expenses thereby incurred, but also indemnify the shipowner for the loss caused by the delay." There is no difficulty in construing this stipulation if the natural meaning be put upon the words. "Cease" certainly applies to what might have happened before the shipment, and possibly, though not perhaps presumably, to what might occur afterwards. [COCKBURN, C. J.—"Liability sometimes means 'obligation,' and sometimes anything to which one may be subject, for not fulfilling an obligation." "All liability shall cease" means breaches of obligation already incurred. [LUSH, J.—Then, there is no equivalent for that.] The consideration for it is the qualified personal responsibility of the agent, who says, as it were, to the shipowner, "I will only sign on the terms that as soon as a cargo is shipped I will be under no liability at all;" and the shipowner, accepting that condition, gets a substantial guarantee in the cargo that the foreign principal is a responsible person. [LUSH, J.—The cargo is not liable for delay before it is shipped.] But when it is shipped the owner of the vessel is practically safe. The Court of Common Pleas have distinctly decided that words such as those in question relieve the

charterer from all liability: *Bannister v. Breslauer* (*sup.*). The clause on which that decision was given ran thus: "The charterer's liability on this charter to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge; the captain having an absolute lien on it for freight, dead freight, and demurrage, which he, or owner, shall be bound to exercise." [BLACKBURN, J.—The charterer's liability is to cease; not the agent's.] Yes; and so that is still stronger provision, of course. BLACKBURN, J.—It is easier to limit the cesser of the liability of the agent, as here, than to provide for the complete dissolution of the charterer's liability.] Delivering his judgment upon the last cited case, Byles, J., says, "This charter-party certainly does not contain so express a stipulation, protecting the charterers from liability as to matters arising before the shipping of the cargo as is found in *Ogleby v. Yglesias* (*sup.*) and *Milevin v. Peres* (1 Mar. Law Cas. O. S. 32; 3 L. T. Rep. N. S. 736; 3 E. & E. 495). But those cases show that the giving a lien on the cargo, and discharging the charterer from all responsibility in respect of the goods, is not unusual." In *Ogleby v. Yglesias* (*sup.*) there was no provision giving the shipowner a lien for demurrage, yet the agent for the freighter was held to be freed from liability by a similar clause. [BLACKBURN, J.—But it contained express words that the liability should cease "in every respect, and as to all matters and things as well before as after the shipping of the . . . cargo"—and the only question here is whether the present clause means the same as if those words were expressed in it.] "Liability, as well before as after," cannot mean more than "all liability." [BLACKBURN, J.—But on the other hand "all liability" may mean something less.] There is nothing "absurd or repugnant" to sense in such a stipulation as this on the part of the agent: see per Crompton, J. in *Ogleby v. Yglesias* (*sup.*). The cause of action here was not vested. The learned judges who decided *Pederson v. Lotings* (*sup.*) seem to have thought that it would be inconsistent with the charter party to construe it, as if the parties agreed that the shipowner might sue for demurrage day by day, and at the same time, that the agent's liability should cease. Stress is laid on the provision that demurrage was to be payable *de die in diem*. *Gray v. Carr* (*sup.*) does not apply. [LUSH, J.—This point was not raised there. BLACKBURN, J.—It was however assumed, and I think correctly, that the Court of Common Pleas, in *Bannister v. Breslauer*, must have thought the lien for demurrage extended so as to cover everything, and upon that this question did arise indirectly.] Why should a narrower meaning be given to the words "all liability shall cease" than they naturally bear? The cases show there is nothing unreasonable in holding that where such a phrase is used, the agent is thereby relieved from all personal responsibility, and it is reasonable that he should be so. The shipowner has a cargo, and may have a lien in a foreign port upon it. He would deem himself to be safe as soon as he had a valuable cargo on board his vessel, and would not hesitate to undertake all responsibility.

Holker, Q.C., in reply.—*Pederson v. Lotings* (*sup.*) is a conclusive authority in the plaintiff's favour, and the court, in deciding it, go further

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than they are now asked to do, for there was a clause giving a lien, and here there is none.

COCKBURN, C.J.—We need not trouble you to proceed, for I think this case comes clearly within the principle of the decision in *Pederson v. Lotings (sup.)*, which case is much nearer in kind to the present than either of the others referred to, and is, in my opinion binding on us. Here is a contract entered into between the plaintiff, a shipowner, and the agent, for a foreign principal, whereby the vessel of the plaintiff is chartered by the defendant, who engages to load a cargo of coals, to be conveyed to Kiel with certain stipulations as to freight, demurrage, &c. The action is brought by reason of delay which occurred in loading this cargo. The defendant, who is one of the contracting parties engaged to load this cargo, and for the failure in loading according to the condition of the contract, he would, as principal, be liable; but the charter contains a clause which, after stating that he is acting for a foreign principal, provides that after the cargo has been loaded, the liability of the defendant shall cease. Now what construction, independently of the authorities, ought to be put on such a stipulation? The language is ambiguous. It may be that he shall be entirely exonerated, both as to past breaches of contract, and for future possible breaches, as soon as cargo was loaded; or it may be that, whereas he would have been liable for breaches of contract prior to the loading, as soon as the cargo was on board the shipowner should look to the principal at Kiel with respect to all things done touching the completion of the contract, and not to the defendant. Which is the more probable of the two? The shipowner would know little or nothing of the parties abroad, although, as soon as the cargo was loaded, he would know them to be persons of substance, that is to say, possessing valuable property on board his vessel, but he would, nevertheless, be always under considerable difficulty in proving his case against persons in a foreign country in respect of delay occasioned to his ship while here, and would be obliged to sue them in a foreign court unless under some state of circumstances through which he could sue in England. Of course then the shipowner would much prefer having a person in this country instead of one in foreign parts or within the jurisdiction only of a foreign court. But I can quite understand, on the other hand, the agent contracting for a foreign principal, saying that he, the agent, was ready to enter into a liability as far as concerned the vessel up to the termination of the loading, but that he would refuse to become liable for what might, or might not, be done at the other side of the sea. And that, according to my view, is the true construction to put on the language used in the present charter-party, looking at the surrounding circumstances, and the relative position of the parties. But it is not necessary to decide this case on principle merely, seeing that there is a case which is a direct authority, viz., *Pederson v. Lotings (sup.)*, which is strictly in point, and is stronger than the present case, for there was an express stipulation, and the reason for absolving the defendant from all liability was that the shipowner engaged to look to the cargo for any claim for demurrage, as well as for freight. The words creating that stipulation do not occur in the charter now before us, and

therefore the present case is more strongly in favour of the plaintiff; consequently I think our judgment ought to be for the plaintiff on principle, and at least on authority.

BLACKBURN, J.—I have also come to the conclusion that our judgment should be for the plaintiff. At one time I had some little doubt, but I have brought my mind to a tolerably clear determination. The first thing to be recognized is that in a charter-party, as in every other contract, if an agent chooses to make himself a contracting party, the other party to the agreement has two different remedies; he may sue the agent, and have recourse to his, the agent's, personal liability; or he may sue the principal, though the agent be a contracting party. Of course he cannot get judgment against both; but he has two resources, one against the principal, whether known or not known at the time of the agreement, and also against the agent. Moreover, any remedy acquired by stipulation over the goods or freight, will equally be available in either case. Now, that being the state of things, it may well be, and would not be unreasonable, for the agent to say, "I prefer that you should rely on my principal, and I am not liable for anything occurring abroad," and it would be equally reasonable for the master of the ship to say, "When I have a cargo I do not care, for I shall have my lien for the freight against your principal, who, being the owner of a cargo, is probably a sufficient man, and I will be content to let you free." If they choose to agree to that, they may, and there is nothing improbable or unlikely in supposing them to do so. Now, certainly, expressions have been used in some of the cases which caused the doubt in my mind, and have given rise to the part of the argument to-day upon the question of reservation of lien. Whether there was a lien for demurrage or not in the present case I do not know, but there is none mentioned in the declaration, and the words of the clause pleaded are "that the said charter-party, being concluded by the defendant, on behalf of another party resident abroad, all liability of the defendant should cease as soon as he had shipped the said cargo." Now that means that the defendant, as agent, contracts with the shipowner to load a cargo, but adds a condition subsequent that as soon as he has shipped a cargo under the contract, which, up to that time was binding on himself, his liability shall cease *ab initio*. If that is the true construction of the agreement then the defendant is wrong, and the plaintiff right. Such a contract may certainly be made. In *Oglesby v. Yglesias*, and *Milvain v. Perez (sup.)*, it was quite clear that such was the language used, and a condition was made that on the shipment of the cargo all liability should cease. Whether or no the shipowner would act prudently in taking such a contract would be a matter for him alone to consider. I think we must interpret this charter without regard to whether the vessel were British or foreign; but, inasmuch as the plaintiff's name is Christoffersen, and the ship is called the *Klaren Elise*, and bound for Kiel, I should come to the conclusion that she was a German ship, taking a cargo to Germany in all probability owned by a foreign principal in Germany, and that the German captain would think he might trust him well enough. We must however, take the words to be the same

whether it was a British, or German, or Italian vessel. Then there would be a difficulty in saying whether, in the words "all liability of the defendant should cease," there might not be a condition subsequent that his liability should cease *ab initio* on the shipment of cargo, and that the shipowners should trust to their lien; I should have had doubt on that, but then the authorities remove it, and declare that the mere saying that the liability shall cease means "from that moment," not, as was expressly stipulated in *Oglesby v. Yglesias* and *Milbain v. Peres, ab initio*. The first of the cases in which this point arose was that cited from the LAW TIMES Reports (*Pederson v. Lotinga (sup.)*), in which there was an express contract, giving liens, I presume, though it is not stated in the case, and then this clause, viz., "The charter-party being concluded by N. S. Lotinga on behalf of another party, it is agreed that all liability of the former shall cease as soon as he has shipped the cargo." . . . Then follows "the owner and masters agreeing to rest solely on their lien on the cargo for freight and demurrage." That shows that the parties were thinking of the lien on the cargo, and were not caring that the liability of the undisclosed principal should remain. A question was raised as to the meaning of that clause, and the judges of the Queen's Bench all said that the lien for demurrage was for demurrage occurring subsequent to the cargo being put on board—the demurrage accruing *de die in diem*, and not for demurrage prior to the shipment of the cargo. But if the lien had been in general terms for demurrage it would apply to home and foreign demurrage alike. I understand the reasoning of the court therefore to be that, inasmuch as a vested liability was incurred by the agent, although there might have been a condition subsequent ending that, it was not to be inferred from the terms used that all liability should cease. Then came the decision of *Bannister v. Breslau* (*sup.*), a somewhat different case from this, as that was not a case of an agent seeking to defend himself in an action brought against him in his personal capacity, but was an action brought against the charterers, who stipulated that "The charterer's liability on this charter to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge; the captain having an absolute lien on it for freight, dead freight, and demurrage which he or the owner shall be bound to exercise." Now the reasoning of the court in that case, as I understand it and as seemingly from the judgment in *Gray v. Carr (sup.)*, my brothers, Willes, Channell, and Brett understood it, was, that the charterers stipulated that they should be free if the shipowner got a cargo of sufficient value, because the other contracting party had bargained that the shipowner should rely on his absolute lien for dead freight and demurrage which the owner should be bound to exercise. The case of *Gray v. Carr (sup.)* becomes material in this respect, viz., as the ingenuity of counsel pointed out, that "demurrage" might be damages for detention beyond the demurrage days, analogous to demurrage proper, and that the decision of *Bannister v. Breslau* (*sup.*) could not be supported unless the words there need would give a lien for such damages. But my brothers Brett and Channell both meet that argument, the one by saying that if the Court of Common Pleas in there holding that the charterers'

responsibility for demurrage did cease, treated mere unliquidated damages for detention of the ship as demurrage, they were wrong; the other by more cautiously saying that if they did so the decision was somewhat doubtful. But I think that the Court of Common Pleas show, from their judgment, that there was a stipulation that, if a cargo was shipped, the shipowners should give up all liability of the charterers, and depend on the lien they were bound to exercise. Now, in the present case, there is no such clause giving a lien at all, and I think that the prior case of *Pederson v. Lotinga* proves that the words here used are not enough to relieve the defendant from all liability; and I have less regret in coming to this conclusion because I am strongly impressed with the fact that when parties mean to get rid of liability they should take care to use clear and unmistakable language, and should put into their agreement words as clear as those in the case of *Oglesby v. Yglesias (sup.)*.

LUSH, J.—I am of the same opinion. I own the case appears to me a very plain one, and I do not feel any difficulty in ascertaining the meaning of the parties, although the clause in question is susceptible of two interpretations. The words "All liability of the defendant shall cease as soon as he has shipped the cargo," may be interpreted to mean that in that event he shall be no longer responsible for any breach, past or future, or may mean simply that he will be no longer a contracting party, and therefore no longer liable. In which of the two senses did the parties contract? To answer that question we must look at the context. By the charter, the defendant bound himself to provide a cargo so that it should be loaded in regular turn, and also to pay the freight of that cargo at the port of discharge. Now he did not provide a cargo so that the ship could be loaded in regular turn, and this action is for detaining the ship nineteen days unnecessarily. The defendant, however, supplied the coals eventually, and says: "I, having at last shipped a cargo, am relieved from further liability." If there had been a provision in the charter-party giving the shipowner an advantage equivalent to that given to the defendant, that would be a reason why he should absolve him altogether. But there is no such provision whatever giving him a remedy against the cargo. He cannot have it by law, and the contract does not give it him, and I cannot suppose that, however long the ship might be detained before the cargo was put on board, the clause would relieve him from any liability, because that would leave the shipowner without any remedy at all except against a foreign merchant who is not even named and whose name is unknown. I think, therefore, the more probable conclusion is that the parties intended that after the cargo was on board the bargain was at an end as far as the defendant was concerned, and he could incur no further responsibility, and that such is the true construction of the clause in question.

Judgment for the plaintiff.

Attorney for the plaintiff, John Scott, for Graham and Graham, Sunderland.

Attorneys for the defendant, Williamson, Hill, and Co., for Ingledew and Daggett, Newcastle-on-Tyne.

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COURT OF COMMON PLEAS.

Reported by H. H. HOCKING, B. A. KINGLAKE, and H. F. POOLST, Esqrs., Barristers-at-Law.

Jan. 22 and May 30, 1872.

DENON v. THE HOME AND COLONIAL ASSURANCE COMPANY (LIMITED).

Policy of insurance—Passage money of coolies—Partial loss—Freight.

Action on a policy of insurance upon freight on a voyage from Calcutta to the Mauritius. The policy was upon "chartered freight valued at 7000*l.* at and from Sydney to Calcutta and London." Defendant underwrote the policy for 1000*l.* On arrival of the ship at Calcutta the charterers stopped payment, and the ship conveyed a cargo consisting of coolies and rice to the Mauritius. Plaintiff got the policy altered, and the interest in freight to be valued at 2000*l.*, the sum insured by the underwriter being the same. Plaintiff did not inform the underwriters of his intention to convey the coolies. The ship took coolies and rice to the Mauritius; the freight of the rice being valued at 1412*l.* The vessel was wrecked near the Mauritius and several coolies drowned, the rice being totally lost. The plaintiff claimed as on a total loss, the passage money of the coolies not being "freight" within the policy. The defendants insisted that the passage of the coolies was "freight" insured by the policy, and that they were liable to a proportionate part of the sum assured against:

Held, that the passage money of the coolies was not freight within the policy:

*Held also, that the policy as applicable to a partial cargo was an open policy for one half the loss of freight not in any case exceeding 1000*l.*, and that as 1412*l.*, the freight of the rice, was lost, the underwriters were liable for one half the value of the freight of the rice, viz., 706*l.**

THIS is an action brought to recover 1000*l.* and interest, as payable under a policy of insurance dated the 13th March 1865, and effected by the plaintiff with the defendants on freight valued at 2000*l.*, under the circumstances hereinafter mentioned.

The defendants paid into court the sum of 440*l.* 1*s.*, and stated that this sum was sufficient to satisfy the plaintiff's claim. The plaintiff replied that such sum was not sufficient.

The case came on for trial before the Lord Chief Justice of the Common Pleas at the sittings in London after Michaelmas Term 1868, when a verdict was taken by consent for the plaintiff for the amount claimed in the declaration, and 40*s.* costs of suit, subject to the opinion of the court upon the following case:

1. On the 1st Dec. 1863 Mr. Frederick Basil, the then owner of a ship called the *James Namyth*, afterwards the *Sandringham*, entered into a charter party with Messrs. Halliday, Fox, and Co., of London, whereby it was agreed that the said ship, which was then on a voyage to Sydney, should proceed from Sydney to Calcutta, and there load a cargo for Liverpool or London, at an agreed rate of freight.

2. On or about the 2nd April 1864 Mr. William Berry became the owner of the said ship *Sandringham*, and the said Mr. Basil assigned to him all his interest in the above-mentioned charter-party.

3. On the 5th April 1864 Mr. Berry, having

become the owner of the said ship *Sandringham*, as before mentioned, mortgaged her to the plaintiff, and also assigned to him all and singular the freights, passage moneys, earnings and gains, profits, sums of money, benefits, and advantages whatsoever, made, earned, and gotten, and to be made, earned, and gotten, and to become due and payable by or by means, or for or on account of the said ship *Sandringham*, and certain other ships, or any of them, and all and every existing and future charter-parties, contracts, and agreements in relation thereto.

4. On the 5th Oct. 1864 the plaintiff effected with the defendants a policy of assurance, whereby the sum of 1000*l.* was insured upon chartered freight valued at 7000*l.* in the said ship *Sandringham*. A copy of this policy is annexed hereto, and is to form part of this case.

5. The master of the said ship having proceeded on his voyage according to the terms of the above-mentioned charter-party, arrived at Calcutta in Nov. 1864, and was there informed, as the fact was, that Messrs. Halliday, Fox and Co., the charterers, had stopped payment, and that their agents at Calcutta refused to have anything to do with the said charter-party, or the loading of the said ship, or otherwise employing her.

6. The master of the said ship thereupon tendered for the conveyance of coolies and rice from Calcutta to Mauritius, and on the 25th Jan. 1865 the said ship sailed from Calcutta for Mauritius, having on board 360 coolies and the necessary provisions for their use on the voyage, and 12,000 bags of rice. The passage money of the coolies amounted to 1944*l.* and was payable on their arrival at Mauritius. The bill of lading freight of the rice amounted to 1412*l.*

7. On the 13th March 1865 the plaintiff, through his broker, Mr. George Tysar, procured the defendants to alter the said policy and subscribe in the margin thereof the note or memorandum, a copy of which will be found in the margin of the copy of the said policy annexed to the case, and is to form part of this case.

8. While the said ship was proceeding on her voyage from Calcutta towards Mauritius she was stranded when near the latter point, and the ship herself and the whole of the said 12,000 bags of rice, and the freight payable in respect thereof, were totally lost by perils insured against.

9. The said 360 coolies, with the exception of twelve, were all saved, and arrived at their destination, and the passage money of those who so arrived, amounting to 1879*l.* 4*s.*, was duly received by the agents of the ship at Mauritius. Twelve of the coolies were drowned, and the passage money payable in respect of them totally lost by perils insured against.

10. The following evidence as to the circumstances under which the said policy was altered, and the said note or memorandum subscribed in the margin thereof was given on behalf of the plaintiff before the arbitrator, by whom this case is stated. It was objected to, and admitted, subject to the opinion of the court as to its admissibility. On the 8th Jan. 1865 the master of the said ship, who is since dead, wrote to Mr. Berry the following letter:

Ship *Sandringham*, Calcutta,

Jan. 8, 1865.

Wm. Berry, Esq.,

Sir,—I have been looking for a letter from you, giving me some information as to my getting money for dis-

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burements here. On my arrival Mr. McKenna (Halliday and Fox), the charterer's agents here, refused to act for them after their failure. They gave two letters to that effect. I have been looking for something to do to pay the Sydney bottomry (£1032) and pay my way home, but without success, till the 5th inst., when I tendered for coolies to the Mauritius, at 54 rupees per adult, and 12,000 bags, at 1s. 2d. per bag, to embark on the 20th. The ship is to be surveyed to-morrow. This truly has been a most unfortunate voyage; it seems nothing but failure throughout the piece. I am sorry you are among the rest, but as to Colefellow, I am not surprised. How some people live and make the show they do is more than I could ever understand. If I am spared to reach the Mauritius safely, I shall come up to Galle, and see if I can find something for home. I am truly unhappy without money, and the owners nothing to do, and a most expensive crew. It is anything but cheering, as I hear the ships are seized as soon as they come home. Write to me to Point de Galle to say if I can do anything for your benefit by remaining out here, if employed, till you get your affairs settled.

P. S. Write me as to further funds, I shall require all I have to clear the ship at Mauritius.—I remain, your obedient servant,
JOHN RITFIN.

On the 21st Feb. 1865 this letter was received in London by the assignees of Mr. Berry, who had become bankrupt, and shortly afterwards Mr. Berry showed a copy of it to the plaintiff.

11. On the 10th March 1865 the plaintiff learned that the ship had sailed from Calcutta for Mauritius, and on the 12th March 1865 a meeting took place between the plaintiff, Mr. Berry, and Mr. Tyser, the plaintiff's broker. At that meeting the plaintiff called Mr. Berry's attention to the master's said letter, and informed him that he considered himself to have no interest in the passage-money of coolies mentioned in the master's letter, and did not wish to insure it, and requested him to compute what cargo the ship could carry over and above accommodation and provision for the coolies. Mr. Berry calculated accordingly, and said that the ship would earn in freight of rice to the value of 2000*l.* over and above accommodation and provisions for the coolies. The plaintiff thereupon instructed Mr. Tyser to insure the freight for 2000*l.*, and it was in pursuance of this instruction that Mr. Tyser procured this policy to be altered, and the rates or memorandum to be subscribed in the margin thereof, as above-mentioned.

12. If the evidence stated in the last two paragraphs was properly admitted, then it was found that that evidence is true in fact, and that the plaintiff and his broker, in procuring the said policy to be so altered, and the note or memorandum to be subscribed in the margin thereof, as before mentioned, intended to insure only the freight of rice, and to exclude from the insurance the passage-money of coolies; but this intention was not communicated to the defendants.

13. Evidence was given on the part of the plaintiff, before the arbitrator, by whom this case is stated, intended to show that by the usage and custom of insurance business the word "freight" simply when used in a policy of insurance is confined to freight of merchandise, and does not include passage-money of coolies. Evidence to the contrary was given on the other side, and no such usage or custom was proved. But the most frequent course when passage money of coolies is intended to be insured is to describe it as freight of coolies, or passage money of coolies, or by some other term distinguishing it from freight of merchandise. The premium for insuring such passage

money upon a voyage from Calcutta to Mauritius is generally less than the premium for insuring freight of merchandise upon the same voyage.

14. A copy of the pleadings in the action is annexed hereto, and is to form part of this case.

15. The court is to be at liberty to draw inferences of fact.

The question for the opinion of the court is, Whether the plaintiff is entitled to recover in this action any, and if any what, sum of money beyond that paid into court?

If the court is of opinion that the plaintiff is entitled to recover any further sum beyond that paid into court, judgment is to be entered for the plaintiff for such further sum as the court shall be of opinion he is entitled to recover, and costs of suit. If the court is of opinion that the plaintiff is not entitled to recover any further sum beyond that paid into court, judgment is to be entered for the defendant, with costs of defence.

The policy which formed part of the appendix to the case was in the usual form, but in the margin it contained the following stipulation:— "It is hereby declared and agreed that the within voyage is from Sydney to Calcutta, and thence to Mauritius instead of as before stated, and to return 20s. per cent. for safe arrival there.

"The within interest is now declared to be on freight valued at 2000*l.*, 13th March 1865."

Charles Pollock, Q.C. for the plaintiff.—The question in this case is, what is covered by the policy of insurance? The policy was a valued one for 1000*l.*, or freight worth 2000*l.* The defendants have paid 440*l.* into court, but say as to the remainder that, inasmuch as we had some coolies on board who were saved, that they only pay on an average loss. If "freight" includes passage money of coolies the defendant is entitled to judgment. "Freight" has a well-known meaning, being that paid for the carriage of the cargo from one port to another: (*Lex Mercatorum*.) When passage-money is paid for coolies, it is usual and is the custom to mention it: (*Levis v. Marshall*, 7 M. & G. 729.) Macleachlan in a note to his work on Merchant Shipping, page 380, says, "According to Kent (3 Com. 219) there is an American use of the term freight which includes passage-money; such a use of the term is not English, and I do not think it enters even into the jargon of trade in this country." The arbitrator found that the frequent course is to describe the sum insured when conveying coolies as the passage-money of coolies, and the insurance money charged is less than that charged on freight, but freight must be taken in its *prima facie* meaning. Emerigon, cap. 1, s. 5, says since the contract of insurance is the result of the stipulations of the contracting parties, it naturally belongs in this view to the class of actions *stricti juris*. The words of the policy are to be weighed with scrupulousness—"Verba assicurationis potissime ponderanda sunt"—nor can we depart from the rule of the policies' intention. "In materia assicurationis principaliter in harendum est verbis apud assicuraciones; quinimo hanc pro lege habenda sunt, nec ab his recedere debemus, quia contrarium voluntas melius haberi non potest." Pothier lays it down as a certain rule that the insurers are not held by the risks, when there has been a variance from the contents of the policy, unless it has been by their own consent or the result of necessity. Lord Ellenborough, in the course of a

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very elaborate judgment in *Forbes v. Aspinall* (13 East, 323), said, "To recover in any case upon a policy on freight it is incumbent on the assured to prove that, unless some of the perils insured against had intervened to prevent it, some freight would have been earned, and where the policy is open, the actual amount of freight which would have been so earned, limits the extent of the underwriter's liability." Hereafter to Merchant Shipping Act (17 & 18 Vict. c. 10).

Sir George Honyman Q.C. (J. C. Mathew with him.)—The defendants are called upon to pay 2000*l.*, which the freight is valued at, because one half of the cargo is lost. If the rice had been saved and the coolies lost, the plaintiffs would have contended that the passage money was covered by the policy. The subject matter of the risk is both coolies and rice. Freight is a benefit derived from the carriage of goods, and differs from passage money, which is generally paid in advance. In *Hall v. Janson* (4 El. & Bl. 500), Lord Campbell says that money paid in advance is not freight, but there seems no reason why the money advanced may not be insured as freight, although not properly freight, and though it may be the price of the hire of the ship. In Kent's Commentaries vol. 3 part 5, Lect. 47 sect. 7, it is said that "freight in the common acceptance of the term means the price for the actual transportation of goods by sea from one place to another; but in its more extensive sense it is applied to all rewards or compensation paid for the use of ships, including the transportation of passengers." (*Giles v. The Cynthia*, 1 Peters Adm. Rep. 206.) If cattle or slaves are sent abroad payment is to be made for those living as well as those dead: (*Roccus*.) Lord Tenterden in *Abbot on Shipping*, cap. 17, p. 233, says: "For slaves, also, who are considered as a species of merchandise, their proprietors contributed according to their value, although this dreadful traffic had not extended so far as to authorise the casting these unhappy persons into the sea, and making their loss an object of contribution." He cited passage from:

Flint v. Fleming, 1 Barn. & Adol. 45;

Deraux v. Janson, 5 Bing. N. C. 519;

Code De Commerce, Bc. 2 tit. 8.

C. Pollock, Q.C. in reply.—This was a goods premium, and not a premium for carrying coolies, there being a difference in price for passage money premium.

Cur. adv. vult.

May 30.—The judgment of the court was delivered by WILLES, J.—This is an action upon a policy of insurance upon freight on a voyage from Calcutta to the Mauritius. As originally filled in, the policy was upon "chartered freight, valued at 7000*l.*, at and from Sydney to Calcutta and London." It was underwritten by the defendants for 1000*l.* The chartered freight mentioned in the policy was upon a charter party for the carriage of goods only upon a voyage from Sydney to Calcutta and London. Upon the arrival of the ship at Calcutta the voyage to England was abandoned because of the charterers having stopped payment, and the ship took coolies and rice to the Mauritius. To meet this change of voyage, and with the intention of insuring the freight of cargo only to the extent which the vessel would carry in the space not occupied by the coolies and their provisions, which intention the plaintiff communicated to his agent, but not to the underwriters, the plaintiff

valued the freight or goods only at 2000*l.*, and procured an alteration of the policy, in effect a new policy, as follows:—"It is hereby declared and agreed that the within policy is from Sydney to Calcutta and Mauritius instead of as before stated and to return 20*s.* per cent. for safe arrival there; London, 13th March 1865. The within interest is now declared to be on freight, value at 2000*l.*; 13th March 1865." The sum underwritten by the defendant remained unaltered—1000*l.*, or half of the new valuation, the assured being (so far as this underwriter was concerned) his own insurer for the other half. The vessel proceeded upon the voyage to Calcutta with 360 coolies and their necessary provisions, for which the passage money of 5*½* rupees each coolie, payable on arrival at the Mauritius, amounted to 194*l.* and 12,000 bags of rice, the bill of lading freight of which was 1412*l.* Near her destination the vessel was wrecked, and the rice and the freight thereof was wholly lost; 342 of the coolies were saved and reached their destination, and their passage money 1879*l.* 4*s.* was paid. The question is for what amount the underwriters are answerable? The plaintiff insists that the passage money of the coolies ought to be thrown out of consideration as not being freight within the policy, and that he is entitled to recover as for a total loss of the freight insured to 1000*l.* The defendants on the other hand insist that the passage money of the coolies is to be considered as freight insured by the policy, and that the full freight being thus taken at, coolies, 1944*l.*; rice, 1412*l.*; total 3356*l.*, they are bound to pay only the proportions of the partial freight lost; coolies 64*l.* 16*s.*; rice, 1412*l.*; total 1476*l.* 16*s.*, which will be produced by the following sum in the rule of three, viz., 3356 : 1000 :: 1476*l.* 16*s.* : 439*l.*; and to cover this claim they have paid a sufficient amount 441*l.* 2*s.* into court, assuming passage money to be freight within the policy and included in the valuation. This mode of calculation was not disputed by the plaintiff and requires no further comment than a reference to the dissonance in the second volume of Mr. Willard Phillips' highly valuable work on Insurance, a 1203, where the subject is discussed. The first and chief question therefore, is whether the passage money of the coolies was freight, within the policy, and to be taken in favour of the underwriter, as included in his valuation. Freight according to the dictionaries, includes first the cargo, second the actual transport from one place to another, third the hire of the ship or part of it, or the transport of goods therein. It may, by extension, include the passengers, or even passage money, as for instance, upon a question arising upon the now abandoned maxim that "freight was the mother of wages," or upon a question of sale, or capture, or abandonment, because the passage money is, equally with the freight of goods, an incident or accessory of the ship. Accordingly Chancellor Kent, 3 Kent's Com. 219, states that "freight in the common acceptance of the term means the price for the actual transportation of goods by sea from one place to another, but in its more extensive sense it is applied to all rewards or compensation paid for the use of ship, including the transportation of passengers," and he refers to the case of *Giles v. The Cynthia* (1 Peters Adm. Rep. 206), in which the question arose upon a claim to wages. And in *Malloy v. Backer* (5 East, 321), where the

question was whether passage money or an appertained part of it became payable in the case of capture on the way, Lawrence, J. said: "Foreign writers considered passage money the same as freight," and Lord Ellenborough added, "except for the purpose of hire it seems the same thing." It must be added to this exception that in respect of general average, not only the passengers, but also their provisions, are exempt from the general rule of contributions, not being regarded as merchandise: (*Brown v. Stapleton*, 4 Bing. 119.) Upon a question of constructive total loss, passage money payable at the port of discharge, so far as it is available, if at all, must be taken into account, as well as freight of goods, but so most general average, according to *Kemp v. Haliday* (2 Msr. Law Cas. O. S. 271, 370; L. Rep. 1 Q. B. 520; 14 L. T. Rep. N. S. 702), and this consideration is, therefore, inconclusive. It is certain that freight is not ordinarily used in marine policies in its most extensive sense as including cargo, and the question in each case must be what, under the circumstances and in the context of the particular policy, it was intended to express. Until late periods when, in consequence of increased facility of communication, the passage across the ocean of large bodies of free men, as emigrants or cultivators, had become so common and important, there was little reason for insuring passage money, especially as it has been, and is in so many cases, paid beforehand, so as not to be at the shipowners' risk. The only case in which the question could arise is one like the present, where the earning of passage money depended upon the arrival of the vessel. Accordingly, it is not surprising that no trace of passage money being treated as freight for the purpose of insurance is to be found in the reported cases, nor that the policy in common use should be framed with minute reference to circumstances affecting the ship and cargo, and in terms, at least, should make no reference to passengers. The case of *Flint v. Fleming* (1 B. & Ad. 45), was relied on as showing that freight has been extended so as to include the value of the vessel to the owner in carrying his own goods; but this only shows that the freight insured by the policy is not limited to money due upon a contract with a liability of a third party. It decided that "freight" sufficiently represents the interest of the shipowner in the carriage of his own goods, and includes the value of their carriage. That case does not decide that the value to the owner of his being carried as a passenger in his own vessel, or of others being so carried, is freight within an ordinary policy, and it does not, therefore, touch the question whether freight in this policy of insurance includes passage-money. Evidence was given on both sides to prove a customary use of the word "freight" in the particular trade; but this evidence was ineffectual to make out a binding usage either way. It appears, however, that the most frequent course is to describe passage-money by a distinguishing term, and not merely as freight, and it was proved that, for insurance purposes, there is a distinction between freight and passage-money, because the premium for the latter upon a voyage from Calcutta to the Mauritius is generally less than that for the former, so that as a matter of business the not mentioning the subject upon the occasion of the insurance would indicate that

the freight was probably intended to refer to the merchandise. This distinction is further supported in the case of the present policy by more than one consideration. First, the policy was originally upon "chartered freight," and the charter was for goods only. The change to freight in general would, therefore, *prima facie* seem to indicate freight of the same kind upon the voyage substituted "instead of as before stated." Secondly, the policy not only generally provides as to ordinary policies for ship and goods as the subject matter under consideration, but provides in specific terms applicable to the freight of merchandise only for the time at which the risk is to commence. These terms are as follows:—"The insurance aforesaid shall commence upon the freight and goods as merchandise aforesaid from the loading of the said goods or merchandise, on board the said ship or vessel at as above, and continue until the said goods or merchandise be discharged and safely landed." This clause obviously has a specific effect upon the freight, because it excludes the application of those cases in which the risk on freight has been held to attach upon the goods being ready but not being loaded; it therefore helps strongly to indicate the meaning of freight in this policy. In this state of facts, and upon the construction of the policy in question we adopt the view of the assured, that the freight of merchandise only was assured according to his intention declared to his agent, and upon which the latter valuation actually took place; which intention, however, not being communicated to the underwriters, could not of itself have altered the construction of the policy, and whatever effect it may have led to, shows a mistake on both sides as to the subject matter of the valuation. The communications, however, of the assured with Barry, and with his agent, coupled with the fact of the large number of coolies on board, and the necessary provisions for their sustenance, are clear to show that the cargo of rice put on board was not a full or substantially a full, cargo, and that there was no total loss of freight understood as freight of merchandise to sustain the claim to recover absolutely the 1000*l.* upon the valuation. A valuation of freight refers *prima facie* to the freight of a full cargo, or the charter of the entire ship, and in this case there was nothing to show the underwriters that the valuation was of less than such full freight. If there had been no passengers, or so few as not substantially to interfere with the amount of the cargo, and the ship had been fully loaded with as much rice as would fetch a sum equal to the total of freight and passage money upon the voyage in question, viz., 3356*l.* and the whole had been lost, the 1000*l.* only would have been payable. If only so many bags of such as would produce a freight of 1476*l.* 18*s.*, the defendants mode of calculation would have been applicable, and they would have been liable to the loss multiplied by 1000, and divided by 3356, equal 439 and a fraction. The diminution of the liability for a partial loss under a valued policy, where the actual value of the total exceeds the valuation, is, however, an artificial rule which can only be applied where there is a total with which to establish the proportion. Where no such total is given the calculation must proceed as upon an open policy, except in respect of the maximum for which the underwriter is answerable, and the portion for

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which he insures. In the present case, assuming that there is a valuation by agreement of the same subject matter, there is no total loss of full freight of merchandise with which to institute the proportion. It is not stated, and we must conclude could not be stated with certainty, what the total freight would have been had the vessel been filled up with cargo, or that there might not possibly have been a full cargo, the freight of which would not have exceeded 2000*l*. Therefore, whilst on the one hand we decide in favour of the assured that the passage money of the coolies was not freight within the policy so as to make up a full freight upon which to work out this proportion; on the other hand we must hold in favour of the underwriter that the policy, as applicable to a partial cargo, was an open policy for half the loss of freight not exceeding in any case 1000*l*., and as only 1412*l*. freight was lost the underwriters are liable for 706*l*., for which sum, less the 441*l*. 2*s*. paid into court, viz., 264*l*. 18*s*., the plaintiff is entitled to judgment. In arriving at this conclusion as to the operation of the policy, in case of a total loss of a partial cargo, we act in accordance with the decision in *Forbes v. Aspinall* (13 East, 323) as to freight, and that of this court in *Tobin v. Harford* (1 Mar. Law Cas. O. S. 297; 13 C. B., N. S., 79; affirmed 2 Mar. Law Cas O. S. 34; 10 L. T. Rep. N. S. 817; 17 C. B., N. S., 528), as to goods.

Judgment for the plaintiff.

Attorneys for the plaintiff, Ware and Hawes, Great Winchester-buildings.

Attorneys for the defendant, Waltons, Bubb, and Walton.

COURT OF EXCHEQUER.

Reported by T. W. SATTERBEE and H. LINGE, Esqrs.,
Barristers-at-Law.

Saturday, May 4, 1872.

SECOND DIVISION OF THE COURT.

(Before MARTIN, BRAMWELL, and PIGOTT, BB.)

BRADFORD AND ANOTHER v. WILLIAMS.

Charter-party—Condition precedent—Refusal by one party to continue performance—Partial breach—Breach going to root of the contract—Distinction between—Action for breach.

*The plaintiffs declared on a charter-party dated 26th May 1871, whereby it was mutually agreed between the plaintiffs and the defendant, that the defendant's ship Ark should sail to B. and there load from the factors of the plaintiffs a full and complete cargo of coals, and proceed therewith to H. or D. and deliver the same on being paid freight at the rate of 2*s*. 9*d*. per ton in cash, on unloading and right delivery. The vessel to be loaded and discharged with all possible dispatch; to load with G. or C. till end of Sept. at captain's option, and after Sept. with C. That it was understood that the vessel should continue at the above mentioned rate and terms until the end of March 1872. Accord of fulfilment of all conditions, &c., and that the plaintiffs were always ready and willing, &c. Yet the said ship did not, after the commencement of Sept. 1871, continue to perform all or any of the matters so agreed as aforesaid, and the defendant would not permit the said ship, after the commencement of Sept. 1871, to load with G.*

or C. during the said month of Sept., or with C. during the months following the said month of Sept.

Plea, that at the commencement of the said month of Sept. and before any breach of the said agreement or charter-party by the defendant the captain of the said vessel exercised his option by electing to load from G., of all which the defendant had notice and although all things, &c., happened, &c., yet the plaintiffs were not ready and willing to cause the said vessel to be loaded in the said month of Sept. or at any subsequent time with G. according to the terms of the said charter-party, but absolutely refused so to do, in violation of the said terms, and gave notice to the defendant thereof, whereupon the defendant, as he lawfully might, refused to perform further the said charter-party. Held on demurrer (by Martin, Bramwell, and Pigott, BB.), that the plea was good and an answer to the action. The contract was one for the continuous employment of the defendant's vessel, and the plaintiffs, by refusing to load the vessel with G. during the month of Sept., broke the continuity of the employment and justified the defendant in rescinding and refusing any longer to perform the contract. The breach of the plaintiffs was not a partial one for which damages in an action for breach would have been a compensation to the defendant, but went to the root and whole consideration of the contract.

This was an action by the plaintiffs, the merchants, against the defendant, the shipowner, for breaking a charter-party, and the plaintiffs, by their declaration, charged that by a certain agreement or charter-party made between the plaintiffs and the defendant, and dated at Bridgewater the 26th May 1871, it was mutually agreed between Capt. Gower, of the ship *Ark*, of 120 tons burthen, then at Highbridge, and the plaintiffs, that the said ship, being tight, &c., should, with all convenient speed, sail and proceed to a loading berth at Bullo, and there load from the factors of the said affreighters a full and complete cargo of coals, to be brought and taken from alongside, at merchant's risk and expense, and, being so loaded, should therewith proceed to Highbridge or Dunball, and deliver the same on being paid freight at and after the rate of 2*s*. 9*d*. per ton of 20*cwt*. in full of all port charges, as customary (the act of God, &c., (the customary risks), always excepted). The freight to be paid on unloading and right delivery of the cargo, in cash. To be loaded and discharged with all possible dispatch, working days to be allowed the said merchants (if not sooner dispatched) for loading the ship as above. Vessel to load with Goidop and Company, or Goid and Company, till end of September, at captain's option; after September, all Goid and Company. The ship to have an absolute lien on cargo for freight, dead freight, and demurrage. The ship to be reported and cleared at the port of lading by Geo. B. Sully, or his agent. Penalty for non-performance of this agreement, estimated amount of freight. It is understood that the vessel shall continue at this rate and term until end of March 1872, and to discharge equally at Dunball and Highbridge. This is subject to Mr. Williams's approval. (Signed) Richard Williams, 3rd June 1871. By authority of Messrs. Bradford and Sons, George B. Sully as agent.

Affirmance, that the Mr. Williams, whose name is written as the foot of the said agreement, is the defendant, and the said Messrs. Bradford and Sons

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are the plaintiffs, and the defendant was the owner of the said ship whereof the said Captain Gower was master, and that the said ship, pursuant to the said charter, subsequently to the date thereof, and until the month of Sept. 1871, proceeded to the said loading berth at Bullo, and there loaded a complete cargo of coals, and proceeded therewith to Highbridge or Dunball, and there delivered the same, and during the said period subsequent to the date of the said agreement and charter, and until the said month of Sept. 1871, made divers successive voyages under the said charter. That all things were done necessary to entitle the plaintiffs to a continuance of a performance by the said ship of the matters and things agreed to be done thereunder, and upon the terms therein mentioned, and that the plaintiffs were always ready and willing to do and perform all things by the said charter required to be done by them, of all which premises the defendant had notice. Nevertheless the said ship did not, during the said period from the commencement of Sept. 1871, or at any time afterwards, continue to perform all or any of the said matters and things so agreed as aforesaid, &c., and the defendant would not, although requested so to do, permit the ship, after the commencement of Sept. 1871, or at any time other than during the period subsequent to the date of the said charter, and until the said month of Sept. 1871, as aforesaid, to proceed to the said loading berth at Bullo, or as near thereto as he might safely get, and there load from the factors of the said affreighters (the said Gollop and Co., and the said Goid and Co.), during the said month of September, and the said Goid and Co., during the months following the said month of September, a full and complete cargo of coals, whereby, &c. (allegation of damage by loss of the profits which would have accrued to the plaintiffs from a continuance of a performance of the charter by the defendant after the commencement of Sept. 1871, and by their having to freight other ships, and buy other coals at an additional expense, &c., &c.)

The defendant pleaded several pleas, as follows: First, that the said agreement or charter-party was not made between the plaintiffs and the defendant as alleged; secondly, that the defendant did not commit the said breaches, or any of them, as alleged; thirdly, exoneration and discharge of the defendant from further performance of the charter before any breach thereof; fourthly, that after the commencement, and long before the end of the said month of September, to wit, on or before the 7th day of the said month, and before any breach of the said agreement or charter-party by the said defendant, the said vessel was at Bullo aforesaid, ready to load according to the terms of the said agreement or charter-party and the said Capt. Gower exercised his said option by electing to load from the said Gollop and Co., of all which premises the plaintiffs had notice; and although all things happened and all times elapsed necessary to entitle, and nothing happened to disentitle, the defendant to have the said vessel loaded in the said month of September by the plaintiffs from or with the said Gollop and Co., yet the plaintiffs were not ready and willing to cause the said vessel to be loaded in the said month of September, or at any subsequent time, from or with the said Gollop and Co., according to the terms of the said agreement or charter-party, but, on the con-

trary, absolutely refused so to do, in violation of the terms of the said agreement or charter-party, and gave notice to the defendant thereof; whereupon the defendant, as he lawfully might, refused further to perform the said agreement or charter-party, which are the breaches in the declaration alleged; fifthly, denying that the plaintiffs or the said factors of the affreighters were ready and willing to ship coals on board the said vessel according to the terms of the said charter as alleged.

Replication and demurrer.

Issue taken and joined upon all the above pleas.

Demurrer and joinder in demurrer to the fourth plea, a ground of demurrer being that it disclosed no sufficient grounds whereby the defendant was justified in refusing further to perform the agreement or charter-party.

The cause went down for trial before the argument of the demurrer; and at the trial before Bramwell, B., at the last spring assizes at Bristol, the following appeared in evidence to be the facts of the case:—

The plaintiffs were coal merchants, and the defendant was the registered owner of a coasting vessel called the *Ark*, of 120 tons burden. In May 1871 an agreement was come to between the plaintiffs, through their broker and agent, Mr. G. B. Sully, and one Levison Gower, the captain of the *Ark*, subject to the approval of the defendant, the owner of the said vessel, that the *Ark* should be exclusively employed in carrying coals for the plaintiffs, from Bullo Pill (a loading place in the river Severn, below Gloucester, where the Forest of Dean coal is shipped) to Highbridge or Dunball (places of discharges in the port of Bridgewater) from the date of the agreement to the end of March 1872, at a freight of 2s. 9d. per ton, and the charter-party set out in the declaration was accordingly prepared, and was then signed by the defendant and by Mr. Sully on the part of the plaintiffs. Between the 22nd May and the 2nd Sept., the vessel made seven voyages for the plaintiffs, the captain exercising his right of electing to load, and loading, in every instance, with Gollop and Co.

The plaintiffs, it appeared, had contracts with both Gollop and Co., and Goid and Co. for a supply of a certain quantity of coal from each of those firms during the summer months, and in consequence of the defendant's captain having exercised his option of always loading with Gollop and Co., the plaintiffs had taken their stipulated quantity of coal to the end of August from Gollop and Co. some time in the month of July, whereupon, on the 17th July, they wrote to Gollop and Co. requesting them to assist the plaintiffs in making up their (the plaintiffs') quantity with Goid and Co., by discharging any vessels loading with Gollop and Co. that month, and informing the captain that the plaintiffs' quantity agreed on with them to that time was already taken. Before, however, that letter arrived, the defendant's captain had taken a cargo on board from Gollop and Co., but the letter was shown by Gollop and Co. to the captain, and he was informed by them that they could not load him again. In consequence of that the captain wrote as follows to the plaintiffs:

Bullo Pill, July 22nd, 1871.

Messrs. Bradford and Sons

Gentlemen,—I find that you have stopped Gollop and Co. sending any more coal for a time, and Goid is having

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sources any down. There is vessels that have been in them with Goid for the last fortnight still empty. I shan't attempt to stem there. Unless you reply Monday I shall consider the charter broken, and I shall fix elsewhere.—Yours, &c., L. GOWER.

The plaintiffs replied to that letter as follows:

24th July 1871.

Captain L. Gower.

Dear Sir,—Yours 22nd to hand. We think you will find Messrs. Goid and Co. can load you either best or rubbish (one or the other) quite as speedily as Gollop and Co. In fact, Messrs. Gollop and Co., by their own error, have been sending us far too much coal, and we think you have not brought a single cargo from Messrs. Goid. However, if you cannot get best or rubbish of Messrs. Goid and Co., then, of course, according to your charter, you can load with Gollop and Co., and this letter to Gollop, when they see it, will explain, and they will load you. Please note, if you can get either best or rubbish of Goid and Co., and in face of this load with Gollop and Co., we shall not pay for it.—Yours, &c., BRADFORD AND SONS.

By the same post (24th July) the plaintiffs wrote also to Gollop and Co. complaining of their having declined positively to load in a case "where the charter had been signed optional to you or Goid," and adding, as it is, if you must you must, and we can pay you proportionately for each month the quantity as agreed on, and in this way meet the difficulty. Only load where charter gives option, and in such cases help us all you can."

Matters went on through the month of August, the defendant's vessel loading two cargoes for the plaintiffs at Gollop and Co.'s in that month, the last of which, which was loaded on the 25th Aug., was discharged at Dunball or Highbridge on the 2nd Sept. On the 7th Sept. the defendant's vessel was again at Bullo, and on that same day the captain wrote to Gollop and Co. asking when he could have a cargo of coal for the plaintiffs, to which on the 8th Sept. Gollop and Co. replied, "that they would load him as soon as they received instructions from the plaintiffs, but that they could not load the defendants' vessel, or any other, without the plaintiffs' authority." The captain also wrote on the 7th Sept. to the plaintiffs as follows:

Bullo Pill, 7th Sept. 1871.

Messrs. Bradford and Sons.

The *Ark* arrived here on Saturday night, and found Goid's stem over three weeks. Gollop and Co. have no orders for me to load. What must we do? I have engaged for a short voyage; will you please inform me by return?—Yours, &c., L. GOWER.

To which the plaintiffs replied, on the 9th Sept. as follows:

In reply to your favour of 7th inst., our contract with Gollop and Co., is expired, and we must now ask you for the future to load with Goid and Co.

The captain, however, declined to load with Goid and Co., on the ground that their stem being so heavy his vessel would be kept waiting for probably two or three weeks before her turn came, and the defendants thereupon elected to rescind the contract, and to treat the matter as at an end. The plaintiffs thereupon brought this action against the defendant for breach of contract in not continuing to perform his contract by loading with Gollop and Co., or Goid and Co., during the month of September, or with Goid and Co. after that month; and at the trial on proof of the above facts, and the correspondence being put in, a verdict for the plaintiffs for 40l. was taken, and leave was reserved for the defendant to move to set that verdict aside, and to enter a verdict for the defen-

dant, on the ground that the defendant's third fourth and fifth pleas were proved at the trial, and were an answer to the action, and a rule to that effect having been obtained by H. T. Cole, Q.C. on the part of the defendant, the same now came on to be argued together with the demurrer to the fourth plea.

Points for argument on the part of the plaintiffs on the demurrer:—First, that the fourth plea does not allege any matters which constitute such a breach of contract or non-performance on the part of the plaintiffs as would entitle the defendant to refuse to perform the agreement or charter-party; secondly, that the plaintiffs not being ready, and willing to cause the said vessel to be loaded in the month of September from or with the said Gollop and Co., and their refusal so to do, was not a ground entitling the defendant to refuse further to perform the agreement or charter-party; thirdly, that the plaintiffs not being ready and willing to cause the vessel to be loaded at any time subsequent to the month of September from or with Gollop and Co., and their refusal so to do was not in violation of the terms of the agreement or charter-party, or a ground entitling the defendant to refuse further to perform it.

The defendant's points for argument:—First, that the fourth plea is good in substance; secondly, that it discloses sufficient grounds to justify the defendant in not further performing the terms of the said charter-party, and in treating the said charter-party as at an end; thirdly, that having regard to the nature of the charter-party, and of the voyage to be made thereunder, as in the declaration alleged, the defendant was justified in refusing to continue performance of the term of the said charter-party under the circumstances stated in the fourth plea.

Lopes, Q.C., and A. R. Poole now appeared to show cause against the rule, and to argue the demurrer on the part of the plaintiffs.—The plea is bad, and no answer to the plaintiffs' action. The defendant was not entitled, under the circumstances disclosed by the evidence, and in the correspondence to rescind the contract and treat the charter-party as at an end, nor does the plea show such a breach or non-performance by the plaintiffs as entitled the defendant to refuse further to perform his agreement. The principles laid down in the cases of *Weaver v. Sessions* (6 Taunt. 154), and *Franklin v. Miller* (4 A. & E. 589), apply distinctly to the present case, and show that a partial failure of performance of their contract by the plaintiffs did not authorise the rescission by the defendant of the whole contract. In *Weaver v. Sessions* the defendant, the lessee of a public house, covenanted to buy of his lessor (the plaintiff) all the malt he should brew into ale or beer, or otherwise use therein, and the lessor covenanted to deliver on request sufficient good, well dried, marketable malt, and at a marketable price, for the use of the defendant in the demised premises, but, if the plaintiff should neglect to do so, the defendant might purchase of any others; and in an action for buying malt of others, a plea that the plaintiff for a long time would not deliver good malt, but delivered divers quantities of bad malt, whereby the defendant was in danger of losing his custom, and therefore bought malt of others, was held ill on demurrer, and Gibbs, C.J., in his judgment there said: "If we were to hold this plea sufficient we must decide that a single breach by the

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lessor would release the covenant of the lessee. The defendant may sue to recover compensation in damages." *Franklin v. Miller* (*ubi sup.*) shows that the defendant here had no right to treat the contract as rescinded; (See per Lord Denman, C.J., at p. 604, of 4 A. & E., and the reference by his Lordship to the judgment of Patteson, J., in *Withers v. Reynolds*, 2 B. & Ad. 882.) In *Franklin v. Miller*, too, Littledale, J., said: "It is a clearly recognised principle that if there is only a partial failure of performance by a party to a contract, for which there may be a compensation in damages, the contract is not put an end to." That, it is submitted, is very strongly in favour of the plaintiffs here. The rule was well laid down by Lord Mansfield, C.J., in the case of *Boone v. Eyre* (2 W. Bl. 1314, n. f; 1 H. Bl. 254-273, n. a) where his Lordship said, "The distinction is very clear; where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to a part, and where a breach may be paid for in damages, then the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." And Littledale, J., in *Franklin v. Miller* (*ubi sup.*), after referring to that rule of Lord Mansfield's, goes on, "So here it cannot be contended that, if in any one week the sovereign had been unpaid, that default would put an end to a contract made up of several stipulations, some of which have been executed." The present contract answers that description precisely. See also per Lord Ellenborough, C.J., in *Ritchie v. Atkinson* (10 East, 295). If carefully looked at, the case of *Withers v. Reynolds* (2 B. & Ad. 882; 1 L. J., N.S., 30, K.B.), is in the plaintiffs' favour. There the defendant agreed to supply the plaintiff with straw, delivered at his premises at the rate of three loads a fortnight, during a specified time, and the plaintiff agreed to pay 35s. for each load so delivered during the said period. After several loads had been delivered, the plaintiff refused to pay for the last load delivered, and claimed to keep one payment always in arrear; and it was held that, as each load was to be paid for on delivery, the defendant, on the plaintiffs' refusal so to pay, was not bound to send any more straw. The ground of the decision in that case was, that there was an entire alteration of the contract from a cash to a credit transaction, and so the contract was frustrated. That clearly appears from the judgments of Lord Denman, C.J., and Parke and Taunton, JJ.; and Patteson, J., there took a distinction, which is in the present plaintiffs' favour. He said, "If the plaintiff had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw; but the plaintiff expressly refused to pay for the loads as delivered, the defendant, therefore, is not liable for ceasing to perform his part of the contract." [POTTER, B.—Is not that the case here? The defendant was entitled to the freight at the end of each voyage.] If at the end of any particular voyage we had declined to pay for that voyage, that would not have amounted to or justified a rescission; but if we had said we will keep a month's freight in hand, that would have come within Patteson, J.'s distinction. Unless what the plaintiffs did frustrated the entire contract, and went to the whole consideration, the defendant is not justified in considering the contract at an end and in rescinding it: (*Tarrabochia v. Hicks* and

another, 1 H. & N. 183; 26 L. J. 26 Ex.), and see particularly the judgments of Pollock, C.B. and Martin, C. in that case. But here, what the plaintiffs did amounted at most to a partial breach only on their part. The default to load was temporary only, and similar to a default in payment of freight on some one particular occasion. It was a subsidiary and subordinate consideration, and was such a breach as was matter for an action for compensation in damages. Again, a contract cannot be rescinded by one party for the default of the other, unless both can be put in *status quo* as before the contract, which cannot be done here. *Hunt v. Silk* 5 East, 449. In *Seeger v. Duthie* and others, in error from the Common Pleas (1 Mar. Law Cas. O. S. 3; 3 L. T. Rep. N. S. 478; 8 C. B., N. S. 72; 30 L. J. 65, C. P.), Martin, B., in his judgment, refers to the rule laid down in *Abbott on Shipping* (at p. 266, 8th edit.; ib. p. 221, 11th edit.) for determining whether a particular covenant by one party was a condition precedent, or an independent covenant, and quoted from the judgment of Tindal, C. J., in the case of *Stavers v. Curling* and another, (3 Bing. N. C. 355; 3 Scott 740; 6 L. J., N. S., 41, C. P.), that "the rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties, as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way." [MARTIN, B.—That is exactly my view now. The meaning and substance of this contract is that the defendant was to be employed continuously in earning freight with his small vessel at 2s. 9d. per ton. It is like the case of *Hoare v. Rennie* (5 H. & N. 19; 29 L. J. 73, Ex.; 1 L. T. Rep. N. S. 104), and the defendant was entitled to consider the contract at an end.] Your Lordship leaves out this, that he might have brought an action. [MARTIN, B.—But the damages he would have recovered would not be equivalent to the continuous earning of freight.] *Jonassohn and another v. Young* (4 B. & S. 206; 32 L. J. 385, Q. B.) is a strong case in the plaintiffs' favour. The defendant here must go the length put by Crompton, J. in his judgment in that case. The fact of detaining the vessel an unreasonable time was no ground of the decision there:

Campbell v. Jones, 6 T. R. 57;
Havelock v. Geddes, 10 East, 555-62, were also cited.

Then with respect to the rule for entering the verdict, it is submitted that the defendant's plea were not proved. There was no refusal by the plaintiffs. Gollop & Co. merely said, "We cannot load you now, we must wait for authority." The defendant was asked to load with Gould and Co., and not with Gollop, but the plaintiffs never refused, nor were they unready. The defendant should have gone to Gollop and Co., and remained there. [POTTER, B., refers to the plaintiffs' letter telling the captain that their contract with Gollop and Co. was at an end.] The evidence showed no exoneration and discharge of the defendant's further performance of his contract.

H. T. Cole, Q.C. and A. Charles, for the defendant, *contra*, were not called on.

MARTIN, B.—I can say no more than I have already expressed in the course of the argument. The rules regarding the construction of covenants

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whether they are or not to be construed as conditions precedent, and as to what covenants are independent and what dependent, and whether the covenant goes only to a part of the consideration on both sides, so that a breach of it may be paid for in damages, and an action be maintained for a breach on the part of the defendant, without averring performance in the declaration, or whether the mutual covenants go to the whole consideration, and so are mutual conditions rendering an averment of performance necessary, will be found fully and lucidly laid down in Mr. Serjt. William's note (4) to the case of *Portage v. Cole* (1 Wms. Saund. 3191, at pp. 320a to 320c.), and also by Lord Tenterden, in his book, *Abbott on the Law of Merchant Ships and Seamen*, where his lordship, at page 226, 8th edit., and page 221, 11th edit., says—"Whether or not a particular covenant by one party be a condition precedent, the breach of which will dispense with the performance of the contract by the other, or an independent covenant, is a question to be determined according to the fair intention of the parties, to be collected from the language employed by them: (*Harelock v. Gaddes*, 10 East, 555). An intention to make any particular stipulation precedent should be clearly and unambiguously expressed. (The general rule (in the words of Lord Ellenborough in *Davidson v. Gwynne*, 12 East, 381) is that, unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered a condition precedent, but as a distinct covenant, for the breach of which the party may be compensated in damages." Now, contracts are so infinite in number, and in their subject and character, are couched in such an endless variety of terms, and embrace such a multitude of ever-differing circumstances, that it is quite impossible to argue from one contract to another. It is, I think, unfortunate and unsafe to apply the phrase "condition precedent" to the case of a contract like that in the present case. We must look at the contract itself, its substance and nature, and, as was said by Findal, C.J., in *Staegers v. Curling* (*ubi sup.*), apply on common sense to its construction, in order to ascertain the intention and meaning of the parties, as appearing on the face of the instrument itself. Now, it is plain that the object of the defendant here, and the intention of both parties, was that the defendant's vessel should be continuously employed from the date of the contract in May 1871 to the month of March in the following year, in earning freight upon the coals loaded for the plaintiffs at the rate of 2s. 9d. per ton, to be paid in cash on the unloading and delivery of each cargo. The cessation or interruption of the performance of the contract on the plaintiffs' part for a month would therefore, to a person in the defendant's small way, be a very serious matter, and one for which any damages he might recover in an action for breach of covenant would not be a compensation equivalent to the regular and continuous payments of freight. When, therefore, he found that he would not be able to get his vessel loaded during the whole of the month of September, he was entitled to elect to put an end to the contract altogether. The case of *Hoare and others v. Rennie and another* (5 H. & N. 19; 29 L. J. 73, Ex; 1 L. T. Rep. N. S. 104) is an authority in favour of that view of the matter, and *Withers v. Reynolds* (2 B. & Ad. 882)

is also in point to the same effect. On the authority of these cases, I think that this plea is a good plea. I was, I confess, at the outset rather disposed to agree with Mr. Lopes, but, on further consideration during the course of the argument, I have come to the conclusion that the plea is good, and furnishes an answer to the plaintiffs' action. The plea being good, it is only necessary to say that it was proved at the trial, and that, therefore, the defendant's rule to enter the verdict for him will be made absolute.

BRANWELL, B.—I am of the same opinion, and, beyond saying that I think the plea demurred to is a good plea, I have very little to add. The parties here agree to a continuing contract, and then the plaintiffs, having contracted with the defendant that they would continually load him, declined for a whole month to load him at all. What then was the defendant to do under such a state of things, or what could he do other than that which he did? No man has a right to put another person, with whom he has entered into a contract of this kind, in such a position as the plaintiffs, by refusing to load his vessel during the month of Sept., placed this defendant here. The observations of Pollock, C.B., in delivering his judgment in the case of *Hoare v. Rennie* (*ubi sup.*) are in point, and very applicable to the present case, as showing that it really does not turn upon any question of condition precedent, but that the question really is whether, where a man who is bound to perform his part of a contract does not do so, he can enforce the contract against the other party. Suppose the plaintiffs in this case had said to the defendant, "We won't load you at all until January next," and the defendant had thereupon said, "Very well, then I must do the best I can, and get other employment for my vessel," would the plaintiffs in that case have been entitled to say, "No, you must not do that, you must wait, keeping your vessel idle, and you can bring your action against us to recover damages, as a compensation for the loss sustained by you in being unemployed during all these months"? Surely not. The defendant would have a right, on the plaintiffs' refusing to load him, to do the best he could with his ship during the interval, not only for his own benefit, but also in order to reduce the amount of damages payable by the plaintiffs; and if he might do so for the interval, he might go on for a longer time, until the expiration of the contract term in March, or longer. Suppose again, a charter entered into between a charterer and a shipowner for an outward and homeward voyage from London to Calcutta and back, and then the charterer says, "I will not load you for the outward voyage, but you shall be ready at Calcutta to take in a cargo for the homeward voyage;" would the shipowner be liable, under such circumstances, to an action at the charterer's suit, because he did not sail out to Calcutta, and find himself there ready to perform the homeward part of the contract?—The conduct of the plaintiffs in the present case was such as to justify the defendant in saying to them, "You won't go on with your contract for a certain time, and so I am entitled to treat the whole matter as at an end, and to rescind the contract." On these grounds I think the judgment of the court on the demurrer should be in favour of the defendant, and I also agree that the rule should be made absolute.

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PROOTT, B.—I am of the same opinion. I think that the present case is not one of a partial breach of contract, but that, on the contrary, the breach of it on the part of the plaintiffs goes to the root and whole consideration of the agreement; and if that be so, then the defendant was entitled to throw it up altogether. In order to ascertain whether it does so go to the root of the matter, we must look at the nature and substance of the contract between the parties. Now, clearly, the defendant intended to have his ship employed constantly and continuously from May 1871 to March 1872, and that as my brother Martin has observed, was the contract between him and the plaintiffs; so that when the plaintiffs told him that they would not employ him during all September, he was entitled to consider the contract at an end, and to look about for other employment for his vessel. I do not think that an action for damages would have put him at all in the same position.

Judgment for the defendant on the demurrer, and rule absolute to enter the verdict for him.
Attorneys for the plaintiffs, Torr, Janssens, and Taggart, agents for Carslake and Barham, Bridgewater.

Attorneys for the defendant, Vizard, Crowder, and Anstie, agents for Kearsley and Parsons, Strood.

COURT OF ADMIRALTY (IRELAND).

Reported by OLIVER J. BUCKE, Esq., Barrister-at-Law.

May 22 and 29, 1872.

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Collision between a vessel under way and a vessel incapable of moving—General allegation of negligence in plaintiff's petition—Inevitable accident.

The plaintiff by his petition alleged that the schooner Secret entered the Arklow harbour under full canvas, and ran into and sank the stern of the schooner Industry, which was then moored fast within the harbour.

The 17th article of the petition having alleged, in general terms, that the collision was altogether the fault of the Secret, and was caused by the recklessness, carelessness, and mismanagement of those on board of her, and not caused by anything done or left undone by those on board of the Industry, concluded with charging one specific act of negligence only, "that the said collision was further occasioned by the want of any sufficient look-out on board the Secret."

Semble, that the established rule, which requires a plaintiff in a cause of damages to state with reasonable certainty the instances of neglect on which he intends to rely, and if he relies on a breach of a statutory rule of navigation, that he should specifically plead that the act done or not done was in violation of that particular rule, does not apply to a case where one vessel is under way and the other incapable of moving.

Where the petition states such facts on the part of the plaintiff, as if proved or admitted, would lead to the conclusion that the vessel charged with the collision was to blame, it is then rather for the defendant to show what has been done than for the plaintiff to show what might have been avoided.

Inevitable accident is where the collision could not have

been prevented by proper care and seamanship in the particular circumstances of the case.

A defendant, in order to support a defence of inevitable accident, is bound to show that everything ordinary and usual was done which could and ought to have been done to avoid a collision.

The facts and the arguments of counsel are fully stated in the judgment of the court.

Erlington, Q.C. and Corrigan appeared for the plaintiff.

Todd, Q.C. and Boyd, were for the defendant.

TOWNSEND, J.—The plaintiffs in this case, Messrs. George Keon and James Tyrrell, of Arklow, owners of the schooner Industry, of Dohlin, seek to recover damages, actual and consequential, amounting in all to the sum of 95*l.* 6*s.* for injury done to that vessel by the schooner Secret, of Dohlin, John Byrne, master, in a collision which occurred on the 12th Jan. last in Arklow Harbour. Both those vessels had arrived on the previous night at Arklow Roads, each laden with a cargo, and anchored there to await daylight and the morning tide to enter the harbour. Two other similar vessels were in company. The harbour is merely a narrow inlet at the north of the River Avoca. On each side of the creek, which runs nearly east and west, a pier has been constructed, one to the northward, another to the southward, the river flowing between the piers, and producing a current onward, varying in strength according to the time of tide, and the quantity of water in the river. The flood deadens, but does not stop it; in winter, and during the floods in the river, the current always sets towards the sea. The distance between the pier heads, is about fifty yards, but the harbour widens a little within soon after the entrance has been passed. A bar crosses the entrance close to the pier heads; the channel between the piers is about a foot deeper on the south side of the mid line than it is towards the north pier. Close to the south pier there are about 11*ft.* or 12*ft.* of water at very high tide, there are from 10*ft.* to 10½*ft.*, or thereabouts in the centre, and something about 9*ft.* or 9½*ft.* to the north pier at high-water springs. A sand and gravel bank has been formed along the south pier, extending about 14*ft.* from it, which prevents the small vessels which frequent the pier from lying exactly alongside the wall, but they may be loaded and discharged by a plank. It is not usual to discharge vessels at the place where the collision occurred, which is about 200 yards from the south pier head, unless in summer time, or when they cannot go further up. On the 12th Jan. before either of the colliding vessels had entered the harbour, a vessel called the Brothers was lying there, close by the place I have mentioned, or about 200 yards from the entrance, moored with her head up the stream, with a chain on each bow, and a rope on the port quarter, the port chain and rope being made fast to the south wall, the starboard chain to the north pier; but it lay on the bottom, there being no strain on it. The Brothers being light, drew but about seven feet, and therefore lay afloat, for all agree that there was a greater depth than that, at the time in question, near the central line; although there is a great discrepancy in the statements and estimates of the witnesses, and unfortunately the times, distances, and depths are almost all matter of estimation. We cannot, therefore, be surprised at the want of precision and accuracy remarkable in the

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case. It seems that after daylight, about 7.30 a.m. or possibly somewhat later, the *Minnie* entered the creek: it was then much more than half-flood, for, according to the Admiralty chart, it being two days after new moon it could not have been high water until ten o'clock, and Byrne, the master of the *Secret* says it was high water at the hour of 10.30. Mr. James Tyrrell made it about high water at half-past eight o'clock, when the *Industry* got in, but as the tide was high and certainly slack, he may have been mistaken. The *Minnie* got into some difficulty on the North Pier, but was extricated after a delay of about twenty minutes, and was warped up to a place something about 30 yards astern of the *Brothers*, but nearer to the pier. A hobbler boat which supplies local pilot boats, and occasional assistance to vessels coming into the place, then went to the *Secret* and the *Industry*, and placed a pilot on board each vessel—not a regular pilot, but a person of skill and local knowledge, and able to act in that capacity. This was, it seems, between half-past seven and eight o'clock, perhaps somewhat later; the water was quite smooth, the wind SSW., freshening, not, as alleged in the defendants' preliminary act, a strong gale, but a fresh sailing breeze, to which the schooners were well able to carry sail. The *Secret* had a main topmast stay sail. The plaintiff, Mr. James Tyrrell, himself a seafaring man, was placed at the *Industry's* helm. The tide was peculiarly high, although, as I have stated, it still wanted more than an hour of high water. The *Industry* crossed the bar before the *Secret*, which was still outside, but under way. The *Industry* passed close to the *Minnie*, and was run aground ahead of her between the south pier and the port quarter of the *Brothers*, carrying away at the same time the port stern-post of the *Brothers*, but doing no further damage, and, having struck the bank formed along the south pier, she lay not parallel to the pier, but, making an angle with it, her bow being 7 ft. and her stern 13 ft. or 14 ft. distant from the wall. The broken ends of the stern-post were then bent together by the *Industry's* crew, and her rope passed from her own quarter to the wall about twenty or twenty-five minutes afterwards—less than that time according to some. The *Secret* came in under all her canvass but her fore stay-sail and gaff-top, and although her helm was ported when she had got inside the pier head, and although her anchor was let go when she got close to the *Minnie*, she, nevertheless, ran into the stern of the *Industry*, doing considerable damage. The case of the *Secret*, as set forth in her answer (7th article) is that on approaching the part of the river where the *Brothers* and the *Industry* were lying, it was unexpectedly found that the passage was completely obstructed by the said vessels; that though her approach must have been seen, nothing effective was done, either on board the *Industry* or the *Brothers* to remove the obstruction, or make a passage to the *Secret*. I may here observe that at the time the *Industry* was aground, the *Brothers'* crew were all absent; then the *Industry* came in, and although they returned soon after, it is not clear that they had done so before the arrival of the *Secret*. The eighth article of the *Secret's* answer asserts that immediately when those on board the *Secret* perceived that the passage was blocked, and that nothing was done to make a passage for her, and it became manifest that there

was danger of a collision, everything was done that could or ought to have been done on board the *Secret*, to, if possible avoid, end at all events to lessen, the force of the collision; her anchor was let go, and her sails were as far as was practicable hauled down or lowered; but, notwithstanding, the *Secret* struck the *Industry*, doing her but trifling damage. The defendant's counsel have commented with some severity on the petition, and contended, that as it was not charged that the collision had been the result of carrying too much sail, or not having ported the *Secret's* helm, the carelessness and negligence to which it attributes the collision must be taken in conjunction with the only specific act of negligence charged, namely, not having a sufficient look-out. The seventeenth article of the petition, having alleged in general terms that the collision was altogether the fault of the *Secret*, and was caused by the recklessness, carelessness, and mismanagement of those on board of her, and was not caused or contributed to by anything done or left undone by those on board of the *Industry*, concludes thus: "And the said collision was further occasioned by the want of any sufficient look-out on board the *Secret*." And the case of *Daniel v. The Metropolitan Railway Company* (L. Rep. 3 C. P. 216; 24 L. T. Rep. N. S. 815) has been referred to, and the judgment of Willes, J., has been relied on by the defendant's counsel, as showing that the plaintiff should have set forth what precaution the defendant's vessel should have taken. That was an action for negligence brought by a passenger against the railway company for an injury done to him by the fall of an iron girder, through the negligence of workmen employed by contractors who had undertaken to put it up. The girder had fallen on a train in which the plaintiff was travelling, and had caused the injury complained of. It was shown that the company had not placed any person to signal that train when the girder was being moved, which was a dangerous operation. A verdict was taken for the plaintiff, to be turned into a verdict for the defendants, or a nonsuit, if the court should be of opinion that there was not sufficient evidence of negligence on the part of the company, they not being liable for the negligence of the contractors. When the case came before the Court of Common Pleas, Willes, J., did indeed state his opinion that the plaintiff should not merely show that an accident had happened on the line, but should also show some reasonable probability that the accident had resulted from the want of some reasonable precaution which the defendants might or ought to have taken; and he adds, "I go further, and say that the plaintiff should also show with reasonable certainty what particular precaution had been taken." But I think he expressed that opinion with regard to the facts then before him, for I find, he says (p. 225), that if he were a jurymen he must say he thought there was reasonable evidence that the accident might, and probably would have been, avoided, if there had been a signalman. The Court of Common Pleas inferred that the company were guilty of negligence in not having taken any precautions. But the judgment was, I find, reversed on appeal to the Exchequer Chamber (p. 591), the court of appeal (which had power to draw inferences of fact), having come to the conclusion that the persons whose duty it was to take the

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precautions, were the contractors by whom the work was carried on. That being so, while I regard any expression of that able judge with the greatest deference and respect, I cannot regard the words he is reported to have used, plainly with reference to a particular action at common law, as conclusive authority that in this court the petition should be deemed insufficient. It is, doubtless, the established rule here that a plaintiff in a cause of damage can only recover *secundum allegata*. The plaintiff must also state with reasonable certainty the instances of neglect on which he intends to rely, and if he relies on a breach of any statutory rule of navigation, he should specifically plead that the act done or not done was in violation of that particular rule. But the present case is not one founded on any statutory rule. The petition alleges that the *Industry* had taken up her position in the port, was moored in a proper position, her sails lowered and furled; and that the *Secret*, under way, and entering the harbour, ran into and struck her. If this were proved the presumption would be that the *Secret* was to blame, the general law of navigation requiring that a vessel under way shall keep clear of one incapable of moving. No doubt the *Secret* might bow, if the fact were so, that the collision was inevitable in the circumstances, but I think the *Industry* was not bound to state more precisely the mode in which it occurred. Lord Chelmsford, when delivering the judgment of the court of appeal in *The East Lothian* (Lush. p. 249), says that it is always quite sufficient for a party who complains of an injury to his vessel occasioned by the improper course of another, to describe that course without attempting to attribute it to any particular cause. If the petition state such facts on the part of the plaintiff as if proved or admitted would lead to the conclusion that the vessel charged with the collision was to blame, it is then rather for the defendant to show what has been done, than for the plaintiff to show it might have been avoided. No objection was taken to the petition, nor any particulars required: the answer, though it does not use the express terms "inevitable accident," clearly treats the case as one of inevitable necessity on the part of the *Secret*, and on that ground alone the learned counsel for the defendant have rested their defence. As to "inevitable accident" I cannot do better than adopt the language of that great authority on maritime cases, Dr. Lushington, whose opinions I have, I may say, been taught to revere, and whose sagacity and extensive knowledge in questions of this kind I see every day deeper reason to admire. He says in *The Europa* (14 Jur. 629), "Inevitable accident is where one vessel, doing a lawful act, without any intention of harm, and using proper precaution to prevent danger, unfortunately happens to run into another vessel." Adopting then, as I do, the definition of inevitable necessity given in *The Europa*—and I think the passage cited from *Brown v. Slesbray*, as given in Fitcher's Digest, p. 141, is quite reconcilable with it, but as the facts of the latter case are not stated, it would hardly be safe to rely on the language of a mere passage from the judgment—remembering then that, in law, inevitable accident is that which the exercise of ordinary care, caution, and maritime skill cannot prevent, I fully admit that it is sufficient if the caution used has been such as has been ordinary and usual in

similar cases. But it is not enough to show that the accident could not be prevented at the moment it occurred; that would be merely to show that it could not be prevented when it had become inevitable. The question is, to use the words of Dr. Lushington in *The Virgil* (2 W. Rob. 207), could previous measures have been adopted to render the occurrence of it less probable? In proportion to the necessity for care and vigilance, should be the care and diligence employed. Now the place was well known to those on board both those vessels. John Byrne, the master of the *Secret*, tells us that before he crossed the bar he could see the masts, though not the hulls, of the vessels which had gone into the harbour before him. According to his calculation the current was running at the rate of a mile an hour. Mr. Tyrrell supposes it to have been running twice as fast. In either case there was a current to be considered, and I do not think it possible, nor do the assessors, that the estimate of time, a minute and a half, sworn to by the defendants' witnesses, or that occupied in running up from the pier end, is quite accurate. It seems to me that it must have been more than twice that time at least. That may not be very material, yet I cannot but observe that on every point of this case a controversy has arisen, and on matters of mere opinion it is difficult to say which opinion is the most reliable. The case has unhappily been greatly protracted by these disputes, that respecting the *Brothers'* position after the *Industry* had parted the stern post, and there is a mass of evidence which cannot help us to a decision, and a length of discussion about it I cannot help thinking likely to convey an impression unfavourable to the procedure in this court. But, however our opinion may incline on that question, the passage up the harbour was not perfectly clear. It could hardly have been deemed perfectly safe on that morning by anyone who knew the locality, for before the *Secret* went in at least three vessels had already occupied places in that narrow channel, and it is evident that their masts were to be seen there when the *Secret* attempted to pass the bar. Byrne, the master, says that when he got between the piers, and saw there was no safe passage, he put his helm to port. His object, therefore, was to go to the northward of the vessels. There is very great doubt on our minds whether the *Brothers* did in fact swing across the creek after her stern post had been carried away. Assuming that she did so, to some extent at least, we are by no means certain that there was not sufficient room and water to allow the *Secret* to pass to the northward of her. The *Secret* actually passed there, after the *Brothers'* quarter had been, according to the defendants' witnesses, warped eight or ten feet to the southward, at a time that there could be no appreciable difference in the depth, so far as regarded the tide. At all events, the bottom of the harbour at or near the mid channel was flat, composed of sand or gravel. There were no rocks or large stones, except at the foundation of the wall, and a vessel like the *Secret* would not have been injured by merely touching the ground in such a place. The master of the *Secret* now says he did not like to try the experiment. However, he ported his helm. The porting of the helm did not succeed; it was found when the *Secret* was about twice her own length from the pier that she did not answer the helm. An attempt was then made to lower her

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THE LION.

[ADM.]

maingaff and ease the mainsheet, but it did not succeed, nor did the attempt to keep her away by holding the head sheets to the port. Nothing more, it is said, could have been done, in the hurry and confusion, except to anchor, which they did when too late. But why was there hurry and confusion? It seems agreed on both sides that it is necessary to keep good way on a vessel crossing the bar, and therefore it is argued it was not improper to enter the place under a press of sail. If a press of sail was necessary, no doubt it was justifiable to carry it, but the necessity implied an obligation for greater caution as to the vessel. If as Byrne states to have been the case, he was going after crossing the bar six or six and a half miles an hour through the water, and four or five over ground, he must have known that he would not have had much time for deliberation, or preparation between crossing the bar and reaching the place where the masts, though not the hulls, of the other vessels, were to be seen. I have asked the assessors what, in their opinion as nautical men, and taking into consideration the place, the weather, and the circumstances, would have been the precautions which a seaman of ordinary skill acquainted with the harbour should have taken to enter it in safety to his own vessel, and without doing an injury to others. They tell me that he should have had his ropes clear, everything ready for shortening sail, his anchor clear and ready for letting go in an instant, and a boat and warp ready to be used if necessary. They think such precautions no more than should be expected from a person of mere ordinary skill. They are also of opinion that there was nothing to prevent the vessel from anchoring between the pier heads and the place where the collision occurred; they think she had both time and space to do so. If she had done so, or even if she had run on the bank astern of the *Minnie* and close to that vessel, as the *Industry* ran inside the *Brothers*, the collision would have been avoided. It was, therefore, not an inevitable accident. Inevitable accident is where the collision could not have been prevented by proper care and seamanship in the particular circumstances of the case. The defendant was bound in order to support a defence of inevitable accident to show that everything was done which could and ought to have been done with safety to the *Secret* to avoid a collision with the *Industry*. Much controversy has been raised respecting the place where the *Industry* was run aground, but it must be considered immaterial whether her berth was properly or improperly chosen. I apprehend that it was the bounden duty of the *Secret* to avoid any collision whatever. This is the doctrine of the maritime law; what particular measures should be taken depends altogether on the particular circumstances of the case. The assessors think that assuming the master of the *Secret* to have truly stated that the *Brothers* appeared to him to be lying across, he should instantly have shortened sail on coming between the pier heads, and have let go his anchor in time to prevent his reaching up so far as the *Brothers* until they had passed the pier head by two ships' length; the master of the *Secret* appears to have taken no steps whatever. The *Secret* appears to have been quite unprepared for any of the contingencies that might have been expected at the time and in the place. It is not for us to lay down what a vessel should do in the like circumstances, but it is the opinion

of the gentlemen who have assisted me with their advice, that there was a practicable and safe course, that was not followed. They attribute the collision exclusively to the *Secret* not having shortened sail and let go her anchor at the time, or if she had not done so, having been inside the *Minnie*. I need not mention the third course, about which the evidence presents some difficulty. The question of proper seamanship and proper vigilance is altogether for their consideration. I have no difficulty in adopting their opinion, and I must therefore hold that this defence has not been upheld in proof, and I must pronounce for the damage, with the costs of suit.

Solicitors for the plaintiff, J. T. Hamerton and Son.

Solicitors for the defendant, J. H. Doran and Son.

June 2 and 4, 1870.

THE LION (a).

Suit for necessities—Injunction—"Until further order."

Plaintiffs brought an action to recover the price of necessities supplied during the year 1869 to the Lion, a vessel which at that time was the property of the North-West of Ireland Deep Fishery Company. Defendants, the official liquidators of said company, lodged in court a sum of 208l. 7s., in lieu of bail, and as security for claim and costs, and to abide the adjudication of this court. They then applied to the Court of Chancery (England), and obtained therefrom an injunction restraining the plaintiffs from prosecuting said action, "until further order." And they now applied by motion to this court for an order that said sum of 208l. 7s. be paid to them.

Held, that inasmuch as the injunction was in force "until further order" only, the court would not make an order directing the payment of the said sum of 208l. 7s. to the said defendants.

This was a motion on behalf of the defendants, that the sum of 208l. 7s. lodged by them in lieu of bail as security for the amount of the plaintiff's claim, and of the costs to be incurred in this cause, be paid out to the defendants. The facts of the case are as follows:

The *Lion* is a steamship, and registered at the port of London; and at the time of the assumed cause of action was the property of the North West of Ireland Deep Sea Fishery Company (Limited), which was a company registered pursuant to the Companies Act 1862, and had its offices in London.

The suit was brought to recover the price of necessities supplied to the *Lion* during the second half of the year 1869.

There were four other similar suits instituted against four other ships of the same company, in each of which judgments had been made in loco of bail, and it was arranged that the decision in this case should rule the rest.

The defendants, in their answer, alleged *inter alia*, that by a resolution of said company, made on the 10th Dec. 1869, and duly confirmed, the company is being wound-up voluntarily in England pursuant to the provisions of the statutes in that

(a) The reporter furnishes this report at the request of several practitioners in the Irish Court of Admiralty.

[ADM.]

THE LION.

[ADM.]

behalf, and that the defendants were appointed the liquidators of the said company by an order of the said company in a general meeting.

The warrant under which the ship was arrested, issued on the 8th Feb. 1870. The ship was arrested on the 9th. The defendants appeared absolutely on the 11th. The money now sought to be drawn out was lodged, and the vessel released on the 12th. The petition was filed on the 15th Feb., the answer on the 3rd March, and the conclusion on the 10th March.

On the 9th March an injunction was obtained from the Court of Chancery in England restraining the plaintiffs from prosecuting these suits until further order.

Seeds, L.L.D., in support of the motion, relied on the impossibility of prosecuting these suits in the face of the injunction, and urged the hardship of keeping these moneys locked up, and contended that the resolution of the 10th Dec. was equivalent to an act of bankruptcy, whereby all debts were levelled and referred to the

Companies' Clauses Consolidation Act 1862, sects. 87, 147;

The Pacific, Bro. & Lush. 243; 2 Mar. Law Cas. O. S. 21.

Elrington, Q.C., L.L.D., and Boyd, L.L.D., contra. Cur. adv. vult.

June 4.—TOWNSEND, J.—This was a motion by the defendants to draw out of court the sum of 208*l. 7s.*, which had been lodged by them in lieu of bail, and as security for costs in an action *in rem* brought by the firm of McChrystall and Elliott, to recover the price of a quantity of coals supplied by them at Londonderry to the steam tug *Lion* of London, during the month of July 1869, and the remaining months of that year. Four other suits of the same nature as this were instituted simultaneously with the present by the same firm against four other steamers. The *Lion* and three of the other vessels were the property of the North-West of Ireland Deep Sea Fishery Company (Limited) which had its office in London; and those four vessels were registered in the names of David Henry Hone and John Vanner. The other vessel, the *Roseneath*, was not the property of the company, but was chartered by them. These several causes were instituted on the 8th Feb. last; on the following day (9th Feb.) the vessels were arrested, and on the 11th Feb. the defendants, Messrs. Hart, Vanner, Anthony, and Cummins appeared absolutely. On the 12th Feb. the defendants lodged in court in each action the sum claimed therein with 100*l.* as security for costs, and thereupon the several vessels were released. The property proceeded against is now represented by the sums so lodged. The petitions were filed on the 15th Feb. On the 3rd March the defendants filed their answers; and on the 9th March consents were entered into in all the causes except this of the *Lion* and of the *Roseneath*, that proceedings should be stayed until a decision should be had in this cause, the event of which the others were to abide. No further proceedings had been had except filing the conclusions and delivering the printed pleadings in this cause and the *Roseneath*. It appears that, pursuant to resolution of the company passed on the 15th Dec. 1869, and confirmed on the 30th Dec, the company is now being wound-up voluntarily pursuant to the Companies Act 1862. The defendants were appointed liquidators of the company.

There is no doubt that in the month of January last the plaintiffs were apprised of the winding-up. It is not asserted that they obtained any leave of the Court of Chancery in England to commence this or any of the other causes I have alluded to. They did so on their own responsibility, and the defendants appeared in the ordinary way. But on the 9th March the defendants obtained an order of the Court of Chancery in England restraining the plaintiffs from prosecuting these actions, or commencing or prosecuting any further action in respect of these vessels until the further order of that court. The order was served on the plaintiffs at Londonderry on the evening of the 10th March, but was not communicated to their proctor until the 12th. In the meanwhile the conclusion had been already filed as I have mentioned. The defendants now seek to withdraw the money they had thus lodged, and rely on the provisions of the Companies Act, ss. 87 and 147. But it appears from the affidavit of Mr. Cummings himself, a liquidator of the company, that this was a voluntary winding-up under the 129th section, and therefore the 87th section, which relates to a winding-up by the court on petition under the 79th section, and the 147th section, which relates to a winding-up under the supervision of the court, do not apply. But it has been urged that, inasmuch as by the 164th section the resolution for voluntary winding-up is to be deemed to correspond with an act of bankruptcy in the case of an individual trader, and as this cause was not instituted until after the resolution of the 30th Dec. was passed, the plaintiffs cannot claim in priority to the simple contract creditors. The defendant's counsel have referred me to *The Pacific* (Bro. & Lush. 243), decided on the 5th section of the Admiralty Court Act 1861, to show that a material man can acquire no maritime lien under the 31st section of the Court of Admiralty (Ireland) Act 1867, but only a right to proceed *in rem*. That proposition is disputed by the plaintiffs, who allege that, according to the ancient law administered in the Irish Court of Admiralty, a lien is created by the very furnishing of the supplies. If it were necessary to decide that question, I should be reluctant to do so on the argument of a motion; but in my opinion it is not necessary. The real ground of the defendants' application is that as the injunction has restrained the plaintiffs from proceeding further in this cause, the money in court should not be allowed to remain useless both to plaintiffs and defendants. The defendants say it is impossible for the plaintiffs, in the face of the injunction, to bring this cause to a hearing, and useless to do so, if it were possible, inasmuch as their alleged lien has been levelled by the resolution tantamount to an act of bankruptcy. They do not, indeed, ask me to dismiss the cause, but I am asked to do that which is equivalent to dismissing it, and that before the facts of the case have been clearly ascertained, or the question of law raised by the answer disposed of. But the injunction is in force till further order only. For anything that I can tell it may yet be dissolved, and the plaintiffs again at liberty to proceed in the causes, but they would then, if I were now to pay out this money, be in the same position as if I had released the vessel without bail or money lodged in lieu of bail, and without anything having been adduced to convince me that the plaintiffs' claim was unfounded or barred by law, or beyond the jurisdiction of this court. I am

[CHAN.]

THE LIVERPOOL MARINE CREDIT COMPANY (LIMITED) v. WILSON.

[CHAN.]

bound to protect the *res* which is the subject of litigation until, in one way or other, that litigation has been brought to an end; and I must not pay out this money unless with the certainty that my doing so will not work injustice either to those who assert a claim against it, or to those who, after the resolution of December had been passed, and with full notice of their own and plaintiffs' position, brought it into court to abide my adjudication. I must, therefore, refuse this application, and as the plaintiffs were justified in their opposition to it, I must do so with costs.

Solicitor for the plaintiffs, *The Queen's Proctor*.

Solicitors for the defendants, *Andrews and Maclean*.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROBERTS and H. PRATT, Esqrs.,
Barristers-at-Law.

April 30, May 7 and 27, 1872.

(Before the LORDS JUSTICES.)

THE LIVERPOOL MARINE CREDIT COMPANY
(LIMITED) v. WILSON.

Ship—Freight—Mortgage—Charge on freight—Possession taken by mortgagee—Notice to charterers—Priority—Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), ss. 66-70.

The first registered mortgagee of a ship made a further advance on the security of a mortgage comprising the ship and the freight thereof then earned or to be earned during the continuance of the security. Prior to the date of this further advance, the mortgagor had executed a second mortgage of the ship, and had given the second mortgagee a lien on the freight for a balance due to him. The first mortgagee had no notice of this second mortgage, or of the lien on the freight, at the time of making the further advance. The second mortgagee completed his title by giving the charterers notice in writing of his lien on the freight. The first mortgagee subsequently took possession of the ship before she reached her port of discharge, and continued in possession till the ship was sold:

Held, that the first mortgagee was entitled to priority over the charge of the second mortgagee of the freight, not only in respect of the amount due on his first mortgage, but also in respect of the whole amount of his further advance, together with interest and costs (a).

This was an appeal from a decision of the Vice-Chancellor (Little) of the county palatine of Lancaster.

On the 5th Oct. 1868 the Liverpool Marine Credit Company, lent the sum of 2500*l.* to Messrs. Satterfield and Fox, of Liverpool, upon the security of a statutory mortgage of their ship *Donna Maria*, and this mortgage was on the following day duly registered under the Merchant Shipping Act.

Shortly before the date of this mortgage, Messrs. Satterfield and Fox, the shipowners, had purchased the ship of Messrs. Wilson, Hett, and Co., of Liverpool, and the whole of the purchase-money not having been paid, they, on the 7th Oct. 1868, executed another mortgage of the ship to Messrs. Wilson, Hett, and Co., to secure the balance of an account current between the mortgagors and

Messrs. Wilson, Hett, and Co., which balance comprised the unpaid part of the purchase-money of the ship.

This second mortgage was, on the 19th Oct. 1868, duly registered under the Merchant Shipping Act.

Being desirous of effecting insurances on the ship and freight, the shipowners borrowed 800*l.* of Messrs. Leech, Harrison, and Forwood, of Liverpool, subsequent to the date of the two mortgages, and, by a letter dated the 24th Oct. 1868, they gave Messrs. Leech, Harrison, and Forwood a lien on the freight of the ship for the 800*l.* and on the same day the Liverpool Marine Credit Company consented in writing that the security of Messrs. Leech, Harrison, and Forwood, should have priority.

In the same month the ship sailed for the Brazils and the Chinch Islands, whence she was to bring back a cargo of guano to England. The charterers were Messrs. Thomson, Bonser, and Co., under a charter-party dated the 18th Sept. 1868.

On the 3rd Nov. 1868 the shipowners agreed, by letter, to give Messrs. Wilson, Hett, and Co. an absolute lien on the homeward freight of the ship, as a further security for the unpaid part of the purchase-money.

On the 11th Aug. 1869, the Liverpool Marine Credit Company advanced the further sum of 1000*l.* to the shipowners on the security of a mortgage, which comprised, amongst other things, the ship *Donna Maria*, and all freight thereof then already earned, or thereafter to be earned, under any then existing charter-party, or any other charter-party entered into during the continuance of the security. This mortgage was not registered.

On the 9th Feb. 1870, Messrs. Wilson, Hett, and Co., gave notice to the charterers of their charge of the 3rd Nov. 1868, upon the freight.

On the 28th Feb. 1870, the Liverpool Marine Credit Company gave notice to the charterers of their charge upon the freight.

In April 1870, the ship put into Queenstown on her homeward voyage, and there the Liverpool Marine Credit Company took possession of her, and remained in possession of her until she arrived at her port of discharge.

On the arrival of the ship at London, which was her port of discharge, it was arranged between the Liverpool Marine Credit Company and Messrs. Wilson, Hett, and Co., that the freight should be received by Messrs. Rucker, Offer, and Co., brokers, until the priorities were decided, and that the ship should be sold by them.

Messrs. Rucker, Offer, and Co., paid the 800*l.* due to Messrs. Leech and Co., under pressure, and upon an undertaking by Messrs. Leech and Co., to repay the amount if it should be declared to have been improperly paid.

The ship was sold, and on the institution of the present suit, which was on— to determine the priorities of the various incumbrancers, the purchase money was paid into court, together with balance of the freight remaining of the payment of the 800*l.* to Messrs. Leech and Co.

The shipowners had failed, and the money in court was not sufficient to pay the amount due from them to the Liverpool Marine Credit Company on the mortgages of the ship and freight.

The Vice-Chancellor decided that the Liverpool Marine Credit Company were entitled to priority in respect of their mortgage of the 3rd Oct. 1868,

(a) See *Wilson v. Wilson*, ante, p. 265.—*En.*

and that by virtue of having taken possession of the ship, they became entitled, as first mortgagees, to the freight, subject to the charge of 800*l.* in favour of Messrs. Leech and Co., in priority to Messrs. Wilson, Hett, and Co., but that they were not entitled to priority in respect of their mortgage of the 11th Aug. 1869.

From this decision the Liverpool Marine Credit Company, and Messrs. Wilson, Hett, and Co. both appealed, the former claiming to be entitled to priority in respect of their mortgage of the 11th Aug. 1869, and the latter claiming to be entitled to priority over Messrs. Leech and Co.'s charge for 800*l.*

Pearson, Q.C. and Martin, for Messrs. Wilson, Hett, and Co.—The plaintiffs agreed that Messrs. Leech and Co.'s charge for 800*l.* should have priority, but that cannot affect us, and we submit that they cannot have priority over us, as we never agreed that their charge should rank before ours. Our mortgage having been duly registered, we contend that the plaintiffs cannot have priority over us in respect of their subsequent mortgage of Aug. 1869. We completed our title by giving notice to the charterers when the ship was at sea, and it was impossible for us to take possession of her; that had the same effect as if we had taken possession of the ship, for it is settled by *Rusden v. Pope* (18 L. T. Rep. N. S. 651; L. Rep. 3 Ex. 269), that a mortgage of a vessel carries with it the freight, that the mortgagee's right may be perfected by his taking possession, or doing an act equivalent to taking possession, at any time before the freight is payable, and that when it is impossible to take actual possession, notice to the mortgagor and to the charterers is equivalent to taking possession. They referred to

The Merchant Shipping Act 1854, ss. 66, 70;
Cato v. Irving, 5 De G. & Sm. 210;
Gardner v. Casemore, 1 H. & N. 423;
Parr v. Applebee, 3 De G. M. & G. 585;
Brown v. Tanner, 18 L. T. Rep. N. S. 634; L. Rep. 3 Ch. 597.

Robinson and Yale Lee, for the Liverpool Marine Credit Company.—We contend that as we had no notice of the second mortgage at the time we made the further advance in Aug. 1869, we are entitled to tack that amount to our first mortgage. Having taken actual possession of the freight, we submit that we are entitled to it in priority to Messrs. Wilson, Hett, and Co., notwithstanding their notice to the charterers.

Bardwell and F. Thompson, for Rucker, Offer, and Co.

Pearson Q.C., in reply.

Cut. adv. vult.

May 27th.—Lord Justice JAMES delivered the following written judgment of the court: The question, or rather the questions, in this case, are as to the relative rights of a first and second mortgagee of a ship in respect of the freight, each of the mortgagees having taken specific charges on such freight, and the first mortgagee having taken actual possession of the ship before it reached its port of discharge. The facts may be shortly summarised thus. The plaintiff was the first registered mortgagee of the ship, such mortgage being for a sum specified, the principal defendant being the second registered mortgagee also for a sum specified. The second mortgagee then advances money on the security of an express charge on the

freight then in course of earning, and completes his title by giving to the charterers notice in writing of his charge. In the meantime the mortgagor is in want of money to effect an insurance on the ship and freight, and borrows and applies 800*l.* for that purpose, giving the lender a charge on the freight, which the first mortgagee in writing agrees shall be the first charge thereon. The first mortgagee afterwards obtains a further express charge on both ship and freight. It is not contended that the first mortgagee had any notice, actual or constructive, of the charge on freight which the second mortgagee had obtained, or that he had any actual notice of the second mortgagee itself. The first mortgagee took actual possession of the ship, and thereby became undoubtedly entitled at law as well as in equity to receive the freight. The ship was sold, and the produce was not sufficient to discharge the first mortgage. It is not denied on behalf of the second mortgagee that to the extent required for the discharge of the first registered mortgage, the sale money of the ship and the freight are to be so applied. But he contends that the sale money and freight being received by the first mortgagee in that character must be considered and applied as one fund in discharge of the first mortgage, and that the balance ought to go to him in discharge of the second registered mortgage. The first mortgagee on the other hand contends that the second mortgagee has no right or equity against him in respect of his application of the freight which he has possessed himself of by a legal title. It is to be observed that the Merchant Shipping Act nowhere deals with charges on freight. They were, long before the passing of the Act, securities well known in the shipping world and of ordinary occurrence; and the right of a mortgage in respect of freight had also been long settled and well recognised. But it was not thought fit to provide by that Act, either with respect to the priorities of charges on freight, or with respect to the rights of mortgagees to freight. These were left to be dealt with according to the ordinary principles of law and equity, and the rules and doctrines established by the decisions of the courts. Now, the right of the mortgagee in respect of freight was well established and clear, but somewhat peculiar. He had no absolute right to the freight as an incident to his mortgage. He could not intercept the freight by giving notice to the charterer before payment; but if he took actual possession, or, according to a recent decision in the Court of Exchequer (*Rusden v. Pope*, *sup.*), if he took constructive possession, of the ship before the freight was actually earned, he then became entitled to the freight as an incident of his legal possessory right, just as a mortgagee of land taking actual possession of the land before severance of the growing crops would have the right to sever and take the crops. What is, then, the position of a second mortgagee of a ship with respect to the freight? He has no legal right to take actual possession, and therefore cannot by his own act give himself that which is equivalent to possession. But, as between him and the mortgagor the equitable right of the second mortgagee is the same as the legal right of the first mortgagee, just as in the case of land if the first mortgagee declines to take possession, the second mortgagee may obtain a receiver, and so have the possession and the benefit of the possessory right. But this is to be understood

only as between the second mortgagee and the mortgagor. As regards all intervening encumbrances, interests, and titles of every kind not requiring registration, the respective positions of the first and second mortgagees are essentially different, arising from the essential difference between a legal and an equitable title. The legal owner's right is paramount to every equitable charge not affecting his own conscience; the equitable owner, in the absence of special circumstances, takes subject to all equities prior in date to his own estate or charge. The court of equity, in appointing a receiver at the instance of an equitable encumbrancer, takes possession, in fact, on behalf of all, and so as not to disturb any legal right or interfere with equitable priorities. If there be a legal mortgage of a ship, then a charge on the freight, then a second mortgage of the ship, the second mortgagee of the ship cannot by any act of his own on the encumbrancer on the freight; and if the first mortgagee of the ship takes under those circumstances possession of the ship, his possession cannot be allowed to alter the equities of the parties. He takes both ship and freight by the same title, and there being one equitable owner of the ship, and another equitable owner of the freight, as between those equitable owners his charge must be considered as satisfied *pro rata*, just as if there was a first mortgage on Whiteacre and Blackacre belonging, subject to that mortgage, to several owners. A due consideration of the same principles shows how is to be solved the question before us, viz., the right of a legal first mortgagee in possession, being at the same time a puisne encumbrancer, without notice, on the freight. He has the paramount legal title; there is nothing to affect his conscience, and we are unable to find either in principle or authority any sound distinction between his case and that of the legal mortgagee of any other kind of property who has made further advances on the property itself, or on the timber of growing crops, without notice of intervening equitable charges or interests. Having arrived at this conclusion, it is not necessary to deal with the special circumstances affecting the 800*l.* advanced for insuring the ship. We intimated in the course of the argument that that sum must be considered as if it had been advanced by the first mortgagees themselves. We agree with the Vice-Chancellor's decision as to that sum. But we go further than he did, and hold that the first mortgagee is entitled to priority in respect of the whole of his charge on the freight, adding thereto his costs of suit, including his costs of the appeal, and the costs which he will have in the first place to pay to the persons in whose favour the charge for the 800*l.* insurance money was made. If there should be any surplus it will go to the second mortgagee. If there should not be enough to pay the first incumbrancer, as well as the costs, the deficiency to answer the costs must be borne by the second mortgagee, whose contention has led to the suit. Having regard to the amount of the fund, and the reasonable certainty that there can be no surplus after satisfying the second mortgagee, and having regard to the disclaimer entered in the suit in the High Court, and no party appearing before us objecting thereto, we think it proper to make a declaration declaring the rights of the parties appearing before us; but of course this must be, and must be declared to

be, without prejudice to any right of the absent parties.

Solicitors for the company, *Thomas and Holmes*.

Solicitor for Messrs. Wilson, Hett, and Co., *J. H. E. Gill*, of Liverpool.

V.C. BACON'S COURT.

Reported by the Hon. ROBERT BUTLER and T. H. CARSON,
Esq., Barristers-at-Law.

Thursday, April 25, 1872.

Re THE TEIGNMOUTH AND GENERAL MUTUAL SHIPPING ASSURANCE ASSOCIATION (MARTIN'S CLAIMS).

Marine Assurance Association—Winding-up—Unstamped policy—Loss of ship—Minute book—Admission of liability.

Where there was an entry in the minute book of an insurance association admitting the liability of the association upon a certain policy, and the association was ordered to be wound-up before the money was paid, the insured was

Held to be entitled to the amount so admitted to be due, although the policy was not stamped.

THIS was a claim by Jane Martin, as the administratrix of her late husband, Edwin Martin, to be allowed to rank as a simple contract creditor against the assets of the above-named association for the sum of 150*l.*, being the balance due on a policy of insurance effected by Edwin Martin with the association, after deducting 50*l.* which had been paid by the association to the Torquay Brewing Company in respect of a claim which they had upon the policy.

In March 1863, Edwin Martin insured the ship *Arbitrator*, of which he was part owner, for the sum of 200*l.*, and this policy, which was unstamped, was renewed annually, the last renewal covering the year ending the 20th March 1868.

On the 16th Feb. 1868, the *Arbitrator*, with Martin on board, sailed from Cardigan on a voyage to Cardiff, but had never since been heard of.

Notice of the loss of the *Arbitrator* was given to the association, and at the next quarterly meeting of the committee of the association the claim upon the policy was allowed, and the amount ordered to be drawn for, and an entry to that effect was made in the minute book of the association; but the money, except the 50*l.* to the Torquay Brewing Company was not paid, owing to the fact that Jane Martin was unable to obtain letters of administration to her late husband's estate until Dec. 1871. The association was ordered to be wound-up in Feb. 1870, and the official liquidator now refused to admit the claim, on the ground that the policy was unstamped.

It appeared to be the practice of the association to issue unstamped policies, unless a special application was made by the insurer for a stamped policy, but no such application was made by Martin.

Inc., in support of the claim, contended that there was a sufficient admission in the books of the association to entitle the widow to recover the amount claimed as upon an account stated, and that the amount having been allowed could not now be disputed: (*Barker v. Birt*, 10 M. & W. 61).

A. G. Marten, for the official liquidator, contended

C. P.]

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[C. P.]

that the claim could not be allowed, as the policy upon which it was founded was void, being unstamped (*Re The London Marine Insurance Association, Smith's case*, L. Rep. 4 Ch. 611; 21 L. T. Rep. N. S. 97; 3 Mar. Law Cas. O. S. 289), and that there was no evidence of any account stated, for until administration was granted, which was not until some time after the winding-up of the association, there was no person to whom an account could have been stated.

The VICE-CHANCELLOR was of opinion that the acknowledgement in the books of the association was quite sufficient to establish the relation of debtor and creditor, and that the administratrix must be allowed to prove in the winding-up for the amount remaining due upon the policy.

Solicitors for the claimant, *Clarke, Woodcock and Ryland*.

Solicitors for the official liquidator, *James, Curtis and James*.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING, R. A. KINOLAKE, and H. F. FOULEY, Esqrs., Barristers-at-Law.

Jan. 26 and May 7, 1872.

SIMPSON AND ANOTHER v. BLUES AND ANOTHER.

County Courts Admiralty jurisdiction—Claim arising out of charter-party—31 & 32 Vict. c. 71 32 & 33 Vict. c. 51.

The "County Courts Admiralty Jurisdiction Acts" (31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51), although they invest certain county courts with a jurisdiction to entertain and determine a limited portion of the cases which were formerly entertained and determined only in the High Court of admiralty, do not by inference and indirect enactment enlarge the jurisdiction of the High Court of Admiralty never possessed.

A County Court having admiralty jurisdiction has no jurisdiction to entertain a suit for damages for short delivery of cargo arising out of a charter-party, the High Court of Admiralty having no jurisdiction to entertain such claim (a).

(a) In giving the reasons why the County Court cannot be considered to have jurisdiction over such claims, the learned judge appears to have overlooked an important matter. No doubt in the construction of such Acts, "all words, whether they be in deeds or statutes or otherwise, if they be general and not express and precise, should be restrained into the fitness of the matter," and "there should be no implication to extend the jurisdiction," but, with great submission, these principles must be qualified in so far that where words exist in Acts giving jurisdiction to inferior courts, however inconvenient, which words cannot be satisfied without those courts acquire a jurisdiction which did not before exist, then, despite the inconvenience, the statute must have effect. The learned judge rules that the County Courts can have no greater jurisdiction than the Admiralty Court had previous to the passing of the 32 & 33 Vict. c. 51. If the words of the 2nd section of the latter Act can be satisfied by giving to the County Courts the jurisdiction possessed by the Admiralty Court under the Admiralty Court Act 1861, sect. 6, it is manifest that the reasons given for restraining the new jurisdiction within those bounds are convincing. The Admiralty Court derives jurisdiction in all claims for damage to cargo and breach of contract of that nature from that Act alone, and therefore the extent of its jurisdiction depends upon the construction of that Act. By sect. 6, the Admiralty Court has "jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales." Under that section, a claim may be made in the Admiralty Court by the owner of any goods, the consignee of any goods, or by the assignee of any bill of lading of any goods carried into any port of England or Wales in any ship the owner of which is not domiciled in England or Wales; a claim may be made by any of those persons for damage done to the goods by the negligence or misconduct of the owner, master, or crew of the ship: a claim may also be made for any breach of duty on their part, or for any breach of contract; but, with respect to this latter claim, it is probably intended that the claim must be in respect to some actual or constructive damage to goods, as the only persons who can make the claim are the owners, &c., of goods carried into a British port (see *The Santa Anna*, 32 L. J. 198 Adm.). Now, a claim for "damage done to goods by negligence or misconduct" is a claim in tort; a claim for breach of duty or contract in this section is a claim arising out of an express or implied condition of the contract entered into for the carriage of goods, as in the case where a master claims to detain the cargo for freight and average, and at the same time refuses to give information so that those claims may be satisfied: (*The Norway*, B & L 225; 2 Mar. Law Cas. O. S. 17.) The words of the Act under discussion are that "any County Court appointed, &c. . . shall have jurisdiction, &c., to try and determine the following causes: (1) As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship." The wording of this section gives jurisdiction over three different claims, first (taking them in inverse order), a claim of tort in respect of goods carried in any ship; which, construed strictly according to the principle adopted in the present case, would correspond with the claim for "damage done to goods by negligence or misconduct" in the Admiralty Court Act 1861; secondly, a claim "arising out of any agreement in relation to the carriage of goods in any ship" which would in the same way correspond to the claim for "breach of duty or breach of contract on the part of the owner, master, or crew of the ship," in the Admiralty Court Act; and thirdly, a claim "arising out of any agreement" made in relation to the use or hire of any ship, for which, if it is submitted, there are no corresponding words in the Admiralty Court Act. The obvious meaning of these words, when read with the whole section, is that they give jurisdiction over claims other than those relating to the mere carriage of goods, that is to say, over claims arising out of a breach of an agreement, by which a ship is hired, independently of any goods being laden on board or carried on that ship. They would appear to relate to claims in the nature of breach of contract in refusing to proceed to a port of loading, or in arriving at such a port after the stipulated time for loading a cargo. Unless such a meaning is attached to them they must be wholly inoperative and have no meaning, except such as is to be gathered from the succeeding words of the section. What makes it still more probable that these words were intended to have an operative force is the fact that the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) s. 3, gave jurisdiction to the County Courts for claims for "damage to cargo," and these words would include, if interpreted by the meaning usually attached to them in the Admiralty Court, all the claims that could be made under the Admiralty Court Act 1861, the amount only being limited. If these conclusions drawn from the comparison of the two Acts are correct, it is difficult to imagine how it can be said that the words of the County Courts Act can be satisfied, except by giving

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diction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales." Under that section, a claim may be made in the Admiralty Court by the owner of any goods, the consignee of any goods, or by the assignee of any bill of lading of any goods carried into any port of England or Wales in any ship the owner of which is not domiciled in England or Wales; a claim may be made by any of those persons for damage done to the goods by the negligence or misconduct of the owner, master, or crew of the ship: a claim may also be made for any breach of duty on their part, or for any breach of contract; but, with respect to this latter claim, it is probably intended that the claim must be in respect to some actual or constructive damage to goods, as the only persons who can make the claim are the owners, &c., of goods carried into a British port (see *The Santa Anna*, 32 L. J. 198 Adm.). Now, a claim for "damage done to goods by negligence or misconduct" is a claim in tort; a claim for breach of duty or contract in this section is a claim arising out of an express or implied condition of the contract entered into for the carriage of goods, as in the case where a master claims to detain the cargo for freight and average, and at the same time refuses to give information so that those claims may be satisfied: (*The Norway*, B & L 225; 2 Mar. Law Cas. O. S. 17.) The words of the Act under discussion are that "any County Court appointed, &c. . . shall have jurisdiction, &c., to try and determine the following causes: (1) As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship." The wording of this section gives jurisdiction over three different claims, first (taking them in inverse order), a claim of tort in respect of goods carried in any ship; which, construed strictly according to the principle adopted in the present case, would correspond with the claim for "damage done to goods by negligence or misconduct" in the Admiralty Court Act 1861; secondly, a claim "arising out of any agreement in relation to the carriage of goods in any ship" which would in the same way correspond to the claim for "breach of duty or breach of contract on the part of the owner, master, or crew of the ship," in the Admiralty Court Act; and thirdly, a claim "arising out of any agreement" made in relation to the use or hire of any ship, for which, if it is submitted, there are no corresponding words in the Admiralty Court Act. The obvious meaning of these words, when read with the whole section, is that they give jurisdiction over claims other than those relating to the mere carriage of goods, that is to say, over claims arising out of a breach of an agreement, by which a ship is hired, independently of any goods being laden on board or carried on that ship. They would appear to relate to claims in the nature of breach of contract in refusing to proceed to a port of loading, or in arriving at such a port after the stipulated time for loading a cargo. Unless such a meaning is attached to them they must be wholly inoperative and have no meaning, except such as is to be gathered from the succeeding words of the section. What makes it still more probable that these words were intended to have an operative force is the fact that the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) s. 3, gave jurisdiction to the County Courts for claims for "damage to cargo," and these words would include, if interpreted by the meaning usually attached to them in the Admiralty Court, all the claims that could be made under the Admiralty Court Act 1861, the amount only being limited. If these conclusions drawn from the comparison of the two Acts are correct, it is difficult to imagine how it can be said that the words of the County Courts Act can be satisfied, except by giving

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Wildfire, was instituted in the County Court of Liverpool, having admiralty jurisdiction. The ship was chartered to the plaintiff, who was a party to the charter-party, and claimed under it for short delivery of goods belonging to him, and laden on board the ship in pursuance of the charter-party.

F. M. White, for the defendant, moved for a writ of prohibition.

E. C. Clarkson showed cause in the first instance. F. M. White replied.

The facts and arguments sufficiently appear in the judgment.

The following cases were cited :

Everard v. Kendall, 3 Mar. Law Cas. O. S. 391; 22 L. T. Rep. N. S. 408; L. Rep. 5 C. P. 428;
The Darrig, 1 Mar. Law Cas. O. S. 392; Brown & Lush. 102;
The Douce, 3 Mar. Law Cas. O. S. 424; 22 L. T. Rep. N. S. 627; L. Rep. 3 Adm. & Eco. 155;
The Swan, 23 L. T. Rep. N. S. 633; L. Rep. 3 Adm. & Eco. 314;
The St. Cloud, 1 Mar. Law Cas. O. S. 369; Brown & Lush. 4;
The Kassen, Brown & Lush. 1;
The Nuova Ragatrina, 1 App. Mar. Law Cas. 16; L. Rep. 3 Adm. & Eco. 483.

May 7.—The judgment of the court (Willes, Byles, Brett, and Grove, J.J.) was delivered by BRET, J.—This was a rule moved by Mr. F. M. White calling upon the plaintiffs to show cause why a writ of prohibition should not issue to the County Court of Lancashire holden at Liverpool to prohibit the court from further proceedings in a suit against the ship the *Madge Wildfire*, and the defendants, her owners, and from further proceeding in the matter of the arrest and detention

a larger jurisdiction than that already possessed by the Admiralty Court, and if it is once admitted that there is a larger jurisdiction, in respect of any one thing, there is no reason why a larger jurisdiction should not exist in all such matters.

With regard to the particular case it is submitted that the proposition that the Admiralty Court never had jurisdiction over a claim arising exclusively out of a charter-party is a little too broad. Under the wording of sect. 8 of the Admiralty Court Act 1861 the court may entertain any claim by the owner or consignee of goods, independently of his being the holder of the bill of lading. If the owner or the consignee were a party to the charter-party, there seems to be no reason why he should not prosecute a claim in the Admiralty Court for a breach of its provisions so long as his goods were damaged by that breach. *The Narrag* (B. & L. 236; 2 Mar. Law Cas. O. S. 17) only decided that the assignee of a bill of lading could not sue on a charter-party to which he was not a party.

Whatever may be the construction put upon the wording of the County Courts Act, there is little doubt that those who introduced it intended to give the County Courts the largest possible jurisdiction, they being of opinion that certain local tribunals should have the exclusive power of trying such questions, and that these County Courts, having the maritime questions of a large district before them would be, by constant practice, more competent to deal with them than the ordinary County Courts, and that much expense would thus be saved to shipowners and others who would otherwise be compelled to resort to the Superior Courts.

Since the above was written the learned judge of the Admiralty Court has given judgment in two similar cases, and, although he held that he was bound by the judgment of a Common Law court upon the construction of a statute, he was of opinion that the County Courts had the larger jurisdiction contended for, and hoped that the cases might be taken to a Court of Appeal.

These cases, *The Cargo ex Argos*, and the *Hencoon*, will be found reported later on in the present volume. —Ed.

of the ship, &c. Cause was shown against the rule in the first instance by Mr. Clarkson. The suit was commenced in the County Court having admiralty jurisdiction under the statutes 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, by a plaintiff, in which the nature of the suit was declared to be for damages for short delivery of cargo arising out of an agreement of charter-party made in relation to the use and hire of the *Madge Wildfire*, and in which the suit was stated to be brought on behalf of the plaintiffs against the barque or vessel "The *Madge Wildfire*," and against the owner or owners thereof unknown, &c. The plaintiff was named to the mast of the ship in the Sandon Dock at Liverpool. A summons to enter an appearance to the suit was served on the defendant Blues. He was resident and domiciled at Sunderland. The ship, on an affidavit of the plaintiff that she was about to leave, was arrested and detained. It was admitted on the argument that the only cause of action was an alleged breach of the charter-party, and that the claim of the plaintiff was founded on his being a party to the charter-party. On the one side it was argued that the County Court had no jurisdiction over such a claim by virtue of sect. 2 of 32 & 33 Vict. c. 51, because on comparing that section with others in the same statute and in the statute 31 & 32 Vict. c. 71, which statutes are to be read as one, and considering the general apparent object of the statute, namely, to allow to the County Court a part, limited as to amount, of existing admiralty jurisdiction; and considering further the effect which would be produced if the words were read in so large a sense as suggested, of indirectly enlarging the jurisdiction of the High Court of Admiralty, with which the legislation does not profess to deal; and considering the effect which would be produced on the business relations of merchants; it would be a wrong interpretation to construe the words so as to give jurisdiction in the present case. On the other side it was contended that there was no sufficient ground for construing the words otherwise than in the largest sense they seem to import. The words relied upon in support of the jurisdiction are as follows: "Any County Court appointed, &c., shall have jurisdiction and all powers and authorities relating thereto, to try and determine the following causes: (1) as to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l*." These words, read apart from qualification by the context, are undoubtedly large enough to create a new jurisdiction in respect of a claim as for a breach of charter-party. The question is whether their meaning is limited by the subject-matter and the context so as to exclude such a claim. The High Court of Admiralty has no original jurisdiction to entertain such a case as the present, and no statute has conferred on the High Court of Admiralty any original jurisdiction to entertain any claim as for a breach of charter-party. It follows that if the claim had been in excess of 300*l*, neither the High Court of Admiralty nor the County Court would have had jurisdiction to entertain it. Yet if the County Court has jurisdiction to try such a case where the claim does not exceed 300*l*, it seems difficult to say that, by virtue of section 26 of 31 & 32 Vict. c. 71, the High Court of Admiralty

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has not a secondary jurisdiction to determine the case by way of appeal, and might not by virtue of section 6 assume, by removing the case into the High Court, a quasi original jurisdiction. Nay, if the rule of construction to be applied to these statutes is that the words are to be read in their largest sense, a suit for breach of charter party with a claim in excess of 300*l.* being brought in the County Court, might be removed under section 6 of 31 & 32 Vict. c. 71 into the High Court of Admiralty, and be there entertained, tried, and determined. In the case of *The Swan* (L. Rep. 3 Ad. & Eccl. 314; 23 L. T. Rep. N. S. 633), the Judge of the High Court of Admiralty held that if the County Court Act 32 & 33 Vict. c. 51, does give jurisdiction to the County Court to deal with a claim for demurrage, it follows that the High Court of Admiralty may transfer the suit, and entertain and determine it under section 6 of 31 & 32 Vict. c. 71, although the High Court of Admiralty has no jurisdiction to deal with a claim for demurrage. "It is true," says the learned judge, "that this court has no jurisdiction to entertain a cause of this nature in the first instance; but if the legislature has given to this court power to transfer the cause, it has thereby conferred upon the court jurisdiction over the cause." The High Court of Admiralty might therefore, according to the supposed effect of this legislation, obtain indirectly a jurisdiction, which the general law has directly forbidden, and which the statute has not in any direct way extended, by allowing suits commenced in the County Court to be removed immediately for trial into the High Court. Another effect of the suggested construction would be that the rights and liabilities of parties entering into the contract of charter-party, and of those claiming under them by sale subsequent to the charter-party, would or might be materially altered. It cannot be seriously contended that either of the County Court Acts, upon the suggested interpretation, would, in the absence of distinct enactments, impress upon a breach of charter-party a maritime lien. There would be no ground for implying such a lien, because the High Court of Admiralty never had any jurisdiction of any kind with regard to the breach of a contract of charter-party. But it might be, and indeed must be, argued that the suggested construction would, by reason of section 3 of 32 & 33 Vict. c. 51, enable the County Court, and therefore also the High Court, to realise the damages by seizure before judgment, and by sale of the particular ship. In other words, the damages would from the moment of the arrest be impressed upon the ship *in rem*. The difference between this and a maritime lien, and the real effect of this, are pointed out by Dr. Lushington in the cases of the *Gustaf* (1 Mar. Law Cas. O. S. 230; Lush's Rep. 506), and the *Pacific* (2 Mar. Law Cas. O. S. 21; Brown & Lush, 243). Whatever the exact effect be upon the ship by virtue of the reading together of the two Acts, there must be some effect, and consequently, the rights and liabilities of ship-owners and the other merchants interested in the mercantile use of ships must be altered; for at present such damages are realised not by seizing, detaining and selling the particular ship, but out of the general personal property of the shipowner by seizure and sale in execution after judgment. As affecting commercial business and enterprise, the seizure and detention of a ship are of the utmost gravity; for, if she be a general ship, the mercantile

adventures of many merchants are by such seizure and detention dislocated, if not destroyed. The suggested construction would also, as it seems to us, create as matter of fact an inequality in the administration of law between different merchants; it would lay a greater burden on the smaller ship-owners and merchants using their ships. Where the claim would be small, as under 300*l.*, it would generally arise in respect of small cargoes on board small ships, which ships would be impressed with the damages; but in the case of claims in excess of 300*l.*, unless the High Court of Admiralty should successfully assume to remove the cause in the way suggested above, the suit would be tried at the common law, and the ship would not be exposed at a critical moment to detention or delay upon the mere assertion or pretence of a claim, and the ship upon a claim being established by judgment would be no more liable to the damages than any other chattel of the shipowner's property. In the one case, that is in the case of small claims, whether well or ill founded, the navigation of the ship would be hampered both as to the ship-owner and as to persons who had contracted for the use of the ship; in the other case, namely, in the case of larger claims, the ship would go free. It would also lay a greater burden on charterers of smaller ships. If the larger effect is to be given to the words of the statutes, charterers of small ships might be brought into the County Court under its Admiralty jurisdiction on claims for charter-party demurrage, or for short freight payable according to charter-party; and if such charterers were to be made liable according to admiralty procedure, the remedy would be against the cargo *in rem*. If the cargo belonged solely to the charterer, this would be a different and more onerous remedy against him than the existing law allows against a charterer of a larger ship; and if the cargo belonged to different shippers, the cargo of one who had made no delay in shipping, or of one who had loaded all he contracted to load, might be seized, detained, and sold for a delay in shipping, or a short shipment of another shipper over whose acts he could have no control, whereas charterers and shippers of part cargo on board larger ships would incur no such burdens and risks. These considerations lead, we think, to the conclusion that we ought not so to construe the words of these County Court Acts as to create this large, novel, and inconvenient jurisdiction when we find from the context that the general intention was only to distribute the existing admiralty jurisdiction by allowing suits of limited amount to be instituted in inferior courts. As to such courts, the rule which has been invariably applied is that there should be no implication to extend the jurisdiction. If ever the rule of construction that "all words, whether they be in deeds or statutes or otherwise, if they be general and not express and precise, should be restrained into the fitness of the matter," were applicable, it would be to limit the alleged erection in an inferior court of a new and unheard of jurisdiction *in rem* over so many of a class of suits as happened to be within a certain limit of amount, in no respect calling for the novel mode of treatment sought to be extracted from the general expressions employed, and at the same time leaving all cases of the same class, which are above that limit of amount, to be dealt with according to a different law. The correct mode of reading such expressions is to read them

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as including, without restriction, the whole of the class of causes in respect of which a like jurisdiction had previously been exercised, and to restrain them in construction to causes of that class.

The authorities upon the construction of these and analogous Acts illustrate the propriety of this rule of construction. In the case of *The St. Cloud* (Br. & Lush. 4; 1 Mar. Law Cas. O. S. 369), Dr. Lushington had to consider what was the true rule of construction to be applied to sect. 6 of the Admiralty Courts Act 1861 (24 Vict. c. 10), which enacts that "the High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods," &c. It was contended that these words ought to be construed in their largest sense, and therefore gave jurisdiction in the case of a claim by any and every assignee of a bill of lading; but that learned judge held that the words must be limited in construction so as to include only an assignee to whom the property in the goods passed by the contract and assignment. "*Prima facie*," he says, "the words of the 6th section would give every assignee, whether for value or not, a right to sue in this court, &c." "What is the true construction, however," he afterwards says, "of the words 'any claim'?" I think that the true construction of the words 'any claim' is any claim lawfully existing independently of this Act. *It may be said, I think with some force, that if it was intended to create a new right of action, the Legislature would have expressed such intention in clearer and more intelligible terms.*" It is true that in *The Nepeter* (3 Mar. Law Cas. O. S. 355; L. Rep. 2 Adm. & Ecc. p. 375; 22 L. T. Rep. N. S. 177), the present learned judge of the Admiralty Court has intimated an opinion that the construction put upon the statute in the case of *The St. Cloud* cannot be supported; but, as he held in the case before him that the property did pass, his intimation as to the construction of the statute was not necessary for the decision of the case. In the case of *The Douse* (3 Mar. Law Cas. O. S. 424; L. Rep. 3 Adm. & Ecc. 135, 22 L. T. Rep. N. S. 627) a suit was instituted in the County Court against a British ship and owners for necessities to an amount less than 150*l.* supplied to the ship, it appearing that a part owner was domiciled in England. Under such circumstances the High Court of Admiralty had no original jurisdiction, either under 3 & 4 Vict. c. 65 or under 24 Vict. c. 10. But it was contended that the County Court nevertheless had jurisdiction by virtue of the large words in sect. 3 of 31 & 32 Vict. c. 71, which are "that any County Court, &c., shall have jurisdiction, &c., to try and determine, &c., as to any claim for necessities, in which the amount claimed does not exceed 150*l.*" But it was held on appeal by the judge of the High Court of Admiralty that the construction must be so limited as to give the County Court jurisdiction only in cases where the High Court would also have jurisdiction. In the case of *The Ruby*, brought before Willes, J., at chambers, the suit was instituted by the shipowner for demurrage alleged to be due according to charter-party, and was commenced by plaintiff in the County Court. The jurisdiction was claimed under sect. 2 of 32 & 33 Vict. c. 51, as in the present case. But the learned judge granted a writ of prohibition on the ground that the words, not being clear,

though large, ought not to be construed so as to give a new right to the shipowner as against cargo, and to impose a new liability on cargo. In *Everard v. Kendal* (*sup.*), the question came before this court whether by virtue of 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, the County Court had jurisdiction to entertain and determine as in an admiralty suit a claim by the owner of a barge propelled by cars only, in respect of a collision in the Thames by another such barge. It is true that the case is not a direct authority with regard to that now before the court, because the question there turned rather upon the construction of the word "ship" as interpreted by general orders, than on the construction to be put upon the statute, where the alleged enactment is not direct and clear, but indirect and doubtful. But the arguments and the judgments delivered treated much of the effect of the large words used in some sections of the County Courts Acts, and on the effect of them, if interpreted in their largest sense, upon the jurisdiction of the High Court of Admiralty, and the rights and liabilities of parties, and on the effect on them of the sections giving to the High Court of Admiralty the powers of appeal and transfer. The judges who took part in that case were of opinion that the large words used in the two County Court Acts were, upon a true interpretation, to be held to apply only to such subject matters of suit as were before the passing of those Acts within the jurisdiction of the High Court of Admiralty. We are of that opinion now. The County Court Acts, we think, invest certain County Courts with a jurisdiction to entertain and determine a certain limited portion of the cases which were formerly entertained and determined only in the High Court of Admiralty; but those Acts do not, we think, by inference and indirect enactment, enlarge the jurisdiction of the High Court of Admiralty, or, by giving to the County Courts a method of procedure not before used either in the Admiralty Court or at the common law, alter the rights and liabilities of merchants engaged in maritime adventure. They give as indeed they profess in terms to give, a part of the admiralty jurisdiction to be administered in a modified form: they do not give as admiralty jurisdiction a jurisdiction which the Court of Admiralty never possessed. The case of *The Swan* (*sup.*), does not incline us to modify this view. In that case it was assumed without argument that the County Court had jurisdiction in a case of demurrage, and we think, assumed without argument that an indirect jurisdiction was given to the High Court of Admiralty; and the only point really decided was that, if both those assumptions were true, the High Court of Admiralty ought to transfer the case. Again, the case of *The Sylph* (3 Mar. Law Cas. O. S. 37; L. Rep. 2 Adm. & Ecc. 24; 17 L. T. Rep. N. S. 519), affirmed on appeal by the Privy Council in *The Beta* (L. Rep. 2 Priv. Co. App. 447; 20 L. T. Rep. N. S. 988)—in which it was held that a claim for compensation for personal injuries caused by negligent management of a ship might be maintained by a suit *in rem* in the Admiralty Court against the ship, by virtue of the words "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship," which are contained in sect. 7 of 24 Vict. c. 10—and the case of *The Guldaze* (3 Mar. Law Cas. O. S. 201; L. Rep.

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2 Adm. & Ecc. 325; 19 L. T. Rep. N. S. 748) would be, if unimpeached, authorities to a great extent against the conclusion to which we in this case arrive. But those cases have been seriously impeached by the case of *Smith v. Brown* (ante, p. 58; 24 L. T. Rep. N. S. 808; 40 L. J., 214, Q. B.), in the decision and reasoning and observations of which we entirely concur. We are therefore of opinion that the County Court had no jurisdiction in the present case to entertain the suit or to detain the ship, and that a writ of prohibition ought to issue.

Attorneys for plaintiffs, Gregory, Rowcliffes, and Rawle.

Attorneys for defendants, Mercer and Mercer.

EXCHEQUER CHAMBER

Reported by J. SNOOK, Esq., Barrister-at-Law.

Friday, May 10, 1872.

(Before KELLY, C.B., KEATING, and BRETT, JJ.,
CHANNELL, and CLEASBY, BB.)

IONIDES AND ANOTHER v. THE PACIFIC FIRE AND
MARINE INSURANCE COMPANY.

Marine insurance—Slip—Open policy—Mistake in name of ship—Innocent misrepresentation—Evidence—30 Vict. c. 23, ss. 4, 9.

*Plaintiffs, ship and insurance brokers, having received instructions from Messrs. G. and K., of Hamburg, to open a policy on hides to the amount of 5000*l.*, filled up a slip for that amount on hides per "ships" and left it at the office of the defendants' underwriters. About four months afterwards, an agent of Messrs. G. and K. having written to the plaintiffs about hides on board the Socrates a clerk of the plaintiffs called on the defendants, and, after referring to the French Veritas which contained the names of two vessels, the Socrates, an old French vessel, and the Socrates, a Norwegian vessel, said he believed the vessel on board of which the hides were to be shipped was the Socrates. About a week after, one of the plaintiffs, taking up the old slip for 5000*l.* at the defendants' office, filled up two slips instead, one for 2500*l.* on hides per the Sophie, the other for 2500*l.* on hides per the Socrates; and policies were duly issued in accordance with the slips. The hides were loaded not on board the Socrates, but on board the vessel, and were totally lost, whilst on board that vessel, by the perils insured against. An action having been brought upon the policy for 2500*l.*, the jury found that the parties intended to insure the hides by the vessel on which they were shipped, whatever the name might be.*

Held (affirming the judgment of the Court of Queen's Bench), that the plaintiffs were entitled to recover, although the hides were on board the Socrates at the time they were lost.

Held, also, that the slip for 5000*l.* was admissible in evidence, to show the intention of the parties at the time the policy founded upon it was executed although by 30 Vict. c. 23 ss. 4, 9, the slip, not having been stamped, would not be available as a policy (a).

(a) The court, in deciding that a slip is admissible in evidence to show what was the intention of the parties in entering into the contract, got rid of the difficulty suggested in a note to the report of the case in the court below (ante p. 146). They expressly say that a slip is not a policy, and not an agreement at all within the

THIS was an appeal from a decision of the court of Queen's Bench, making absolute a rule to enter a verdict for the defendants on the second and sixth pleas, so far as they related to the fourth count of the declaration, and discharging the rule as to the rest. See the report of the case in the court below, ante, p. 141, where the pleadings are fully set forth.

The facts of the case were as follows:

1. The plaintiffs are ship and insurance brokers carrying on business in the city of London, and have for some years been in the habit of effecting insurances by the instructions of a Mr. Schaffer, an insurance broker at Hamburg. Some of these insurances were on behalf of a Mr. Gayen, and others on behalf of Messrs. Kalkmann, both merchants at Hamburg.

2. The defendants are a company carrying on business in the city of London as underwriters, and prior to Aug. 1869, had been in the habit from time to time of effecting insurances for the plaintiffs on ship or ships.

3. On the 12th Aug. 1869 the plaintiffs effected on behalf of Messrs. Kalkmann, with the defendants, a policy of insurance for 3000*l.* on hides, per ship or ships, as might be declared, from any port or places at the Brazils to any port of call in the United Kingdom.

On the 13th Aug. another similar policy was effected for 2354*l.* on behalf of Mr. Gayen.

4. On the 23rd Sept. 1869 the plaintiffs received a letter from Mr. Schaffer of which the following are the material parts:

Messrs. Kalkmann, Brothers, hereby request you to open at once a policy of insurance on hides to the amount of 5000*l.*, as by their next letter they will have to declare 3000*l.* to 4000*l.* on that head.

5. On receipt of this letter the plaintiff, Mr. De Chapeaurouge, had an interview with Mr. Drummond, the underwriter of the defendants when a slip, of which the following is a copy, was submitted to, and accepted by, Mr. Drummond, on behalf of the defendants, by writing the words and letters upon it:

5000 Pfo.	Cash.
Hides.	Ionides and De Chapeaurouge.
	Insurance 12 <i>l.</i> 0 0
	Average recoverable on the whole interest.
	Ship or ships and steamer.
Brazils	U.K. $\frac{1}{16}$
	and for steamer to Hamburg.
00 <i>l.</i>	9/6 U.K.
	5000 Pfo.
23/9/69.	Not more than 2500 <i>l.</i> by each vessel.

6. At this interview according to the evidence of Mr. Drummond, the plaintiff stated that the ships to be declared under it would be first-class vessels, and that the consignees under it would be first-class people. The plaintiff denied this, but said that, in answer to inquiries from Drummond upon the subject, he might have referred to the declarations made upon previous policies which in many instances were on first-class German ships, but that he did not remember any such thing having occurred.

meaning of the statute, and cannot be set up as such, but can only be used as explaining the intention of the parties in entering into a subsequent contract, valid within the statute. It would follow from this decision that under no circumstances could a slip be used as evidence, unless it were followed by a duly executed policy of insurance.—Ed

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7. Mr. De Chapeaurouge then filled up a slip on one of the printed forms kept by the defendants and left it at their office. The following is a copy of such slip.

PACIFIC INSURANCE COMPANY.—MARINE DEPARTMENT.

London Branch, 68, Cornhill.				22d Sept., 1869.	
In whose Name.	On what.	Ship.	Captain.	Voyage.	Amount. Premium.
Ionides and De Chapeaurouge.	Hides, 12½ per cent.	Shipa.		Including risk of craft to and from the ship. Warranted free from capture, seizure, and detention, and all the consequences thereof, and of any attempt thereto, any port or places on the Brazils to any port of call for discharge in the United Kingdom for the Continent between Havre and Hamburg, both inclusive, containing the risk from the United Kingdom or Havre by steamer to Hamburg.	£1000 60s.
For whose Account.	To return 9s. 6d. for interest shipped to U. K. or , and 28s 6d. for interest by steamer on arrival. Warranted free from particular average under the same amount to 5 per cent.				
Ditto.					

8. On the 21st Jan. 1870, a letter of which the following is an extract was received from Mr. Schaffler by the plaintiffs.

Hamburg, 19th Jan. 1870.

Messrs. Ionides and De Chapeaurouge, London.

Messrs. Kalkmann declare as follows: Cotton from Ceara to Hamburg, per *Socrates* C. Jeaneard, K 1/100, 100 bales cotton valued at £730.

9. On or about the 23rd Jan. 1870, the plaintiffs received a letter from Mr. Schaffler, dated the 22nd Jan. 1870, of which the material part was as follows:

Hamburg, 22d Jan. 1870.

Messrs. Ionides and De Chapeaurouge, London.

I beg to refer you to my respects of yesterday's date, and this is to inform you that Mr. Gayen is declaring to-day from Ceara to Hamburg by the *Socrates*. Bill of lading, dated the 23rd Dec. last year made out to order.

P. B. 1008 hides
M. 158 do.
C. 35 do.
S. 199 do.

1400 dry salted hides £1450.

Mr. Gayen keeps upon his hide policy only £1500 still. As, however, he does not expect any fresh shipment near at hand, he does, therefore, not feel disposed at the present moment to enter upon fresh insurances.

10. On the 24th Jan. in pursuance of the instructions contained in the above letter, Mr. De Chapeaurouge, made an indorsement upon the 13th Aug. 1869 as follows:

The following interest is now declared and agreed to this policy.

Per *Socrates*—Ceara to Hamburg. B.L. 23rd Decem-ber.

P.B. 1008 }
M. 158 } 1400 dry salted hides, valued at 1450l.
C. 35 }
S. 199 }

London, 24th January, 1870.

He then gave the policy to his clerk, Mr. Lambert, and directed him to take it to the defendants.

11. At the same time Mr. De Chapeaurouge having noticed that a portion of the hides belonging to Mr. Gayen, were insured in the Progress Insurance Company which had failed, instructed Mr. Lambert to offer that portion of the insurance to the defendants, and wrote in pencil in the fold of the said policy the words following:

"Re-insurance Progress, £121."

12. At this interview between Mr. De Chapeaurouge and Mr. Lambert, they both referred to the *Veritas* and found in it that there were two ships—the *Socrates* and the *Socrate*. [The descriptions of the two vessels were set out.]

13. Mr. De Chapeaurouge observed to Mr. Lambert that he supposed that the *Socrates* referred to in the letter of the 22nd January was the Norwegian ship, as that ship was most likely to be engaged in the trade, or words to that effect.

14. In consequence of these instructions Mr. Lambert called upon Mr. Drummond on the same day, and handed him the policy of the 13th Aug., which Mr. De Chapeaurouge had endorsed as above, to initial, and at the same time he offered him the reinsurance for 121l.

15. Mr. Drummond turned to the *Veritas* and finding in it entries of the *Socrates* and *Socrate*, as described above, asked if the *Socrates* was the ship. Mr. Lambert replied that he thought so, whereupon Mr. Drummond handed the policy to his clerk, Mr. Lark, to initial, and at the same time a slip was prepared for the reinsurance, which risk was taken without discussion at the same premium as the other policies. The following is a copy of the slip:

PACIFIC INSURANCE COMPANY.—MARINE DEPARTMENT.

MEMORANDUM FOR A POLICY.

London Branch, 68, Cornhill.				18, 187.	
In whose Name.	On what.	Ship.	Captain.	Voyage.	Amount. Premium.
Ionides and De Chapeaurouge.	1400 hides, valued at £1450.	<i>Socrates</i> , B. 4, 23 December.		Including risk of craft to and from the ship. Warranted free from capture, seizure, and detention, and all the consequences thereof, and of any attempt thereto, Ceara, Hamburg, London, 24 Jan. 1870.	£121. 0s.
For whose Account.	Being a reinsurance of a part of a policy issued by the Progress Insurance Company in case of loss or claim to pay as per original.				
Ditto.					
Claim payable in...	Date 1870.				

Per cent £3 12 7
Brokerage 0 5 8
10 % discount ... £3 11
Stamp £3 2 0
£3 2 6

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16. The following is the account given by Mr. Lambert and Mr. Drummond, the defendants' underwriter, of what passed at the interview.

The following is the account given by Mr. Lambert:—

He, Drummond, asked me to show him the ship. I found it in the *Veritas*. There are two ships, the *Socrates* and the *Socrate*. I said, "I think this is the ship," pointing to the *Socrates*. I believe it to be the ship. I did not tell him the information I had. I then prepared a slip, and this is it, and, further (on cross-examination) I mentioned the name *Socrates*. The French *Veritas* was on the table; I think I took it up. I pointed to the *Socrates*. I suppose I led him to believe it was the *Socrates*.

17. The following is the account given by Mr. Drummond:—

The plaintiff's clerk, Lambert, called on me on the 24th Jan., and presented me with the open policy and a declaration of the *Socrates*, which I passed to my assistant for registering in our books. He then produced a slip for 1211., on which I referred to the *Veritas*. I found two vessels, and said to him, "What is your vessel?" He said, "*Socrates*." In taking that risk, I believed I was insuring a risk on a specific vessel the *Socrates*, Captain Albertsen, the Norwegian. In insuring the policy of that date I thought I was insuring the *Socrates*. The risk on the *Socrate* was decidedly greater than on the *Socrates*; I would not have insured the *Socrate*.

18. The French *Veritas* is a book in which are entered the names and description of foreign vessels, and it is usual and customary for underwriters and others to refer thereto when questions arise as to the names and descriptions of foreign vessels.

19. On the 3rd Feb. the plaintiffs received a letter from Mr. Schaffler, an extract from which is as follows:

Messrs. Ionides and De Chapeaurouge, London.

Hamburg 1st. Feb. 1870.

Messrs. Kalkmann Brothers declare further on hide policy by *Socrates*, Captain Jeancord, from Ceara, to Hamburg, 2600 dry salted hides, valued at £2700. The balance which Messrs. Kalkmann Brothers have still open at your place is to the amount of £245, on Policy No. 13 (that is to say, policy of 12th Aug. for £3000), and £5000 on Policy No. 14 (that is to say, slip of 23rd Sept.), out of which £2500 can be declared by ship bill of lading, dated Jan. As the last policies, so far as I can remember, are running up to June, this declaration will be therefore quite in order. In case, then, that you are able to add on the same conditions another sum of £1100, you may further declare, and thus close the hide policy per *Sophie*, Captain Boltzen, from Ceara to Hamburg.

K	1018	} 3444 dry salted hides, £3600.
K. K.	1299	
K.	575	
A.	591	

Sophie is 5.6.11., K.'s own ship, and the *Serie* is so large that I hope you will have no difficulty in succeeding. In any case, I must request you to let me have at once a telegram from you. Bill of lading per *Sophie* is likewise dated January in the present year. Moreover, the said gentlemen are declaring on cotton, &c. Policy per *Sophie*, Captain Boltzen, from Ceara to Hamburg, U. K. 45 bales of cotton, valued at £340. I am looking forward to your telegraphic message, and beg meanwhile to remain yours, &c., S. H. SCHAFFLER.

20. In consequence of this letter, Mr. De Chapeaurouge called the same day upon the defendants, and saw their clerk, Mr. T. Lark. Mr. De Chapeaurouge endorsed on the back of the 3000L. policy of 12th Aug. 1869, which is referred to in the above letter as No. 13, a declaration of interest on hides, per *Socrates*, to the extent still open on the policy, viz., 245L.

21. He at the same time took the slip for the 5000L. policy of 23rd Sept. 1869, mentioned in

paragraph 7, and filled up two slips, one for 2455L. on hides per *Socrates*, and the other for 2500L. on hides per *Sophie*.

22. Mr. De Chapeaurouge suggested to Mr. Lark that it would be more convenient for both parties to have two separate policies, instead of drawing up an open policy for 5000L. and then declaring on it for 4955L., which would leave the small balance of 45L., and Lark thereupon initialed the above declaration and the two slips, and in due course the policies were executed by the defendants.

23. It was admitted between the parties that the hides on which the plaintiffs and their principals were interested were loaded on board the *Socrate*, and not the *Socrates*, in the French *Veritas* mentioned, and that whilst on board that vessel, on a voyage from Ceara to Hamburg, they were lost by the perils insured against.

24. It was also admitted that there were in existence at the time of the insurance the two said vessels as described in the *Veritas*, and that the description therein given of them is correct, and that the risk on the *Socrate* was greater.

25. A copy of the several policies and of the pleadings are to form part of the case.

26. The cause came on for trial before Hannen, J., and a special jury, at the Guildhall sittings after Michaelmas Term 1870, when the learned judge left to the jury the question, amongst others, whether the parties in making the policies both meant to insure the hides by the vessel on which they were shipped, whatever her name might be, though they supposed her to be the *Socrates*, or whether the defendants meant to insure hides on board the *Socrate*.

27. The jury found for the plaintiffs upon the questions submitted to them, and the verdict was entered for the plaintiffs, subject to leave reserved to the defendants to enter a verdict for them or a nonsuit.

28. On the 14th Jan. 1871, the defendants obtained a rule nisi to set aside the verdict so entered for the plaintiffs and to enter a verdict for the defendants, or a nonsuit, pursuant to leave reserved by the learned judge, on the ground that no insurance ever was effected on goods on board the *Socrate*, and no loss was proved within the meaning of the several policies declared upon, or why a new trial should not be had between the parties on the ground that the learned judge misdirected the jury in putting to the jury as material whether they thought the parties intended to insure the hides by whatever ship they might be carried, or that there was any evidence proper to be submitted to them that the parties insured, or meant to insure hides carried by any other ship than the *Socrates*, and that they might properly find for the plaintiffs on the plea of concealment and misrepresentation upon the evidence of the captain's name under the circumstances proved, and also on the ground that the verdict was against the evidence.

29. The rule came on for argument in Trinity Term 1871, when the court made it absolute to enter a verdict for the defendants upon the re-insurance policy, and discharged it as to the other. Against this judgment the defendants now appeal.

Milward, Q.C. (with him *Murphy*), for the defendants argued that there was a misrepresentation on the part of the plaintiffs, which exonerated

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the defendants from liability on the policy. The policy was effected on goods shipped on the *Socrate*, whereas they were actually shipped on the *Socrate*, an old ship, thereby increasing the risk. If there were really no other vessel than the *Socrate* it might be said that the French name of the vessel was simply Anglicanised; but there being two distinct vessels, and of very different ages, the matter amounts to a material misrepresentation. The ordinary words found in other policies, "or by whatever other name or names the said ship should be called," are not found in the present policy. In *Le Mesurier v. Vaughan* (6 East, 382), where the broker had received instructions to insure goods by an American ship called the *President*, and by mistake insured as on a ship called the *American President*, and it was held that the plaintiffs might recover, notwithstanding the mistake, we find in the policy the words "or by whatever other name or names the same ship or the master was or should be named or called"—words sufficient to cover the case, but which are absent in the present instance. Lord Ellenborough, C.J., in the case referred to, relies, in giving judgment, on the presence of these words. He said, "Certainly a true description both of the name of the ship, and the voyage intended, should be observed to the extent which the terms of the policy itself require. But the framers of this policy, contemplating that there might be a mistake in the names given to the ship, have added these words, 'or by whatever name or names the same ship should be called; they have therefore provided for the event which has occurred, of a mistake in the name.' There was in reality no contract between the parties in the present case—no consensus *ad idem*. The slip is inadmissible to show the intention of the parties. 30 Vict. c. 23, s. 9, makes the slip inadmissible, enacting that "no policy shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or equity unless duly stamped; and sect. 4 provides that the word 'policy' shall mean 'any instrument whereby a contract or agreement for any sea insurance is made or entered into.'" In *Mackenzie v. Coulson* (L. Rep. 8 Eq. 368), where plaintiffs, underwriters, having executed to the defendants, iron merchants, a policy of marine insurance on a cargo which suffered loss, filed a bill for a rectification of the policy so as to make it conformable to that which they said was the real contract between the agents, in proof of which they produced in evidence the slip which was signed by their agent when presented at Lloyd's by a clerk of the defendants' insurance broker; the defendants denying that they ever entered or intended to enter into any contract other than that expressed by the policy, it was held that, as the slip formed no contract, and there was no binding agreement between the parties until the policy was signed, and the premium paid, the bill must be dismissed with costs. [CLEASBY, B., referred to *Cory v. Patton*, ante, p. 225; L. Rep. 7 Q. B. 304.]

Cohen (with him *Lanyon*) for the plaintiffs.—First, there was no misrepresentation in this case. Paragraph 20 of the case describes what really took place. The prior conversation took place with Mr. De Chapeaurouge, and he had nothing to do with the policies sued on. There is no ground for supposing that the policies sued on were executed by reason of any preceding conver-

sation; the two slips were given without reference to any such conversation. There is no evidence therefore, to show that the defendants were induced to execute the policy now in dispute by any misrepresentation. That the naming of a ship in a policy does not amount to a warranty that the vessel has that particular name, is well established by decided cases. They are collected in the last edition of Arnould on Marine Insurance, 4th edit., p. 316: "An insurance was effected on ship, as on a ship called the *Leopard*, it appeared that the name of the ship was in fact called the *Leonard*, and that she had never been called the *Leopard*, it being proved, however, that the ship lost was the same that the underwriters intended to insure, the court held that the variance did not affect the validity of the policy: (*Hally Molinaux*, before Lee, C.J., 17th Dec. 1744, cited 6 East, 385.) So where an American ship called the *President* was described in the policy as the good ship called the *American Ship President*; but it clearly appeared that the error was a hinder of the broker's clerk, and that the ship lost was really that on which the underwriters meant to insure, the error was held immaterial: (*Le Mesurier v. Vaughan*, 6 East, 382.) And the decision of the court was the same in another case, where a ship really called by the Spanish name of *Las Tres Hermanas* was described in the policy by an English translation of the name as *The Three Sisters*: (*Clapham v. Cologan*, 3 Camp. 382.) The reason is stated by Arnould to be that "as it is for the purpose of identification that such desirable accuracy derives its whole importance, misdescription by name, if not the source of error as to the subject designated, does not invalidate the policy. This is a general principle of law: *nisi facit error nominis cum de corpore constat*." Phillips on Insurance, par. 430, states the rule thus: "If the description designates the subject with sufficient certainty, or suggests the means of doing it, a mistake of the name of the ship or any other particulars, will not defeat the contract," referring to *Pothier*, Ins. n. 105, and *Estrangin's* note. 1 Emer. 159, c. 6, s. 2. [BRETT, J.—The only question really is—was the ship insured the ship intended to be insured?] On this point the verdict of the jury is decisive, they having found that the parties intended to insure the hides by whatever ship they might be carried. Then as to the admissibility in evidence of the slip, the production of which was not objected to at the trial, *Mackenzie v. Coulson* (ubi sup.), decides only that it does not amount to a contract, which is not disputed. In *Nicholson v. Power* (3 Mar. Law Cas. O. S. 236; 20 L. T. Rep. N. S. 580), the defendant, an underwriter, signed a "slip" effecting an insurance on the freight of a certain ship, and at the time of his so signing it the plaintiff knew of, but did not communicate to the defendant, a fact which the court held to be a material fact which plaintiff was bound to communicate. The defendant subsequently, at a time when he was fully acquainted with this fact, signed a policy in conformity with the terms of the "slip," but also at the same time wrote a letter of protest to plaintiffs' brokers, declaring that he would resist any claim made under the policy. It was held in an action on the policy that it was vitiated by the concealment, and that the action was not maintainable;—in other words, so far as the present contention is concerned, that the "slip" might be looked at for some purposes. The

section in the last Stamp Act has no such effect as contended for by the other side. It means merely that no unstamped policy shall be available as a contract of marine insurance. [KEATINGE, J.—Unstamped bills of exchange have often been received in evidence for collateral purposes.]

MURPHY in reply.—There is no evidence to support the finding of the jury, that the underwriters intended to insure hides by any other ship than the *Socrates*. In the various cases cited of mistake in the name of the ship there was no evidence of the existence of any other ship than the one, so that no confusion or misunderstanding could arise. The case is quite different here, and the slip cannot be looked at to show that the parties intended to insure by any other ship than the *Socrates*. In *Xenos v. Wickham* (3 Mar. Law Cas. O. S. 537; L. Rep. 2 Eng. & Ir. App. 314; 16 L. T. Rep. N. S. 800), WILLES, J., says: "The statutes requiring contracts of marine insurance to be in writing and stamped (35 Geo. 3, c. 63, s. 11; 54 Geo. 3, c. 144, ss. 3, 4, 5) annul contracts not so framed; consequently a marine policy, or contract for a marine policy, to be valid, must be in writing, which by the assent of both parties shall represent the contract between them. But for the decided cases, it might have been supposed that upon the slip being completed there was a contract on the part of the assured to prepare and hand over a policy according to the slip, and that although because of the statutes no action could be maintained as upon a policy of insurance, yet an action might be maintained for not preparing a policy; and causes have been tried without objection, upon the notion that the insurance is complete from the date of the slip. But the law, as settled by the decisions upon the construction of the statutes referred to, is that as there can be no valid insurance, or contract for an insurance, unless by writing, with the statutory requisites, the slip by itself has no binding force. . . . It follows that the slip, though complete, is no contract, nor even part of a contract of insurance, but a mere proposal that a policy of insurance shall be entered into in *future*, and in case of insurance with a company, a request that the policy shall be prepared at the office."

KELLY, C.B.—In this case the question we have to consider is, whether the verdict for the plaintiff in respect of the point reserved is supported by the evidence; and there is the further question, whether the slip which was received in evidence—received indeed, without objection made at the time—was admissible; whether it has been dealt with in any way which the law does not allow. Now, it is better in the first instance to consider the former question independently. The policy is upon hides coming from Brazil by a ship described as the ship *Socrates*, and the question which has arisen is, whether the ship the *Socrates* is so named as to make the particular ship the *Socrates* an essential part of the contract between the parties, or whether the contract was such, and intended to be such, and that not inconsistently with the language of the policy itself, as to be on any ship or ships by which the cargo of hides was coming from Brazil to England. When we come to look at the facts of the case, as they were given in evidence, we find that the ship *Socrates* is named in the policy, though it turns out that the ship on which these hides were placed was the ship *Socrate*, a French vessel. It appears that at

an early period of the transactions between these parties several communications had taken place in which another ship, the *Socrates*, commanded by a Norwegian, named Albertsen, had been mentioned, and it also appeared that there was a ship, the *Socrate*, the commander of which was named Jeacard; and with respect to the question which has been determined by the Court of Queen's Bench in favour of the defendants, and as to which there is no appeal now before us, it became material to consider which of the two ships, the *Socrates* or the *Socrate* had really been intended. But in the case before us it appears that when the policy was about to be made—certain communications having taken place between these parties; but the house on whose behalf the plaintiff acted having been different altogether from the parties on whose behalf they acted in respect of the other policy, and a slip having been prepared on the 23rd Sept., and at a later period, that is, on the 3rd Feb.,—when the policy in question was about to be entered into, the parties met. What occurred is stated in paragraph 20, 21, and 22 of the case. [His Lordship read these paragraphs.] It thus appears that this policy was framed and executed upon a declaration of a ship, or it may be a ship or ships, and the question arises, therefore, when we find the name *Socrates* is the name and description of the ship introduced, what was really intended? Whether upon the contract between the parties, and upon what took place between the parties at the time this policy was framed, it became at all material to consider the precise name of the ship; whether the contract was not pursuant to a declaration on a ship or ships, and consequently whether it was competent to the party to name any ship he thought fit, and in pursuance of that accordingly the name *Socrates* was introduced; and for that purpose it became absolutely necessary and inevitable that the question should be considered what it was that the parties really intended. But where a policy is framed upon a previous arrangement between the parties that it is to be upon ship or ships to be declared, or upon the cargo of a ship or ships to be declared, it becomes absolutely necessary then to see what is declared. In order to see whether the precise name of the ship is material at all, authorities have been cited to show that in a certain class of cases the precise name of the ship is really immaterial. A mistake in the name of the ship, as for example, mentioning the *Leopard* instead of the *Leonard*, is perfectly immaterial to the insurance. The question is, whether this is not a case of the same nature, and whether, therefore, the parties did really enter into this policy in pursuance of some arrangement between them, that it was to be a policy on a cargo of hides by a ship or ships to be declared. Evidence to this effect as stated in the paragraphs which I have read was given. It is not disputed that hides to the value insured were in fact shipped on board the *Socrate* by the parties interested, and that they had no hides whatever on board the *Socrates*, and that the *Socrate* was totally lost with the hides on board. My brother Hannen reserved leave to the defendants to move to enter the verdict for them on all or any of the issues, subject to the finding of the jury on the question he left to them, which was whether the parties, in entering into the contract, meant to insure hides by the vessel on which they were actually shipped, whatever her name might be, though they supposed it to be the

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Socrates, or whether the defendants meant to insure hides on board the *Socrates*. The jury answered this question in favour of the plaintiffs, and the consequence is, that upon these facts, and the mode in which this transaction was conducted between these two parties, De Chapeaurouge, who represented the plaintiffs, and Lark, who represented the defendants, the naming of the ship really did become wholly immaterial. The question, therefore, to be determined was, whether that was so, and what it was that the parties really intended. The jury have found that they intended, in effect, that the insurance should be made upon hides by the vessel on board of which they were actually shipped, whatever her name might be, although the one party may have supposed it to be the *Socrates*. In preparing the slips, and executing the policy, they acted in a very irregular manner—first, in splitting the slip of the 23rd Sept. into two slips, and then in indorsing it and preparing the policy in the way they did, naming the *Socrates* in it. Although that was so, the real question is, what they intended to do—whether they intended that this transaction should be a transaction and policy upon ship or ships to be declared. Well, the jury have found that they did; and if that be so, the name of the ship—I mean the orthography of the name—becomes almost immaterial; and no question arose whether the parties meant the Norwegian ship *Socrates*; and secondly, no question arose whether there was any misrepresentation with respect to that ship. Well, the jury having found that the parties intended to effect this insurance on ship or ships, there is an end of the question of the materiality of the name *Socrate* or *Socrates* which was given to the ship in the policy. But the question still remains, first, whether the slip was admissible in evidence at all; and, secondly, if it were, whether it was admissible in evidence for the purpose for which alone it was used on the trial of this cause. Now, it is quite true that under the statute in question the document called a slip, although it constitutes a contract, binding in point of honour, between parties circumstanced like these parties were, with a view to a policy of insurance, is utterly void to all intents and purposes, utterly unavailable as an agreement for insurance, and for such a purpose is not admissible in evidence. It is not like an agreement for a lease, where an action can be brought for the non-acceptance of the lease, or the refusal to grant a lease, and the agreement may be given in evidence to show the obligation imposed on one party or the other, and is treated as, and really is, a binding contract. This slip, by force of the statute, is in truth no contract at all. It is utterly useless, utterly unavailable for the purpose of enforcing the performance of the contract; but it does not follow that it is not admissible in evidence for a great variety of purposes. It is unnecessary to do more than to consider whether it is admissible in evidence in the present case for the purposes of showing what the two parties intended at the time they made the policy; in other words, whether they intended it to be a policy pursuant to a previous contract, though not binding—a contract namely for insurance on ship or ships to be declared. For that purpose it was receivable in evidence. In the first place, it may be observed that its admissibility was not objected to, and on that ground alone I do not think that we could be

called upon to hold that it was inadmissible in evidence; but if it had been applied to a purpose forbidden by the Act of Parliament, I, for one, should not have hesitated to say that it ought not to be admitted in evidence, or if admitted, applied to any such purpose. But for all purposes to which it may be applied, in all cases where a fraud is suggested, in all cases where there is a plea, as there is here, of misrepresentation, the slip may be evidence of a representation which may turn out to be false. For example, supposing a slip of this nature, although it constitutes no binding contract, had been made with a view to the insurance from a port in South America, which had been under blockade a little while before the contract was entered into, but the slip, prepared at the instance, I will suppose, of the plaintiff, had described the port as an open port, and the question had arisen, not upon the slip, but upon the collateral question of whether the policy had been procured by misrepresentation of some fact material or essential with reference to entering into the policy, and the misrepresentation was alleged to be that a port which to the knowledge of the parties who had made and signed the slip, was under blockade, had nevertheless been described as an open port, and it had been expressly stated on the slip that the blockade had been raised and had ceased, in such a case no one can doubt that upon the collateral question of fraud, the collateral question of whether one of the parties to the insurance had been guilty of misrepresentation, the slip would for that purpose have been admissible in evidence. It is quite enough, therefore, to say that here the slip was not given in evidence to prove a binding contract between the parties, or to contradict, or to explain, or in any way affect the construction of the policy in question; but that it was given in evidence only inasmuch as it had been looked at, and considered, and found a guard to the parties who arranged the contract, to show what their intention was in preparing the policy. I am clearly of opinion that for that purpose it was admissible in evidence, and that it might be used for that purpose; and when we come to consider that the question is not whether this was a binding contract, or what was the contract which had been contained in the slip, but what these two parties who prepared and framed the policy intended at the time, in other words whether they intended it should be a policy on ship or ships to be declared, for that purpose, as it appeared they acted on the slip, and prepared from the slip two other slips from which the policy was prepared, it was admissible. It is quite impossible to decide this question without looking at the slip upon which the parties, though they were under no obligation to act upon it, did nevertheless act in this particular transaction. Upon the question as to what was meant, and whether it was not meant that this should be a policy on ship or ships to be declared, the evidence is decisive. The parties, in order to determine on the form of the policy, how it should be prepared, looked to this slip, took it into their hands, considered its effect, what it was that had by this slip been arranged, and finding it was to be an insurance on the cargo of a ship or ships to be declared, they prepared the two other slips and executed the policy in question. Under these circumstances it appears to us that the question was correctly left to the jury, and there was evidence by means of this slip which, though not a binding

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[Ex.]

contract, the parties acted on as a binding contract, which showed that the parties did intend it should be a policy upon the hides by a ship or ships, and that, consequently, the policy was prepared in its present form. The name of the ship is immaterial, and, consequently, the plaintiffs were entitled to the benefit of the policy and the verdict of the jury; and, inasmuch as it was open to them to declare any ship or ships they thought fit, the declaration of a wrong name from whichever point of view it is considered became wholly immaterial. KEATING and BRETT, JJ.; CHANNELL and CLEASBY, BB., concurred.

Judgment affirmed.

Attorneys for plaintiffs, *Hillier and Fenwick*.
Attorneys for defendants, *Holmer, Robinson, and Stensham*.

COURT OF EXCHEQUER.

Reported by T. W. SAWYERS and H. LEIGH, Esqrs.,
Barristers at-Law.

Monday, April 22, 1872.

(Before KELLY, C.B., and MARTIN, BRAMWELL, and CLEASBY, BB.)

TAUBMAN v. THE PACIFIC STEAM NAVIGATION COMPANY.

Carriage by sea—Wilful act and default—Exemption of carrier from liability, under special contract.

A special contract, entered into between a shipowner and a passenger by sea, contained a provision that the shipowner would not be answerable for loss of baggage "under any circumstances whatsoever." Held, that such a stipulation covers the case of wilful default and misfeasance by the shipowner's servants.

Martin v. The Great Indian Peninsular Railway Company (17 L. T. Rep. N. S. 349; 37 L. J. 27, Ex.; L. Rep. 3 Ex. 9) explained.

THE plaintiff became a passenger on one of the defendants' vessels from Rio Janeiro to England. On taking his passage he signed a contract by which the company engaged to carry him and his luggage upon condition, among other things, that the company would not be answerable for loss of or damage to the luggage "under any circumstances whatsoever." On the voyage, the plaintiff's portmanteau was lost through the negligence of the defendant company's servants. The plaintiff brought an action for the loss of the portmanteau, averring in the declaration that the loss was occasioned by the wilful act and default of the defendants.

To this the defendants pleaded, setting out the terms of the contract.

Replication, that the defendants did not use proper skill and care, but were guilty of gross negligence and wilful default, and that, by reason of the said gross negligence and wilful default, the loss was occasioned, and demurrer to the plea.

Demurrer to the replication.

Garth, Q.C. (with him *Morgan Howard*) for the plaintiffs.—The act complained of is a wrongful act of the defendants' own doing, against the consequences of which no form of contract can protect them. The contract would protect the defendants in a case of ordinary negligence, but not in a case of wilful misfeasance or default. The courts have never held that a company could

screen itself from liability in such cases, and it was to prevent such attempts that the Railway and Canal Traffic Act) 17 & 18 Vict. c. 31) was passed. He cited:

Peck v. The North Staffordshire Railway Company, in the House of Lords, 8 L. T. Rep. N. S. 768; 32 L. J. 241, Q. B.; 10 H. L. Cas. 743;

Story on Bailments, s. 549;

Martin v. The Great Indian Peninsular Railway Company, 17 L. T. Rep. N. S. 349; 37 L. J. 27, Ex.; L. Rep. 3 Ex. 9.

Cohen for the defendants was not called upon.

KELLY, C.B.—The defendants in this case are entitled to our judgment. It is only necessary to read the contract in order to decide this case. The defendants are not to be liable for the loss of luggage "under any circumstances." The "gross negligence" of the defendants' servants is a "circumstance"; so is "wilful default." If the act had been actually done by the shipowners, the act would have been a trespass, whatever the contract might be. But this is the act of the servants, and the action is really one for breach of contract. *Martin v. The Great Indian Peninsular Railway Company* is distinguishable, for there the freedom from liability only extended to the time during which the baggage was to be in the charge of the troops.

MARTIN, B.—I am of the same opinion, as far as I can see from the imperfect statement of facts we have before us. The defendants are not under the liabilities of common carriers, and they are free to make any terms they choose. Probably the words in the special contract were inserted for the very purpose of exempting the company from liability for the acts of their servants.

BRAMWELL, B.—I am of the same opinion. *Prima facie*, the defendants are not liable, for the contract says they are not to be liable for the loss of baggage under "any circumstances." A loss has occurred under certain circumstances, and the plaintiffs are seeking to recover. Next, we must consider is there any implied exception? I am of opinion that there cannot be, for the parties could easily have expressed it; see the judgment of Manly, J., in *Borradaile v. Hunter* (5 M. & G. 639; 12 L. J. N. S. 225, C. P.). Then it is urged that in certain cases the Legislature have interfered. That, as far as it goes, is against the plaintiff's case. And the court will not extend the Railway and Canal Traffic Act further than they can help, for it has been already the cause of more dishonest transactions than any Act of Parliament.

CLEASBY, B.—What is the meaning of the word "circumstances?" I find in Johnson's Dictionary that the word "circumstance," in a legal sense, means "one of the adjuncts of a fact, which makes it more or less criminal." Arguing from this definition of "circumstance" by analogy, I should think the words in the contract will cover the present case.

Attorneys for the plaintiffs, *Busby and Marsden*.
Attorneys for the defendants, *Field, Roscoe, and Co.*

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Ex parte MICHAEL—BATUIT v. HARTLEY.

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COURT OF QUEEN'S BENCH.Reported by J. SHORRY, M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Monday, June 3, 1872.

Ex parte MICHAEL.

County Court—Admiralty jurisdiction—Claim for necessities supplied to a ship—Owner domiciled in England or Wales—Time for taking objection—Prohibition.

Where a suit is instituted in a County Court (Admiralty Jurisdiction) under 31 & 32 Vict. c. 71, s. 3, for necessities supplied to a ship, the objection that the owner or part owner of the ship is domiciled in England or Wales (24 Vict. c. 10, s. 5) must be taken before judgment is pronounced. Where the objection is taken for the first time after judgment has been pronounced, a prohibition will not be granted.

A SUIT was instituted in the County Court of Bristol (under 31 & 32 Vict. c. 71, s. 3) for necessities supplied to a ship, which was at the time in the port of Bristol, and judgment was given for the plaintiff. After judgment had been given an application was made on behalf of the owner, Mr. Michael, to the judge to stay proceedings, on the ground that Mr. Michael was domiciled in England. The judge having refused to give the owner relief on the ground that this objection to the jurisdiction should have been taken at the trial, and that the domicile of the owner should then have been proved to the court.

R. E. Webster moved for a prohibition.—The County Court jurisdiction in a suit for necessities is given by 31 & 32 Vict. c. 71, s. 3, sub-sect. 2, which enacts that "Any County Court having admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine subject and according to the provisions of this Act the following causes. . . . As to any claim for towage, necessities, or wages, any cause in which the amount claimed does not exceed 150*l*." The County Court jurisdiction as to such suits cannot exceed that conferred on the High Court of Admiralty, and the jurisdiction of the High Court is limited by 24 Vict. c. 10, s. 5, which provides that "the Court of Admiralty shall have jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." [BLACKBURN, J.—That was not shown to the County Court judge until after judgment was given. LUSH, J.—If the judge had jurisdiction to pronounce judgment, we cannot interfere, and he clearly had jurisdiction when it was not shown "that at the time of the institution of the cause, any owner or part owner was domiciled in England or Wales." There was no opportunity of raising the objection at the hearing, for the defendant was absent and had no legal advice. The statute fixes no time for showing this, and it ought to be open to an owner or part owner to show it at any time before the ship is sold. [BLACKBURN, J.—The statute says the court is to have jurisdiction unless a certain thing is shown to its satisfaction. That must mean that this thing must be shown whilst the court is still seized of the case, and before judgment has been pronounced.]

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COCKBURN, C.J.—I am clearly of opinion that there ought to be no rule in this case. The case is not one to which a writ of prohibition could properly be applied by this court. It is conceded that the County Court had jurisdiction over the subject matter of the suit, and the only ground on which the judge could be called on not to proceed is that it should be shown to his satisfaction that the owner, or some part owner of the vessel, is domiciled in England or Wales. That is a thing which must be shown to the court. And when must it be shown? Before the court has pronounced judgment. If it is shown afterwards, it may be a ground for appealing to the court itself to grant a new trial, but is not a cause for a prohibition. The judge had jurisdiction unless a particular defence was set up which was not set up. It is said that the defendant was absent and was *inops consilii*, but any attorney could readily have explained to him the position in which he was.

BLACKBURN, J.—I am of the same opinion. The general rule of the common law was that where necessities were supplied to a ship at home the Court of Admiralty had no jurisdiction, but if the necessities were supplied abroad then the Court of Admiralty had jurisdiction. Sect. 5 of 24 Vict. c. 10, enacts that "the High Court of Admiralty shall have jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales." It seems to me to be clearly intended by this that the Court of Admiralty shall have jurisdiction though the necessities are supplied in England, just as if they had been supplied abroad. If, however, the owner or any part owner, is domiciled in England or Wales, this is an exception; and the court is not to have jurisdiction if that is shown to its satisfaction before judgment is given. The objection in the present case does not seem to have been taken until after judgment was pronounced, and then it was, I think, too late.

MELLOR, J.—I am of the same opinion.

LUSH, J.—I am of the same opinion.

COCKBURN, C.J.—I may add another reason why the objection must be taken before judgment is pronounced. The fact of the domicile of the owner or part owner may be a matter in dispute between the parties on which evidence is to be given by both sides, and the court may have to determine the matter before giving judgment for either side.

Rule refused.

Attorneys for applicant, *Ingledeve, Ince, and Greening.*

May 24 and July 6, 1872.

BATUIT v. HARTLEY

Bailees—Wharfinger—Detention of goods by—Collusive transfer of bill of lading.

The plaintiff, a merchant abroad, received an order for wine from L., and accordingly shipped certain cases thereof to him in London, also forwarding a bill of lading. Before the arrival of the vessel L. deposited the bill of lading with the defendant, a wharfinger, directing him to warehouse the goods on account of L. The wine came, and was ware-

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housed by the wharfinger, who entered it in L's name, but subject to a stop order put on it by the shipowner for freight, pursuant to 25 & 26 Vict. c. 63, s. 28. L. declined to accept the wine, as not equal to sample. The plaintiff thereupon agreed to take it back, and L. promised to send a delivery order to enable him to obtain it, but did not do so, and it afterwards appeared that L. had, on the same day, indorsed the bill of lading to one M., who thereby caused the wine to be transferred into his own name in the books of the wharfinger. The plaintiff demanded the wine from the latter, offering to pay all charges, and to indemnify him against other claims, but the defendant having given warrants to M., refused delivery. The jury found that the transfer of the bill of lading from L. to M. was collusive and not for value. An action of detinue having been brought by the plaintiff against the defendant,

Held, that the wharfinger had no better title than L., his bailor, who could not have justified a detention of the wine, and consequently the plaintiff was entitled to recover.

This was an action of detinue to recover 200 cases of wine, which had been deposited by one Leah with the defendant, the proprietor of a snuffrance wharf, under the following circumstances:

The wine had been ordered by Leah of the plaintiff, and was shipped by him, consigned to Leah, on the 20th Jan. 1870. The bill of lading and invoice were forwarded in due course. Before the arrival of the vessel, which was on the 12th Feb. 1870, Leah deposited the bill of lading at the defendant's wharf, with directions to take delivery and warehouse the goods on his account. This was done, the shipowner putting on a stop order for freight, pursuant to 25 & 26 Vict. c. 63, s. 68, and the wine was entered in Leah's name, subject to the freight. On the 19th Feb. Leah, having in the meantime sampled the wines, gave notice to the plaintiff that they were not according to contract, and that he refused to accept them. A correspondence thereupon ensued, which led to no satisfactory result, and on the 19th April the plaintiff came to London, and called on Leah, when it was agreed that the wine should be taken back, and Leah promised to send a delivery order to enable the plaintiff to obtain it. This, however, he failed to do.

It appeared that on the same day on which he had thus promised to deliver to the plaintiff, he had indorsed the bill of lading to Magnus, and that Magnus took it to the defendant's, and procured a transfer of the goods into his own name.

In the beginning of May the plaintiff, not having succeeded in obtaining the delivery order, called at the docks to make inquiry, and in consequence of what took place his attorney wrote to Leah on the subject, and received an answer that the wine was at the disposal of the plaintiff, but subject to charges which were stated to amount to 22l. 14s. 9d. After an ineffectual attempt to see Leah, an appointment was made to meet at the office of the plaintiff's attorney on the 27th May, when, instead of Leah, Magnus came. He said he was ready to give up the wine on payment of the sum which had been previously named by Leah. That amount according to an account which he then showed, was made up of 17l. 14s. 9d. for charges, and 5l. for loss of profit. The attorney tendered the former sum, but refused to pay the 5l. for loss of profit. Magnus promised to see Leah and send

an answer the same afternoon, but this he never did. On the 10th June the plaintiff's attorney, having ascertained where the wines were deposited, called on the defendant, showed the correspondence to his manager, and explained the transaction, and then, in order to get possession of the goods, offered to pay all the charges and indemnify the defendant against the claim of any other person. The defendant refused to deliver, on the ground that he had given warrants for the wine to Magnus. Ultimately the wines were delivered up to another person by Magnus's order.

It further appeared that Magnus, into whose name the wines had, as above stated, been transferred on the 19th of April, had on the 3rd June paid the freight and obtained warrants for delivery to him or his order, and that a transfer had then been made from Magnus to the holder of the warrants. Magnus stated at the trial that he had *bond fide* advanced money to Leah on the wine, but this was negatived by the jury, who found that the transaction between Magnus and Leah was colourable, and with knowledge on the part of Magnus of the intention of Leah to deprive the plaintiff of the wine.

The Lord Chief Justice, before whom the case was tried, thereupon directed a verdict to be entered for the plaintiff for 150l., with leave to the defendant to move (subject to the finding of the jury) to enter a verdict for him, the court to have power to draw any inferences of fact not inconsistent with that finding, a rule having been obtained according to leave reserved.

Gibbons (McColl with him).—These goods were originally the plaintiff's, and the only question is whether he parted with the property so as to vest it in any other person. A bailee is to give the bailed goods back to the bailor, unless the true owner steps forward and claims them. So "a party with whom an article is pledged undertakes to return it to the pledgor, provided it turns out not to be the property of another." (*Cheeseman v. Exelst*, 6 Ex. 344; 20 L. J. 209 Ex., per Pollock, C.B., citing *Oyle v. Atkinson*, 5 Tann. 759.) Leah's position was only that of a holder of a bill of lading. But as Lord Campbell said in *Gurney v. Behrend* (23 L. J. 265, Q. B.), "A bill of lading is not like a bill of exchange or promissory note a negotiable instrument which passes by mere delivery to a *bond fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer." And as against the plaintiff the defendant can have no better title than Leah. In *Wilson v. Anderton* (1 B. & Ad. 450) the captain of a ship, who had taken goods on freight, and claimed to have a lien upon them, delivered them to the bailee. The real owner demanded them of the latter, and he refused to deliver them without the direction of the bailor. Held that the bailor not having any lien upon the goods, the refusal by the bailee was sufficient evidence of a conversion. At the time the plaintiff here claimed the goods they were in the defendant's keeping, and the latter was quite aware of the circumstances. There is no estoppel in this case whatever. "The indorsement of a delivery order or dock warrant has not (independently of the Factors' Acts) any effect beyond that of a token of an authority to receive possession": (*Blackburn on Sales*, 297, as cited in *Benjamin on Sale*, p. 614.) The wharfinger cannot stand in a better position than the captain of a ship in the case above referred to, who recovered the wine;

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and the jury have found collusion between Leah and Magnus, which defeats the effect of the transfer: (*Cuning v. Brown*, 9 East 506). These goods, being at a sufferance wharf were, in contemplation of law, still on board ship: (*Meyerstein v. Barber*, 22 L. T. Rep. N. S. 808; L. Rep. 4 H. L. 317.) The property never passed from the plaintiff. The property certainly did not rest on shipment (*Brandt v. Bosely*, 2 B. & Ad. 932), and could not rest until the goods were accepted, but when seen by Leah were rejected. The plaintiff who would recover them from him can likewise recover them from the defendants.

Ingham (H. James, Q. C. with him) in support of the rule.—Admitting that the property of the goods was in the plaintiff, Leah would have no answer to an action by him. But the wharfingers are in a better position than Leah. The goods arrived with a bill of lading. The defendants, keeping a sufferance wharf, are in the place of the shipowners, therefore the goods were still *in transitu*. The plaintiff says, however, by his bill of lading, "I authorise you to hold this wine to the order of Leah." In *Meyerstein v. Barber* (*sup.*), it was held that "where goods are at sea the parting with the bill of lading, which is the symbol of the goods, is parting with the ownership of the goods themselves. The same principle applies to goods which, for the convenience of parties, have been landed at a sufferance wharf (11 & 12 Vict. c. xviii. and 25 & 26 Vict. c. 63, s. 67). As long as the engagement of the shipowner has not been completely fulfilled, the bill of lading is a living instrument, and the transfer of it for value passes the absolute property in the goods." Here the shipowners deliver to the defendants, under a bill of lading, giving them authority to transfer the goods to Leah. An entry is made in the wharfinger's books by Leah prior to the arrival of the wine, and when it reaches the wharf he proceeds there, and causes a free entry to be made, and there was an authority to hand over the goods, coupled with an interest, and that being so the plaintiff could not revoke it: (*Wood v. Leadbitter*, 13 M. & W. 838.) In *Walker v. Boatton* (9 M. & W. 42), Lord Abinger, C.B., said: "This is a case of a party engaging himself to appropriate the proceeds of the goods according to certain directions of the owner, and appears to us to fall within that class of cases where, when an order has been given to a person who holds goods to appropriate them in a particular manner, and he has engaged to do so, none of the parties are at liberty, without the consent of all, to alter that arrangement." Therefore, even if what took place in May was notice not to deliver to Leah, yet nevertheless it was not competent to the owner to revoke the authority which he had given. But there was no revocation: (*Williams v. Everett*, 14 East, 582.) There such an authority was held revocable, because the broker had not entered into a subsidiary arrangement. [LEAH, J.—What point do you make on the Sufferance Wharf Acts?] That the shipowner not being paid his freight, is entitled to hold the goods, and, therefore, the defendants are likewise entitled, for the wine was landed at their wharf under a stop for freight. [LEAH, J.—Leah received the goods and entered them in his own name.] The freight was not paid for some time. No warrants were given until the freight was paid. [LEAH, J.—Your conversion was not only a refusal to deliver, but a delivery to some one else.] The defendant had warrants to deliver.

[MELLOR, J.—But to Magnus; and the jury have found that Magnus and Leah were identified with each other.] It is quite consistent with the evidence that Leah was entitled to get possession of this wine as against the plaintiff. Martin, B., in *Meyerstein v. Barber* (16 L. T. Rep. N. S. 569; L. Rep. 2 C. P. 676), says: "For many years past there have been two symbols of property in goods imported; the one the bill of lading, the other the wharfinger's certificate or warrant. Until the latter is issued by the wharfinger, the former remains the only symbol of property in the goods." [COCKBURN, C.J.—The important question, is how far an attornment to a particular individual binds the bailee so as to compel him to yield to the demand of the person to whom he has attorned, when in the meantime he becomes aware that the property is in anyone else.]

Cur. adv. vult.

July 6.—The judgment of the Court (Cockburn, C.J., Mellor and Leah, JJ.) was delivered by Mellor, J., who, after stating the facts as above set out, proceeded as follows:—It was admitted that Leah, if he had been the defendant, would have had no answer to the action; but it was ingeniously contended by Mr. Ingham that, as the defendant received the goods for the shipowner, subject to his lien for freight, he stood in all respects in the position of the shipowner, and when the freight was paid was bound to deliver according to the bill of lading, and that the transfer by direction of Leah to Magnus, and the giving the delivery warrant to Magnus, amounted to a delivery to Leah, and discharged the defendant. We are of opinion that this argument is fallacious. The defendant received the goods as bailee to Leah, and, although he might have justified detaining them on behalf of the shipowner for his freight, yet when that was paid he held in no other than the ordinary relation of bailee, and could have no better title than his bailor had. Then by the finding of the jury Magnus had no better title than Leah, and, as the plaintiff had tendered the amount of charges both to Magnus and the defendant, the plaintiff's title was as good against the defendant as it would have been against Leah. We therefore discharge the rule.

Attorney for the plaintiff, G. F. Pasher.

Attorney for the defendant, John Frost.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING, B. A. KIDGLEY, and H. F. POOLY, Esqrs., Barristers-at-Law.

April 21, 26, 27; June 6, 1872.

HARRIS v. SCARAMANGA.

Policy of insurance—Place of adjustment—General average loss—Law of port of Bremen—Liability of underwriters—Foreign average statement.
Action upon a policy of insurance on a voyage from Tagenrog to Bremen. The ship, through stress of weather, was obliged to put into Constantinople, and the master there executed a bottomry bond on ship, freight, and cargo, for the purpose of raising money to repair the ship, so that she might continue the voyage. The ship was again obliged to put into Malta in distress, where the master executed a second bottomry bond on the ship, freight, and cargo.
On the ship's arrival at Bremen the master was

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unable to take up either bond, and the consignees of the cargo, to obtain possession, paid off the holders of both bonds. A statement of average was drawn up by an average stater at Bremen, in which the ship and freight was charged with the sum of 1185*l.* 11*s.*

The underwriters paid the plaintiff the sum with which the cargo was charged. The shipowner being unable to pay his share the ship was sold, when a sum of 663*l.* 2*s.* 10*d.* still remained unsatisfied.

It was admitted that such a loss was treated by the law of Bremen as a general average loss.

The policy, which was in the usual form, contained in the margin the following conditions, "To pay general average as per foreign statement if so made up."

In an action on behalf of the consignees of the cargo against the underwriters for the unsatisfied sum.

Held, that the defendants were bound by the foreign average statement, both as to the facts and as to the law of general average at the port of Bremen, and that the plaintiffs were, therefore, entitled to the sum awarded by the average stater.

Per Brett, J., that although the underwriter of a policy in the ordinary form is not liable to indemnify against general average loss, whether according to the law of his own country, or according to the law of a foreign country, if the general average loss be not made in order to avert loss by a peril insured against; yet that the construction of the policy "To pay general average as per foreign statement" must be considered as an obligation to indemnify the assured against any loss which might fall upon him by compulsion at the foreign port of adjustment.

THIS was a special case stated for the opinion of the court, pursuant to an order of Byles J., made with the consent of the parties. The action was brought upon a policy of insurance for 4160*l.* to recover a loss of 663*l.* 10*s.* The declaration contained special counts on the policy for a general average loss, and on the suing and labouring clauses, and for a loss according to a foreign average statement made up with the terms of the policy, and there were also the common money counts for money had and received, and for money paid and for interest. The defendants pleaded a denial of the general average loss, and a denial of the loss under the suing and labouring clause, and that the claim upon the policy had been satisfied by payments, and to the money counts that they never were indebted. Before the case came on to be tried, by consent of the parties the above-mentioned order was made and the action was submitted for the decision of the court.

1. The plaintiffs and the defendants are corn-factors, and carry on their business respectively in the city of London, where the policy of insurance on which this action was brought, was underwritten by the defendants. The said policy is on 3122 cwt. of rye by the ship *Bella Leandra*, on a voyage from Taganrog to Bremen. It contained a clause to pay general average as per foreign statement, if so made up, and was underwritten for 4160*l.*, being the whole sum thereby insured.

2. The plaintiffs bought the cargo of rye of the defendants on behalf of their principals Messrs. Bacmeister and Stone. These last-named gentlemen again sold the cargo to Messrs. Kneist and Todeman, who again sold it to Messrs. Bolte and Co., of Bremen. The policy in question, and the bill of lading of the rye were first handed by the

defendants to the plaintiffs, who passed them on to their principals, Messrs. Bacmeister and Stone. Thus, ultimately, the documents came into the hands of Bolte and Co., as final owners of the cargo.

3. The *Bella Leandra* was an Italian vessel. She sailed from Taganrog on the voyage insured, on or about 22nd Sept. 1867, having on board the said cargo of rye. After leaving Taganrog she encountered very severe weather, and was, in the month of Oct. 1867, compelled to put into Constantinople in distress. There Capt. Schiaffino, the master of the ship, in order to raise the money necessary for repairs, so as to enable the ship to continue the voyage, executed a bottomry bond, dated 17th Feb. 1868, on the ship, freight, and cargo, to secure the repayment of the capital sum of 2120*l.*, with maritime interest at 11 per cent. which, on the said ship's arrival at Bremen, amounted to the sum of 2353*l.* 4*s.*, to Messrs. Helting, merchant, of Constantinople, who advanced him that sum. It is to be assumed, for the purposes of this case that the said bond was and is valid and binding on the said cargo.

4. The *Bella Leandra* sailed from Constantinople, on or about 23rd Feb. 1868, and again met with very bad weather, and on or about 28th March 1868, the captain was compelled to put into Malta in distress. There again, in order to raise the money necessary for repairs, so as to be able to continue the voyage, the captain executed a bottomry bond, dated 20th April 1868, on ship, freight, and cargo. This last-mentioned bond was for the capital sum of 442*l.* 15*s.*, with maritime interest at 5 per cent., which, on the arrival of the said ship at Bremen, amounted to the sum of 465*l.* 6*s.* 5*d.*, and was in favour of Mr. Ignazio Buttigieg, merchant, of Malta, on behalf of the firm of Giuseppe Buttigieg e figlii, who advanced that sum. It is to be assumed for the purposes of this case that the said bond was and is valid and binding upon the said cargo.

5. The said Messrs. Bolte and Co., who are merchants carrying on business at Bremen, had in the meantime become the purchasers of the rye, and this action is brought by the plaintiffs as trustees for the said Messrs. Bolte and Co.

6. The ship sailed from Malta on or about the 1st of May, and on or about the 25th of June she arrived at Bremen, Messrs. Bolte and Co. being the consignees of the cargo.

7. The bond which was executed at Constantinople had been endorsed by Hermann Helting to the order of the said Messrs. Bolte and Co., who took it up, and on the arrival of the ship at Bremen the captain was unable to pay the same, or any part thereof.

8. The bond which was executed at Malta had been endorsed by Giuseppe Buttigieg and Co. to the order of, and was taken up by, the defendants, and by them endorsed to Messrs. W. A. Fritz and Co., of Bremen, and as the said captain was unable to redeem the same the said Messrs. W. A. Fritz and Co. demanded payment thereof from the said Messrs. Bolte and Co., the consignees of the cargo. The said Messrs. Bolte and Co., in order to prevent the holders thereof from covering their claims by a sale of the said cargo, took up the said bonds and paid off the holders thereof. By taking this course, which was the only course they could take, the said Messrs. Bolte and Co. obtained a delivery of the cargo.

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9. A statement of average dated the 3rd of Aug. 1868, was prepared by Heinrich Tecklenborg, an average stater in Bremen, in which the loss arising upon the said bottomry bonds was apportioned between the cargo and the ship and freight. By the said statement the amount of 1088*l.* 1*4s.* 11*d.* was the proportion shown as falling upon the cargo, and the amount of 1185*l.* 11*s.* was shown as falling upon the ship and freight.

10. No question arises as to the said sum of 1088*l.* 1*4s.* 11*d.*, which, it is admitted, is properly chargeable on the defendants as underwriters on the cargo, and the defendants have paid the same to the said Messrs. Bolte and Co. accordingly.

11. The said Captain Schiaffino was unable to pay or to give any security for the said sum of 1185*l.* 11*s.*, the said proportion of the said loss so falling on the said ship and freight, according to the said average statement or any part thereof.

12. The said Messrs. Bolte and Co., in order to obtain payment of the said sum of 1185*l.* 11*s.*, the said proportion of the said bottomry moneys so as aforesaid falling upon the said ship and freight, have applied to the Tribunal of Commerce at Bremen, the same being a court of competent jurisdiction in that behalf, to order the said ship to be sold, and the proceeds to be applied in or towards the liquidation of the said amount. The said Tribunal of Commerce duly made the said order, and after the requisite public notices had been given the said ship was, with due observance of all legal form, sold by public auction by one Gotfried Steinmeyer, a ship broker, at Bremen, on or about the 12th Sept. 1868, under the order of the said Tribunal of Commerce for 4450 thalers gold, equal to 129*l.* 10*s.* 2*d.* sterling, or thereabouts being the highest price that could be obtained for her, and the net proceeds of the said sale were handed over to the said Messrs. Bolte and Co. under the order of the said Tribunal.

13. After deducting the said net proceeds of the said sale from the said sum of 1185*l.* 11*s.* so falling upon the said ship and freight according to the said average statement of the 3rd Aug. 1868 as aforesaid, there remained a balance of 663*l.* 2*s.* 10*d.* of the said sum so as aforesaid falling on the said ship and freight, in respect of which the said Messrs. Bolte and Co. were still unsatisfied, and a further or supplemental average statement, dated the 3rd Oct. 1868, was made up by the said Heinrich Tecklenborg, in which the said sum of 663*l.* 2*s.* 10*d.* was stated as the amount which the cargo had to pay as additional bottomry debt to the said Messrs. Bolte and Co. It is admitted that the said last mentioned average statement of the 3rd Oct. 1868, as well as the said former statement of the 3rd Aug., is in all respects accurate as to amounts and figures, and is correctly made up in accordance with the law in force in Bremen.

14. Such a loss as that which has occurred in the present case is treated at Bremen as a general average loss, and not as a particular average loss. At Bremen the German code of commercial law is by legislative enactment in force. The sections of that code which enunciate the principles of law more particularly applicable to the present case are articles 695, 697, 734, 735, 824, sub-sect. 5, and 838, sub-sect. 1. Either party is, on the argument of this case, to be at liberty to refer to a copy of the said code, which was identified by several witnesses under the commission which was sent to Bremen.

The following is a translation of the above-mentioned articles.

Art. 692. All the objects hypothecated are jointly and severally liable to the bottomry creditor. Even before his claims become due the creditor can, after the arrival of the vessel in the port of destination of the Bottomry voyage, apply for an arrest of all the bottomried objects.

Art. 695. The master shall not deliver the bottomried cargo, either entirely or partially, before the creditor has been paid or properly secured, otherwise the master is personally answerable to the creditor for the bottomry debt, so far as he could at the time of their delivery have been paid by the goods so given up; until the contrary is proved, it shall be considered that the creditor could have been paid in full.

Art. 697. If the amount of bottomry is not paid when due, the creditor may apply to the proper court to order the sale of the ship and cargo on which bottomry has been taken, and also to hand over the bottomried freight. The action shall be brought, as far as the ship and freight are concerned, against the master or owner; as to the cargo, if before its delivery, against the master; after its delivery, against the consignee, so long as it is in his own possession, or in the custody of any person holding it for his account. If the master, in order to continue his voyage for the purpose of an expenditure that does not come under general average, has hypothecated the cargo, or has disposed of the cargo by sale or by appropriation, the loss sustained by one proprietor of the cargo by reason that his claim for indemnification cannot be at all, or cannot be fully satisfied, out of the ship and freight (Art. 509, 510, 618) shall be borne by all the proprietors of the cargo, according to the principles of general average. In ascertaining the loss, the indemnification indicated in Art. 713 is applicable in relation to the proprietors of the cargo in all cases, especially also in the case of the second paragraph of Art. 613, for the value of which this indemnification is determined, the goods so sold shall contribute to a general average, if such occur.

Art. 735. The contributions to be paid under the stipulations of Art. 735 and Art. 734 are in all respects placed on the same footing as contributions in cases of general average.

Art. 824. The insurer bears all risks to which ship or cargo are exposed, during the continuance of the insurance, if not otherwise determined by the following provisions or by contract. He bears in particular (sub-sect. 5) the risk of the hypothecation of the insured goods, for the purpose of continuing the voyage, or of the disposal of the same by sale or by hypothecation for the like purpose (Art. 507, 510, 734).

Art. 838. The insurer is liable for (sub-sect. 1) the contributions to general average, including those which the insured has to bear on account of a loss suffered by him, the contributions, which by Art. 637 and 734, subject to the principles of general average, shall be accounted, and an amount to contributions to general average. If ships and cargo are hypothecated together, each has to contribute its proportion towards the discharge of the amount for which they have been hypothecated, as if the loss were a general average loss, and should the ship be unable to discharge its proportion of liability, the owner of the cargo would, in addition to discharging the proportion of liability attaching to the cargo, have to make up the deficiency as a general average loss.

This deficiency would be made good to the owners of the cargo by their underwriters, if the owners of the cargo have insured their interest. If this case, therefore, had been decided at Bremen, the defendants would have been held liable, by the tribunals there, to make good to the said Messrs. Bolte and Co. the whole of the said sum of 663*l.* 2*s.* 10*d.*

15. The defendants have refused to pay to the plaintiffs, as trustees for the said Messrs. Bolte and Co., the said sum of 663*l.* 2*s.* 10*d.* or any part thereof. The court is at liberty to draw inferences of facts. The schedule annexed to the case, containing a translation of the first and second

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bottomry bonds, executed at Constantinople and Malta, formed part of the special case.

The question for the opinion of the court is, whether the plaintiffs, as trustees for the said Messrs. Bolte and Co., are entitled to recover from the defendants the said sum of 663*l.* 2*s.* 10*d.*, or any part thereof.

If the court shall be of opinion that they are so entitled, judgment is to be entered for the plaintiffs with costs of suit. If the court shall be of opinion that they are not so entitled, judgment shall be entered for the defendants, with costs of suit.

The plaintiff's points of argument were that the average statement of 3rd Aug. 1868 in the ninth paragraph of the case mentioned, and also the further or supplemental average statement of 3rd Oct. 1868, in the thirteenth paragraph mentioned, were and are foreign statements made up within the meaning of the memorandum in the policy of insurance; secondly, that the sum of 663*l.* 2*s.* 10*d.* is a general average loss for which the defendants are liable under the said foreign statements, or one of them; thirdly, that the execution of the bottomry bonds was the consequence of injuries by the perils insured against, and that Messrs. Bolte and Co. were compelled to take up the bonds before they could obtain possession of the cargo, and are entitled under the policy to recover from the defendants the money so expended as a loss by perils of the seas.

The defendants, on the contrary, relied on the following points of argument: First, that the payment which is sought to be recovered in this action is not a loss or expenditure covered by the policy declared upon; secondly, that the said payment was not caused proximately by perils insured against so as to constitute a general average loss within the meaning of the policy; thirdly, that the average statement was made up at Bremen, upon the hypothesis that there was an absolute necessity for the captain of the *Bella Leandra* to make the bottomry bonds on which payment has been made, and the plaintiffs have not proved this was the case, as they were bound to do; fourthly, that the clause to pay general damage as per foreign statement, if so made up, is not to be extended to make the underwriters liable for a loss by way of general average which is not a general average loss according to English law; fifthly, that according to Bremen law, as stated in the special case, the claim now sought to be charged upon the cargo was primarily chargeable upon the ship and freight, and it is not shown that any part of the claim in question has been charged upon the freight which was earned.

The policy of insurance was in the usual form for a voyage from Taganrog to Bremen, but in the margin were inserted additional conditions, as follows:

Additional conditions—p. *Bella Leandra*.—With leave to call for orders as often as required, and at any intermediate port or ports, place or places, for any purpose whatsoever, including all risk of craft to and from the ship, and particularly of any special lighterage, each lighter or craft being considered as if separately insured.

To pay general average as per foreign statement, if so made up.—Warranted free from particular average, unless the ship or craft be stranded, sunk, or burnt, but this warranty not to exonerate the underwriters from the liability to pay any special charges for rats, warehousing, forwarding, or otherwise, if incurred, as well as partial loss arising from transshipment.

Warranted free from capture and seizure, and the consequences of any attempt thereat.

Sir George Honyman, Q.C. (*McLeod* with him).

—The important point is whether the underwriters are liable to pay general average, which is not general average according to English law; and what is the effect to be given to the clause to pay general average as per foreign statement if so made up? The policy is on cargo alone, and the question is one which should be discussed between the shipowner and owner of the cargo at the port of adjustment. As a general rule the place for the adjustment of general average is the ship's port of destination or discharge. When this happens to be a foreign port the general average loss is adjusted there according to the law and usage of the country to which such foreign port belongs, and the adjustment so made is called a foreign adjustment. There is a great diversity in the practice of different countries as to what shall and what shall not be included in general average; sometimes losses are included and charged for, which are general average in the country where the adjustment is settled, but not in the country where the charter-party was entered into and the policy of insurance effected; and sometimes a different proportion of contribution is assessed in the foreign port from that which is chargeable in the home port. In either case two questions arise: First, are the contributors as among themselves bound by the foreign adjustment? Secondly, are the respective underwriters bound by it? It is generally agreed that parties are liable to make contribution in accordance with the laws of the place of adjustment. Arnould on Marine Insurance, p. 814, says, "That the underwriter is in all cases bound by a foreign adjustment of general average when it is rightly settled according to the laws and usages of a foreign port. But that unless it is clearly proved to have been settled in strict conformity with such laws and usages, he is not bound thereby in any case in which he would not be bound in his own country." So in the case of *Newman v. Casale* (2 Park Ins. 900), the assured owner of goods had been compelled to pay under a foreign adjustment settled at Pisa, in respect of losses which would not have been general average in this country, and upon contributory values differently computed from what they would have been here; yet as it clearly appeared in evidence, that all the losses allowed were general average at Pisa, and that the apportionment was correct according to the mercantile usage of the place, the assured recovered against the underwriters the full amount of his claim. So in *Walpole v. Ewer* (3 Park Ins. 896), the holder of a respondentia bond, not liable to general average at all in this country, was compelled to pay a contribution under a foreign adjustment settled in Denmark, and, upon evidence given that it was in accordance with the law and practice of Denmark, he recovered. Here the parties entered into the contract, not with reference to the law of England, but according to the state of the law at the port of adjustment (*Simons and Loder v. White*, 2 Barn. and Cres. 805.). In *Power v. Whitmore*, 4 M. & S. 141, it was decided that the insurer of goods to a foreign country, is not liable to indemnify the assured, who is obliged by a decree of the court there, to pay contribution to a general average, which by the law of this country could not have been demanded, where it does not appear that the parties contracted upon the footing of

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some usage among merchants obtaining in the foreign country to treat the same as general average; but such usage is to be collected merely from the recitals and assumption made in the decree.

Dent v. Smith, L. Rep. 4 Q. B. 414; 20 L. T. Rep. N. S. 868.

Watkin Williams (with him *Cohen*), for the defendant.—The defendant is not liable for the surplus of 663*l.* 2*s.* 10*d.* This was an English policy made in London from Taganrog to Bremen. Although the policy is an English policy, I do not contend that the average is not to be calculated according to the practices and usages of the port of adjustment. But it does not appear that the 663*l.* 2*s.* 10*d.* was general average according to the law of Bremen, and was not a loss covered by the policy. The meaning of the clause "to pay general average as per foreign statement if so made up" means that if the assured has by the perils insured against been compelled to make a contribution in general average, the underwriters will repay him according to the foreign average statement, if so made up. The definition of general average is where several interests are exposed to one common danger which threaten the destruction of all and one is sacrificed for the general good, the owner of the goods which are sacrificed is entitled to call on the owners of the others to contribute ratably towards the loss. This is the rule of the general average by the Rhodian law two centuries later than the law of marine insurance. Benecke says: "This is a law by which everybody is bound according to the law of the place of adjustment, and it varies in different countries. The ship, cargo, and freight are all, therefore, liable to contribute. The captain was justified in raising money on a bottomry bond binding them all, and binding each separately for the whole sum. [BOVILL, C.J.—You say this liability arises from the insufficiency of the ship to pay the bondholders.] Yes, for this is a liability arising under the bottomry bond. [BRETT, J.—We may take it that according to English law, that would not be a general average contribution.] The ship must be kept in repair by the shipowners; this is a mere debt from the shipowner to the owner of cargo. [BOVILL, C.J.—Do you say you are not liable under any clause in the policy?] I say we are not. The policy is warranted free from particular average, unless the ship is stranded, sunk, or burnt, but not to pay any special charges for mate, warehousing, forwarding or otherwise. This is not particular average according to *Kidston v. Empire Marine Insurance Company* (15 L. T. Rep. N. S. 12; L. Rep. 1 C.P. 535, (Ex. Ch.) 2 C. P. 357); for this is not a loss at all from any peril insured against, and it is not because the goods have been bottomried that the owners can come down on the underwriters. This is clearly a loss not covered by the policy, and arising from a peril uninsured against; for the plaintiff to recover he must show that this was a loss which has arisen proximately from the perils insured against:

Powell v. Gudgeon, 4 M. & S. 431.

Sarguy v. Hobson, 2 Barn. & C. 7.

When part of the cargo is sold for the benefit of the ship and cargo, that would not be a loss by perils of the sea, but it would be a general average loss; but if the ship were chased by an enemy, and part of the goods were thrown overboard to escape capture, that would be a case of general

average loss, but would not come within the terms of the policy, and even assuming here that this is a general average loss, which I dispute, we are not liable if the loss is not included in the policy and if the underwriters are made liable, it is in spite of the words of the policy. The case of *Dent v. Smith* (L. Rep. 4 Q. B. 214; 20 L. T. Rep. N. S. 868) is distinguishable. The gold being cast into the hands of persons who would not part with it, it was a payment of a ransom to obtain back the possession.

Great Indian Peninsular Railway Company v. Saunders, 4 L. T. Rep. N. S. 240; 1 B. & S. 41, Ex. Ch.; 2 B. & S. 266.

Booth v. Gair, 15 C. B., N. S., 291; 33 L. J. 90, C. P.

In *Hallet v. Wigram* (9 C. B. 580) it was decided that a claim for contribution to general average arises only where a part of the cargo is sacrificed for the preservation of the ship and the rest of the cargo from an impending danger, not where part of the cargo is sold to raise money at a port to which the ship has put back for the repair of damage incurred by ordinary perils of the sea. In delivering the judgment of the court in that case, Wilde, C. J. says, "The result of these cases is thus summed up in *Abbot on Shipping*, p. 497: If a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expense of port charges, wages, and provisions during the stay, are to be considered as general average; but if the damage was incurred by the mere violence of the wind and weather, without sacrifice on the part of the owners for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of the shipowner to keep his vessel tight, staunch, and strong during the voyage for which she is hired."

Sir *George Honyman* in reply.—It is not necessary for me to show this to be a case of general average according to English law. If I show it was a case of general average according to the law of Bremen, the underwriter will be liable to the consignee of the goods.

Cur. ade. vult.

June 6th.—The judgment of the court was delivered by BOVILL, C. J.—This action was brought to recover from the underwriters on goods for an alleged general average loss sustained by the plaintiffs as owners of a cargo of rye, by the *Bella Leandra*, insured on a voyage from Taganrog to Bremen. Upon that voyage the vessel with her cargo on board having reached Bremen; that was the proper port for the adjustment of any claim or liability for general average, and the adjustment would have to be made there according to the law of Bremen, and would be binding as between the shipowner and the owner of the cargo. It does not, however, necessarily follow that an underwriter upon an ordinary form of policy would be liable for the whole, or even any part of the general average so adjusted. If the sacrifice or loss which occasioned the general average arose from any of the perils insured against, or the consequences of them, or from proper endeavours to avert such perils or their consequences, to that extent the underwriters would under the terms of an ordinary policy, and according to well-known maritime usage, be liable to indemnify the assured, though as between the shipowner and the owner of the cargo neither might be introduced into the statement

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of general average, for which the underwriters upon the ordinary form of policy would not be liable. There are also many differences in the laws of various countries as to what are to be deemed the proper subjects of general average, as well as with respect to the proportions or value in or upon which the apportionment should be made; and under these circumstances the present policy was entered into, with a special memorandum as to general average. By that memorandum, in addition to the ordinary insurance in the body of the policy, the underwriters agree "to pay general average as per foreign statement if so made up," with certain special warranties as to particular average and capture or seizure. It seems to me that the general effect of the memorandum is to make the underwriters liable as for general average for whatever the assured owners of the goods might be called upon to pay on that account by the foreign statement of adjustment. This memorandum was probably introduced in order to avoid all questions not only as to the propriety of particular items being treated as the subject of general average, but also as to the correctness of the apportionments, and I find it difficult to place any other reasonable construction upon the term of the policy and memorandum. If it be open to this court to consider and determine the question whether the 6631, 2s. 10d. claimed in this action or any part of it was properly the subject of general average according to the law of England, I should be of opinion that it was not, and that this was not a loss covered by an ordinary policy in the usual form. So if we had to determine whether this sum was strictly general average according to the law of Bremen, as set forth in the special case, it may well be argued that it is not strictly general average, but is merely to be treated in a similar manner by the law of that place. It seems to me, however, that under the terms of this policy the underwriters and the assured have both agreed to accept the adjustment and statement of the average stater in the foreign port if and when made as conclusive between them, both in principle and in details as to the loss which the underwriters are to undertake in respect of general average, subject to the exception of any matters, such as capture or seizure, which are excluded by the express terms of the policy. In this case a maritime lien on the cargo was created by the bottomry bonds, and which involved a liability of the cargo to make good any deficiency caused by the insufficient value of the ship to cover its own proportion of the bottomry bonds, and the necessity for giving the bottomry bonds and creating that lien arose from perils of the seas, though these debts would not necessarily be the subject of general average as against the underwriters according to the law of England or, possibly, by the law of Bremen. How, then, is the question to be determined whether the claim in this case is to be considered as general average for which the underwriters are liable? Is it to be determined by the court, or by the statement of the foreign average stater? It seems to me that by the express agreement of the parties contained in the memorandum, it is not open to us to determine it, and that we have only to see whether the foreign adjustment which gives rise to this claim has been in fact made or not. Has there, then, been such a statement of general average made in Bremen with respect to the amount now claimed? and how does the matter

stand upon this fact as stated in the special case? The plaintiffs contend that there was such a statement; the defendants, on the other hand, contend that there was no such statement, and that the passages in the case as to the statement of October do not treat it as a statement of general average, but as a mere calculation of the deficiency arising upon the sale of the ship from the proceeds of that sale being insufficient to pay the amount apportioned to the ship and freight, and that this loss, therefore, cannot be considered as coming within the perils or terms of this policy. Now, what are the statements in the special case upon this subject? In paragraph 13 it is said that a further or supplemental average statement, dated the 3rd Oct. 1868, was made up by the said H. Thienborg (who had been previously described as an average stater in Bremen), in which the 6631, 2s. 10d. was stated as the amount which the cargo had to pay as additional bottomry bonds to Messrs. Bolte and Co. (which is in accordance with the fact), and that a translation of the average statement was annexed to and formed part of the case. It is further mentioned that the last-mentioned average statement of the 3rd Oct. 1868, as well as the former statement of the 3rd Aug. was in all respects accurate as to amounts and figures, and was correctly made up in accordance with the law in force in Bremen; it is also stated in paragraph 14 that such a loss as that which had occurred in the principal case was treated at Bremen as a general average loss, and not as a particular average loss, and at the end of that paragraph it is further stated that if this case had been decided at Bremen the defendants would have been held liable by the tribunals there to make good to the said Messrs. Bolte and Co. the whole of the said sum of 6631, 2s. 10d. Upon these facts, thus stated, I am of opinion that the statement of the 3rd Oct. must be considered and treated by the court as a foreign statement of general average made up at Bremen within the terms of the special memorandum on this policy, and that as neither of the exceptions nor warranties is applicable to this case, the question of the liability of the underwriters to pay the amount now in question is conclusively settled against them; that it is not competent for this court to inquire into the propriety of that foreign average statement, and that our judgment, therefore, ought to be in favour of the plaintiffs. In this view of the case it becomes unnecessary to go through the authorities or discuss the elaborate arguments which were very ably addressed to us by the learned counsel for the defendants. If his contention be correct, it would equally have entitled his clients to dispute each item in the original average statement of the 3rd Aug. on the ground either that it was not properly the subject of general average, or that it did not arise from any of the perils covered by the policy. But it appears to me that the intention and effect of the policy and memorandum were that all such questions should be excluded in all cases where a foreign statement of general average had been made up, as it was in this case, at the proper port of adjustment abroad, and that the underwriters by this policy, as between themselves and the assured, agreed to be bound by the opinion and decision of the foreign average stater, both as to fact and law, on the subject of general average in the statement which

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he might make up in the foreign port. I think the underwriters agreed to pay according to that statement, with the exception of any matters which are expressly excluded by other parts of the policy (but which are not applicable to this case); and that the plaintiffs are entitled to recover from the underwriters the whole of the sum claimed in the action.

BARR, J.—In this special case the question ultimately in dispute was whether the plaintiffs, the assured, as trustees for Messrs. Bolte and Co., were entitled to recover from the defendants, the underwriters, a sum of 663*l.* 2*s.* 10*d.* The plaintiffs, merchants in London, had insured with the defendants, as underwriters in London, by a policy dated the 23rd July 1867, a cargo of rye on board the Italian vessel, the *Bella Leandra*, on a voyage from Taganrog to Bremen. The vessel, after starting on the voyage insured, was compelled by severe weather to put into Constantinople in distress. The master, in order to raise money necessary for repairs, so as to enable the ship to continue her voyage, executed a bottomry bond on ship, freight, and cargo, to secure the repayment of 2353*l.* 4*s.* on the said ship's arrival at Bremen. The ship, having sailed from Constantinople, was compelled, by further severe weather, to put into Malta in distress, and was there obliged to execute another and similar bottomry bond, on ship, freight, and cargo, to secure repayment at Bremen, of 465*l.* 6*s.* 5*d.* The vessel arrived at Bremen, and the captain was unable to take up either bonds. Messrs. Bolte and Co., who had become owners by purchase of the cargo of rye, took up both bonds, and in order to obtain delivery of the cargo, paid off the holders of both. This was found by the case to be the only course by which the Messrs. Bolte and Co. could obtain possession of the cargo. The special case then found that a statement of average, dated the 3rd Aug. 1868, was prepared by an average stater in Bremen, in which the loss arising upon the said bottomry bonds was apportioned between the cargo and the ship and freight. By the said statement the amount of 1083*l.* 14*s.* 11*d.* was the proportion shown as falling upon the cargo, and the amount 1185*l.* 11*s.* 6*d.* was shown as falling upon the ship and freight. No question, it was stated in the case, arises as to the said sum of 1083*l.* 14*s.* 11*d.*, the proportion by that adjustment falling on the cargo, which, it is admitted, is properly chargeable on the defendants as underwriters, and the defendants have paid the sum, but the captain was unable to pay or give any security for the said sum of 1185*l.* 11*s.*, the proportion falling on the said ship and freight. The Messrs. Bolte and Co., therefore applied to the Tribunal of Commerce at Bremen to sell the ship, which was accordingly duly done, and the net proceeds of sale were handed to Messrs. Bolte and Co. After deducting the said net proceeds from the said sum of 1185*l.* 11*s.*, there remained a balance of 663*l.* 2*s.* 10*d.*, in respect of which the Messrs. Bolte and Co. were still unsatisfied. The special case then continued, "And a further or supplemental average statement," dated the 3rd Oct. 1868, was made up by the same average stater in which the said sum of 663*l.* 2*s.* 10*d.* was stated as the amount which the cargo had to pay as additional bottomry debt to the said Messrs. Bolte and Co.; a translation it was said "of the last mentioned average statement, is annexed, &c." It is admitted that the said last mentioned average statement is

correctly made up in accordance with the law in force in Bremen. Such a loss as that which has occurred in the present case is treated at Bremen as a general average loss, and not as a particular average loss. It was admitted on the argument that the last paragraph was intended to apply to the loss of the 663*l.* 2*s.* 10*d.* The case there stated that the German Code was in force as law at Bremen, and set out several sections or articles of the code; and then it was stated as a fact that according to that law, if ship and cargo are hypothecated together, each has to contribute its proportion towards the discharge of the amount for which they have been hypothecated, as if the loss were a general average loss; and should the ship be unable to discharge its proportion of liability, the owners of the cargo would, in addition to discharging their proportion of liability attaching to the cargo, have to make up the deficiency "as a general average loss." This deficiency would be made good to the owners of the cargo by their underwriters, if the owners of the cargo had insured their interest. If this case, therefore, had been decided at Bremen, the defendants would have been there held liable to make good to Messrs. Bolte and Co. the whole of the said sum of 663*l.* 2*s.* 10*d.* The court was to be at liberty to draw inferences of fact. The policy was as to the body of it in the ordinary forms of an English Lloyd's policy, with the ordinary enumerated risks. But in the margin there were among other provisions the following: "To pay general average as per foreign statement, if so made up," "warranted free from particular average, unless the ship and craft be stranded, sunk, or burnt; but this warranty not to exonerate the underwriters from the liability to pay any special charge for mate, warehousing, forwarding, or otherwise, if incurred, as well as partial loss, arising from transhipment, warranted free from capture and seizure, and the consequences of any attempt thereat." Upon this case Mr. Watkins Williams, in an able argument, every part of which seemed to me to deserve and require the utmost attention, contended that the defendant's English underwriters of an English policy were not liable in respect of the 663*l.* 2*s.* 10*d.*, and maintained that the loss of Messrs. Bolte and Co., in respect of that sum was not a general average loss according to English law, or according to the law of Bremen, and that it was not stated or made up as a general average loss in the Bremen average statement, and even if it were a general average loss according to the law of Bremen, and were so stated in conformity with such law, or if it were stated in fact, but erroneously, according to the Bremen law, and if in either case the defendants were bound by it as a foreign adjustment of a loss to be taken as a general average loss, yet that the defendants were not liable, because it was not a loss arising from any peril insured against by this English policy. Now in the first place I agree that this was not a general average loss according to the law of England. There was a general average loss incurred during the voyage, insured by reason of the necessity arising from sea perils of the ship, putting into two different ports of distress, and being necessarily repaired in order to enable the voyage to be continued for the benefit of all concerned, but all the contributions of the owners of cargo to that loss which can properly be called a general average contribution according to the English law were

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included in the first average statement, dated 3rd Aug. 1868. It is true that the loss of the 6632l. 10s. was necessarily incurred by Messrs. Bolte and Co. as owners of the cargo, by reason of the cargo being bound by the bottomry bonds; and it is true that the loss was the result of sea perils in the sense that without the happening of such perils the loss would not have been incurred; but this particular loss was not the immediate or the necessary result of any effort to avoid a peril of the sea. It was the result of the insolvency of the ship-owners, or of the want of means or credit of the master, and of the deficiency in value on sale of the ship, contingencies which might or might not have happened after the peril of the sea had happened, and without the happening of some one or more of which the particular loss would not have occurred notwithstanding the occurrence of the peril of the sea. Moreover, payment of the 663l. 2s. 10d. was made after the completion of the voyage and the safe arrival of the ship and cargo, and was not made for the common advantage of ship freight and cargo, but upon consideration of a balance of advantage and loss to the owners of cargo alone. It was made in order to obtain possession of the cargo. But as to the second point, I think that upon the special case as stated the court is bound to hold that the loss was a general average loss according to the law of Bremen. The allegations made at the beginning and end of paragraph fourteen, seem to me to amount to express findings on the point. I further think that upon the allegations made in paragraph thirteen and fourteen treated as they are in the fourth of the defendants' points, and it being admitted that the words "such a loss as that which has occurred" at the commencement of paragraph fourteen refer to the sum of 663l. 2s. 10d., we are bound to hold either as upon an express finding, or as upon an inference of fact to be drawn, that the loss of the 663l. 2s. 10d. was stated by the average stater at Bremen as and with intent to be a general average loss falling on the owners of the cargo. The next point to be determined is whether under such circumstances underwriters of an ordinary English policy would be liable. That raises the question as to how far underwriters of such a policy on an insured voyage to terminate at a foreign port are bound by a foreign general average adjustment made at the port of destination. Now I think it is clearly established that upon such a policy English underwriters are bound by the foreign adjustment, as an adjustment, if made according to the law of the country in which it was made. They are bound, although the contributions are apportioned between the different interests in a manner different from the English mode, or, though matters are brought into or omitted from general average, which would not be so treated in England. I further incline to think, notwithstanding the case of *Power v. Whitmore* (4 M. & S. 141), that underwriters, if they are not absolutely bound to accept the foreign adjustment as rightly made, if "bona fide made," must assume it to be rightly made, until the contrary be proved. It seems to be stated as a general principle of insurance law that when a general average is fairly settled in a foreign port, and the assured is obliged to pay his proportion of it, he may recover the amount from the insurer, though the average may have been settled differently from what it would have been

at the home port (2 Phillips on Insurance, par. 1414); and further on, in paragraph 1444 it is thus stated: The *lex loci* is that underwriters shall reimburse general averages, if within the perils insured against, according to the apportionments made and contributions exacted abroad at the port of destination. But I think that according to the English and American law, the underwriter of a policy, in the ordinary form, is not liable to indemnify against any general average loss or contribution, whether it be general average according to the law of his own country or according to the law of the foreign country in which the voyage terminates, or whether the adjustment be made according to his domestic or to the foreign law; if the general average loss be not incurred, or the general average contribution be not made, in order to avert loss by a peril insured against. I do not find this doctrine as clearly expressed in the English books or cases as I should have expected. But the statements in Phillips on Insurance, a book of the highest authority as to English as well as to American insurance law, are clear and precise. "Underwriters are liable to make indemnity by payments of either a particular or general average or total loss only in case of its being caused by the perils insured against." (Phillips's Insurance, 1353.) It is obvious that this must be so in case of a particular average loss; for a total loss. And a general average loss, as meaning the loss to the person who suffers damages, is no more than a particular average to each of the parties who has to suffer or pay contribution in respect of it. By the word "general" it is only meant that the loss is to be generally distributed on the ship and cargo, or the contribution to be generally made by all. It is the loss to each and all caused by a sea peril which must, as in the other cases, be the loss caused by a peril insured against. "So far as general average is occasioned by perils insured against," says Phillips, "the insurers are liable for it in proportion to the amount insured;" (par. 1409). "General average is only payable," says Story, J., "where it is a consequence or result or incident of some peril insured against.—*Sherwood v. The General Mutual Insurance Company* (1 Blatch Rep. 251), quoted in 2 Phillips on Insurance (par. 1414, 3rd edit.) So far, then, except as to the true meaning of the special case itself, I have gone almost entirely with the arguments and propositions put forward by Mr. Williams; but it is the force and truth of them which now makes me break from his next point. If these propositions be true, and the conclusion in which he asks us to concur be correct, the proviso in the margin of the policy seems to me to be of no real effect. The same interpretation and effect would be practically given to a policy in the ordinary form, that is, to this policy without the marginal provisions. This policy, being an English policy, is to be construed according to English rule of construction, and amongst those rules are two, first, that the court must, if possible, give some effect to words apparently used as words of obligation in a written instrument made between parties; and the other, the words are rather to be construed so as to impose a burden on the person who apparently assumes them as obligatory. Mr. Williams contended that effect would be given to the proviso by holding that it met the case, otherwise unmet, of a foreign average statement erroneously made according to the law

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of the foreign port. But in the first place I have already expressed an opinion that such a statement, by virtue of which the assured would be just as much compelled to pay his appointed contribution as by a correct statement, is binding on the underwriters; and if not I cannot adopt the view that this important stipulation is introduced in contemplation only of a foreign average stater not knowing how to conduct his own business according to the law of his own country. It is well known, says Mr. Phillips in the paragraph I have so often quoted (paragraph 1414), amongst underwriters and merchants, that there is a diversity in the effect of foreign adjustments. Three well recognised diversities are there pointed out. The third is thus stated: "Where a loss is included in a general average in one country which is not insured against in the policies of another," the underwriters in the latter certainly ought not to be liable to indemnify the assured against the proportions of a foreign adjustment of such a loss. This is, of course, averred with respect to policies in the ordinary form. It seems to me that the only way to give effect to the marginal provision in this case and an effect as against the underwriter who has by it taken upon himself some real substantial obligation, different from his ordinary obligation, is to say that it was intended to meet this recognised diversity, and to oblige the underwriters to indemnify the assured against a loss which should fall upon him by compulsion in the port of Bremen, and which should be there treated as against him as a general average loss or contribution, unless such loss so treated should be a consequence of an attempt at capture or seizure. Upon such a construction of the policy the defendants are, under the circumstances, liable to the plaintiffs in respect of the disputed sum of 663l. 2s. 10d. This decision makes it unnecessary to determine whether the present case is within the principle of the decision in *Dent v. Smith* (sup.) or what is the legal principle upon which that case was decided. I cannot, however, help expressing the greatest doubt whether the present case can be brought within the principle on which I understand the decision in that case to have been founded, that there was in that case, before the completion of the voyage insured, a total loss by shipwreck and a detention of the cargo in the hands of a foreign government, and a detention by the foreign government to the end, so that the total loss could only be overcome by a payment exacted by such foreign government. I am of opinion that the judgment should be entered for the plaintiffs for 663l. 2s. 10d.

Judgment for the plaintiffs.

Attorneys for plaintiff, McCleod and Watney.

Attorney for defendant, James H. Cotterill.

COURT OF ADMIRALTY.

Reported by J. F. ARNOLD, Esq., Barrister-at-Law.

May 30 and 31; June 3, 4, and 5, 1872.

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Damage to Cargo—War—Risk of capture—Reasonableness of delay—Foreign ship—Governing law—Charter party—Bill of lading—Excepted perils. Where a contract of affreightment contains the exception "Queen's enemies," an apprehension of capture, founded upon circumstances calculated to affect

the mind of a master of ordinary courage, judgment, and experience, will justify delay in port during the continuance of the risk; nor is such delay less justifiable in the case of a ship belonging to a belligerent nation, but carrying a neutral cargo.

Where a charter-party contains the exceptions "Queen's enemies, restraints of princes," &c., and a stipulation that the master is to sign bills of lading in pursuance thereof, "without prejudice to this charter-party," and the bills of lading are signed containing no exception but "dangers of the seas only excepted," the cargo being thereby consigned to consignees named therein, who had notice of the terms of the charter-party at the time it was entered into, the contract is contained in both instruments, and the stipulation in the bills of lading does not supersede the stipulations in the charter-party.

By a charter-party in the English language, entered into between British merchants and North German shipowners, it was agreed that a North German ship should load a cargo at V. I., and carry the same to a British port for orders for any port in the United Kingdom or on the continent between Bordeaux and the Baltic (Queen's enemies, &c., excepted); the master to sign bills of lading "without prejudice to this charter-party." The master signed bills of lading referring to the charter-party, but containing only the exception "dangers of the seas only excepted." The ship sailed with her cargo, and was compelled to put into V. for repairs, and there the master learned that war existed between France and Germany, and there being great risk of capture by French cruisers outside the port, from Sept. 21st until Dec. 23rd 1870, he remained there during that period (three months), and the risk being then ended, sailed for the port of call and was ordered to a British port, where he discharged. The cargo was damaged by the delay. The consignees named in the bills of lading had negotiated the charter-party and so had notice of its terms. In a suit by them for demand to cargo by unreasonable delay:

Held, that at the place of performance of the contract was fixed in England, the English law governed the question of delay, and that the shipowners were entitled under the exception of "Queen's enemies" in the charter-party to remain in port, although carrying a neutral cargo, so long as the actual risk of capture existed. (a)

THIS was a cause instituted under the 6th section

(a) These cases, taken in conjunction with those cited in the argument—the *Heinrich* and the *Wilhelm Schmidt*—establish, so far as a court of first instance can do so, the proposition that a vessel in danger of capture may delay in port so long as that risk continues to exist, provided that she sails under a charter of bill of lading containing the exception "Queen's enemies." How far this doctrine would apply where the charter contained no such exception is a question yet undecided. There can be little doubt that the delay of a few days would be reasonable even in such a case, as a master, even with a neutral cargo, is not bound to put his ship in actual danger; he is rather bound to take precautions to enable him to fulfil his contract, which he would be unable to do if captured. There is also a further question, and that is, whether the exceptions in a contract of affreightment do not relate to the case of an absolute non-completion of the contract, and are intended as an excuse in such case only. If this be so, the question of delay would be reduced to one of reasonable construction of the contract, and the question would be solely did the master act for the benefit of both ship and cargo in delaying in port. —Ed.

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of the Admiralty Court Act 1861 on behalf of James Anderson, James George Skelton Anderson, Alexander Gavin Anderson, and William Richard Anderson, trading as Anderson, Anderson, and Co., merchants in London, consignees of cargo laden on board the *San Roman*, against that vessel and her freight and against her owners intervening, to recover damages consequent upon the non-delivery of that cargo within a reasonable time, and the deterioration and depreciation in value of the cargo by delay.

The *San Roman* was a vessel sailing under the flag of the North German Confederation, and belonging to the city of Hamburg, a free city of that confederation, and her owners were subjects of that confederation. On 13th Feb. 1869, whilst the *San Roman* was lying at Antwerp, her owners sent over to the firm of Anderson, Thomson, and Co., merchants of London, a charter-party signed by or for the shipowners, in order that the London firm might obtain, if possible the desired employment of the ship. The charter-party was accepted by the firm of Thomas Bilbe and Co., shipwrights and dealers in timber, carrying on business at Nelson Dock, Rotherhithe, and the charter-party was signed by that firm. The charter-party, so far as material, is as follows:

Charter-party.

ANDERSON, THOMPSON, and Co.,
Billiter-court, London, E.C.

London, Feb. 13, 1870.

It is the day mutually agreed between Messrs. Ang. Jos. Saron and Co., owners of the good ship or vessel called the *San Roman*, of the measurement of 1335 tons register, or thereabouts, classed . . . and now at Antwerp, and Thomas Bilbe and Co., of London, merchants and charterers; that the said ship being warranted as above described, and tight, staunch, and strong, and every way fitted for the voyage, and so to be maintained throughout the voyage, shall, after discharging outward cargo at Japan @ Wales, for owners' benefit, with all convenient speed, sail and proceed to a safe loading place in Paget Sound or Burrard's Inlet, as ordered, in Royal Roads of Victoria, Vancouver's Island, or so near thereunto as she may safely get, and there load, as supplied by the agents of the said charterers, a full and complete cargo of spars, of diameters not exceeding 38in., and of the ordinary proportionate lengths, and (or) other lawful merchandise which the said charterers bind themselves to supply, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and being so loaded, shall therewith proceed as charterers' agents may order on signing bills of lading, either to a port of discharge direct, within the limits hereinafter mentioned, or to Queenstown, Falmouth, for orders for a port of discharge within these limits, or so near thereunto as she may safely get, and shall there deliver the cargo on being paid freight at the following rates per load of fifty cubic feet English Customs Calliper Measurement—i.e., as used by H.B.M. Customs before repeal of duties on timber—viz., for spars (masts or yard pieces) of twenty inches diameter and upwards:

If ordered from port of loading.—A port in the United Kingdom, 95s.; a port on the Continent from Bordeaux to Hamburg, both inclusive, 100s.; a port in the Baltic, 110s.

If ordered from Queenstown or Falmouth.—A port in the United Kingdom, 100s.; a port on the Continent from Bordeaux to Hamburg, both inclusive, 105s.; a port in the Baltic, 115s.; and 10s. per like load less for like spars under twenty inches, &c.

The freight to be paid on final and right delivery of the cargo, one half in cash and one half by good and approved bills on London, at three months from same date

The master to sign bills of lading for the cargo as required by the charterers or their agents, but at not less than the above chartered rate, without prejudice to this charter-party. The cargo to be brought to, and taken from alongside the ship free of risk and expense to

the ship. The vessel to be discharged with all dispatch, in such safe dock or place in the port of discharge as charterers may order (the act of God, the Queen's enemies, restraints of princes and rulers, frost, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind aever, during the said voyage, always mutually excepted) forty-five working days, &c.

Ang. Jos. SARON and Co., as owners.
THOS. BILBE and Co.

26th Feb. 1869.

This charter-party was indorsed with the following words:

A true copy of the original in our possession.—Anderson, Thompson and Co.

From answer to interrogatories administered by the defendants to the plaintiffs, it appeared that the plaintiffs James Anderson and James George Skelton Anderson were between the month of Jan. 1869 and the 31st Dec. 1869 partners in the firm of Thomas Bilbe and Co., and after the latter date all the plaintiffs became interested in the business of that firm; also that the two plaintiffs above mentioned were, in Feb. 1869, partners in the firm of Anderson, Thomson, and Co., and that that firm having negotiated the charter, retained a copy of it till May 1870, after the bill of lading was signed and the goods shipped; that Messrs. Sproat and Co., of Vancouver's Island, acted as the plaintiffs' agent and consigned the cargo to the plaintiffs in the ordinary course of business, and that the plaintiffs sent on June 12th 1869 a copy of the charter party to Messrs. Sproat and Co., that the plaintiffs had notice of the charter.

It further appeared that the plaintiffs were aware the *San Roman* was a German ship and that her owners were Germans; and that the charter-party was signed by the defendants in Hamburg.

In pursuance of the above charter-party the *San Roman* proceeded to Vancouver's Island, and there received orders by Messrs. Sproat and Co., the plaintiffs' agents, to proceed to Port Ludlow, Washington territory, U.S., which she did, arriving there in April 1870. The plaintiffs' agents there loaded the vessel with a cargo of spars, yards, masts, and other timber; and on May 21st, 1870, the master signed and delivered to the agents the following bill of lading—

Shipped in good order and condition by Sproat and Co., as agents, on board the ship called the *San Roman*, whereof C. Martens is master, now lying at Port Ludlow, bound for Queenstown or Falmouth, for orders for a port of discharge, forty-eight spars, four hundred and twenty-seven yards, twenty-nine topmasts, seventy-one masts, six bowsprits, one thousand three hundred and twelve pieces lumber containing 110,314 feet, as per specification, indorsed hereon, and are to be delivered in like order and condition at a port within the limits mentioned in charter-party, as may be ordered at Queenstown or Falmouth (the dangers of the sea only excepted), unto Messrs. Anderson, Anderson, and Co., or to their assigns he or they, paying freight for the said cargo, as per charter-party, with average accustomed as per charter-party.

In witness whereof the master of the said vessel hath affirmed three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Port Ludlow, the 21st May 1870.

R. MARTENS.

This bill of lading was forwarded by Messrs. Sproat and Co. to the plaintiffs, who were the consignees and owners of the cargo.

On 24th May 1870 the vessel sailed with the cargo from Port Ludlow; but on the 7th June the master was taken seriously ill, and the vessel was compelled to put into Mazatlan, in Mexico, where

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the master was landed on 22nd June. On 24th June the vessel again sailed under the charge of Edward Hacké, the first mate, who was appointed master by the German consul. The voyage continued till 9th Aug., when the vessel, meeting with bad weather, had the mainpiece of her rudder broken, and was compelled to put into Valparaiso, the nearest port, for repairs. She arrived there on 26th Aug., and the repairs were completed with all despatch on 21st Sept. At Valparaiso the master was informed by the German Consul-General that war had broken out between France and Germany, and thereupon a letter was written by Messrs. Schutte and Co., the defendant's agents, at Valparaiso, to the plaintiffs, at the master's request, informing the plaintiffs that the *San Roman* had been compelled to put in for repairs, and saying, "The repairs will be finished in a short time; but as the master has been warned by his consul not to proceed to sea as long as vessels of his nation are exposed to capture by French men-of-war, he wishes to get instructions from you as to what to do in case of the war between Germany and France continuing at the receipt of the present." This letter was received by the plaintiffs on 17th Oct. 1870, and was answered by them as agents for the charterers on 19th Oct., but they sent the letter as an enclosure to Messrs. Sloman, of Hamburg, the defendants' brokers, on losing a mail to Valparaiso, and it did not arrive at Valparaiso till after the vessel had left. The plaintiffs' letter was as follows:

19th Oct. 1870.

Gentlemen,—Messrs. Thos. Bilbe and Co. have asked us as their agents to reply to your favour of the 2nd ult., which reached them yesterday. We have first to point out to Capt. E. Hacké, of the *San Roman*, that the mere dread of being captured is not a sufficient reason for his breaking his contract with the charterers; and while calling upon him, as we now do, to prosecute the voyage with all reasonable diligence, we have to give him notice that our principals will hold him or the owners of the ship liable for loss of market or other damages which they may sustain by the delay. Be kind enough to communicate this to Capt. Hacké.—We are, &c.,

ANDERSON, ANDERSON, and Co.,

Agents to Thos. Bilbe and Co., Rotherhithe.

Messrs. Schutte and Co.

As there were French cruisers in and about the port of Valparaiso, the master kept the *San Roman* in that port until 12th Dec., when having heard that the last of the cruisers had left Peruvian waters, he prepared for sea, and sailed on 23rd Dec. for Europe; and on 16th April, 1871, the *San Roman* arrived at Queenstown, and received orders to proceed to the Tyne, where she arrived 25th April, and began to discharge on 26th April and completed her discharge on 29th May. Her cargo was heated and charred, and it was admitted by the defendants that if it should be held that the delay at Valparaiso on account of the war was unjustifiable there must be a reference to the registrar and merchants to ascertain what damage was sustained and whether it was caused by the delay or original bad stowage. It was also admitted by the plaintiffs that the deviation in consequence of the master's illness, and the deviation and delay for repairs were justifiable and not unreasonable in point of time.

The above were the undisputed facts of the case. The plaintiffs in their petition pleaded, after setting out the charter-party and the bill of lading as above,

5. The *San Roman* sailed from Port Ludlow with the

said cargo on board, but her master, in violation of the terms of the said bill of lading, without any justifiable cause, deviated from the said agreed voyage by putting, with the said vessel and cargo, into Valparaiso, and by for a long time remaining there, though not prevented by the said excepted dangers from prosecuting the said voyage to the port of Queenstown or Falmouth, according to the terms of the said bill of lading.

6. By reason of the premises the plaintiffs have incurred great loss on account of their being for a long time deprived of the said cargo, and have also been put to great expense in and about endeavouring to obtain possession of the same, and the said cargo has been greatly deteriorated and depreciated in value, and the plaintiffs have been otherwise greatly damaged and injured.

The defendants' answer, after setting out the above facts, contained the following paragraphs:

6. Subsequently to the sailing of the *San Roman* from port Ludlow, as aforesaid, and before her arrival at Valparaiso, war broke out, and was declared between the empire of France and the States of the said Confederation, and such war continued until and was existing at the time of the arrival of the said vessel at Valparaiso, and thence until and at the time of the departure of the said vessel from Valparaiso, as hereinafter mentioned. By reason of such war the *San Roman* became and was liable to risk of capture. Upon the arrival of the *San Roman* at Valparaiso, the said E. Hacké received, for the first time, information of the said war.

7. The said E. Hacké, immediately upon his arrival at Valparaiso, caused proper enquiry to be made of the said damage, and the repairs found necessary were proceeded with and completed with all reasonable despatch, and on or about the 23rd Sept. the said repairs were completed, and the vessel was ready for sea.

8. From the time when the *San Roman* put into Valparaiso, and thence until the completion of the said repairs, and until the 12th Dec. 1870, French armed national cruisers were off the port of Valparaiso, and lying in the said port in readiness at any time to proceed to sea under sail or steam with the intention of capturing North German ships, and if the *San Roman* had, during the time and under the circumstances aforesaid, left Valparaiso, and attempted to proceed upon her voyage, she would almost certainly have been captured by some or one of the said cruisers, and there was no reasonable expectation that she would have escaped such capture.

9. On or about the 12th Dec. 1870, the last of the said cruisers left Valparaiso and the offing, and the master of the *San Roman* immediately proceeded to sea, with all reasonable despatch, the necessary preparations for proceeding upon his voyage, and on the 23rd of the said month the said preparations were completed, and a reasonable and proper time having then elapsed since the said cruisers had sailed, so that it appeared that they were not in the neighbourhood of the port of Valparaiso, or intending to return thence, the *San Roman* on the said 23rd Dec. got under weigh, and proceeded on her voyage. It is wholly untrue, as alleged in the 5th article of the petition, that the master of the said vessel, in violation of the terms of the said bill of lading, and without justifiable cause, remained a long time in Valparaiso; on the contrary, the master of the *San Roman*, as soon as the aforesaid repairs were completed, was always ready and willing to proceed on the said voyage as soon as it was reasonable and prudent so to do, regard being had to the said liability to risk of capture.

11. By the law of the said city of Hamburg, and of the said North German Confederation, the master of the *San Roman* was entitled to keep the said vessel in Valparaiso whilst she would have been liable to risk of capture at sea by reason of the said war, and by such law the master of the said vessel, whilst the said war and liability to risk of capture continued, was not under any obligation to the plaintiffs to proceed, or to attempt to proceed, upon the said voyage with the *San Roman*; and by the said law the master of the said vessel has not been guilty of any breach of contract or duty with or to the plaintiffs by remaining in Valparaiso with the said cargo, under the circumstances hereinbefore stated.

13. The said delay of the said vessel at Valparaiso and the damages, if any, resulting to the said cargo, and to the plaintiffs therefrom, were caused by the act of God, the Queen's enemies, restraints of princes and

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ruled, and dangers and accidents of the seas, within the true intent and meaning of the said charter-party, and bill of lading.

14. By the law of Hemburgh, and of the said Confederation, the defendants are not liable to the plaintiffs in respect of any deterioration of the said cargo or losses of the plaintiffs, arising from the prolongation of the said voyage owing to the said war, and liability to risk of capture.

The evidence for both plaintiffs and defendants was principally directed to the risk of capture. A joint commission was sent out to Valparaiso, and witnesses were there examined for both parties. From the plaintiffs' evidence under the commission, it appeared that from 3rd Aug. 1870 to 15th Dec. 1870 five North German ships sailed from Valparaiso, one for Hamburg, and the rest for South American ports, four clearing before 18th Aug. 1870 and one on 15th Dec., and that only one North German vessel was captured in the vicinity of the coast of Chili; that between 24th Sept. and 28th Nov. 1870 nine North German vessels entered Valparaiso; that in the opinion of the plaintiffs' witnesses there was little risk of capture; that no French man-of-war was known to be stationed to intercept German vessels, but they were entering and leaving the port; that there were five French cruisers about the port, and that the last finally left on 13th Nov. 1870, leaving only a store-ship in the harbour.

From the defendants' evidence taken under the commission it appeared that the war became known in Valparaiso on 18th Aug. 1870; that when the master of the *San Roman*, on the repairs being completed on 21st Sept. 1870, applied for his papers, he was warned by his consul not to proceed to sea, the consul producing an official notification from the German Chargé d'Affaires at Santiago, to that effect; that in the opinion of the defendants' witnesses no German ship could have sailed without almost certainly being captured by French men-of-war, which were all steamers, as the movements of one of those vessels made it apparent that from 17th Sept. to 13th Nov. there was a cruiser outside the port watching for vessels; that from 17th Sept. to 13th Nov. there were always French cruisers in the port, except for eight days—viz., from 22nd Sept. to 30th Sept. sometimes one, sometimes more; that, even if no cruiser had been outside the port in the track which sailing vessels had to take, a sailing vessel even with twenty-four hours' start (which allowance of time was never tested, and it was a question whether it would have been allowed) would have been in imminent danger of capture by one of the men-of-war in port; that south winds prevail in Valparaiso during the day, but generally die away at night, and it sometimes happens that there is a breeze in the bay and a calm outside; that the destinations of the French men-of-war were kept secret; that there was telegraphic communication between Valparaiso and the coast outside the port, by which intelligence of the departure of German vessels might have been communicated to cruisers; that on the departure of the last French man-of-war the master of the *San Roman* could not leave at once as he had to raise money on bottomry to pay the expense of the repairs to his ship; but that the reason why no German vessel cleared between 13th Nov. and 15th Dec. 1870, was because they did not then know the destination of the cruisers, and it was not until intelligence came that they had arrived in Peruvian

waters that they could safely leave; that fifteen or twenty German vessels remained in port in consequence of the war; that such vessels could not have sailed with the same facility as they entered, as the cruisers could not know what vessels were arriving, but would know what vessels left; that the ship's agents advertised for a loan on bottomry on 12th Dec., and the ship's average papers were returned on the 23rd; that the ship's crew refused to go to sea then for fear of capture, but the master had the vessel towed out, and so compelled them.

At the hearing several ship masters were called for both plaintiff and defendants, and from their evidence it appeared that the prevailing wind during the months of August, September, October, November, and December, at Valparaiso is S.; that it generally dies away in shore during the night, but well out at sea it generally blows steadily, sometimes, however, dropping at night; that a vessel leaving Valparaiso would have to make straight out to sea before she stood on her course; that the departure would probably be known, as it is usual to start from a buoy at the mouth of the harbour, but that a vessel might be towed out in the night. The plaintiffs' witnesses thought there was little risk of capture; whilst the defendant's witnesses considered there was considerable risk, owing to the uncertainty of the wind.

The defendants called a North German advocate, Dr. Julius Siebhorn, practising at Hamburg, to prove the law of North Germany as pleaded by them. His evidence was as follows:

Hamburg was at the time of the making of the charter-party a city in the North German Confederation, and is now in the German Empire. The German commercial code has been in force in Hamburg since the year 1868. I have read the pleadings, charter-party, and bill of lading in this case. According to the German Code, it would be the duty of a German ship with a neutral cargo arriving in a port of distress, and there learning the existence of war between France and Germany, to avoid exposing herself or her cargo to any danger. It is the duty of the master to avoid danger as much with respect to the cargo as with respect to the ship. That question has been decided in two cases in the Commercial Court at Hamburg, the *Guttenburg* and the *Landwäster* (a).

(a) The case of the *Guttenburg* was a claim by the ship-owners against the neutral owners of cargo on that vessel for average fallow upon the cargo for the cost of delay originating in the port of departure, New York, through the Franco-German war, and was made under Art. 631 of the code. The defendants pleaded that the lading of the vessel had only begun after the breaking out of the war had become known in New York; that the freighters, who according to American law could not withdraw from the contract for the freight, were compelled by the master to load, although he knew that he could not sail; lastly, that the hindrance affected the ship only, and not the neutral cargo. The Commercial Court of Hamburg held that, although the costs of delay are under Art. 637 only payable in respect of delay caused by the events provided for by Art. 631 of the code, after the ship has been fully laden, they must be paid although the event which prevents the ship sailing has only taken place or come to the knowledge of the parties concerned before the ship has received its cargo; but that to avoid such payment the freighter must withdraw from the contract under Art. 631; that the master was not only entitled but even bound with regard to the owners of the cargo to take care that his ship should not be captured by the enemies' vessels, since even, where the cargo of a captured ship consists of neutral property, the delivery of the cargo at the port of destination becomes as a rule, in consequence of the capture, a very remote circumstance, and can only be affected at considerable expense; that the owners of cargo must have known that

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These decisions were based on the German Code, Arts. 504, 505, 631, 636, 637, 708, 735 (see post). The code distinctly lays down that a bill of lading does not override a charter-party as between the charterer and shipowner: Art. 653 (see post). In that article "contract of affreightment" means charter party. The provisions of Art. 645 (see post) as to the form of a bill of lading are descriptive, not compulsory; omitting a portion of the bill of lading there provided would not affect the operation of the German law. If anything is provided for by the code there is no need to include such a provision in the contract; the provisions of Art. 607 (see post) would apply if not referred to in a bill of lading. Even if one of the provisions of the code were specially referred to, that would not affect the application of others without such reference. The words "danger of the sea only excepted" in a bill of lading would not, according to the German code, justify a master in proceeding on his voyage, if by so doing he might expose his ship and cargo to capture, even if the cargo were neutral.

In cross-examination he gave the following evidence:

In case the owner of the cargo requested the master to proceed, he would still be bound to stay in port for the safety of his ship. If he sailed he would be guilty of a breach of duty to his owner, but not of a breach of the German law. A master would be justified in stopping in port to avoid such risk as would, in the judgment of a sensible man, make him consider it the interest of his owner that he should stop. If there is any risk he should communicate with his owner. The master must exercise a sound discretion. The provisions of the code do not forbid a shipowner undertaking the risks excepted by the code. If the shipowner authorised the master to take the risk the code does not prevent him. Unless there was an absolute and clear stipulation that the shipowner was bound to take the risks, the printed forms in use would not exclude the code; such a stipulation must be an express agreement binding the shipowner. Perils of the sea would in German law include capture. These words have a wider meaning in a bill of lading than in a policy of insurance, as their meaning is restricted in the

the German master would not have exposed his ship to danger and would only act as he was bound to do by German law, and, therefore, that the German law governed the question of delay at the port of discharge, and that therefore the plaintiffs were entitled to be paid the cargo's share of the expenses of delay as the contracting parties were bound to await the removal of the hindering cause.

The case of the *Landwehrster* was a similar claim against the neutral owner of cargo of that ship in respect of delay in a port of distress, and also delay at Gibraltar in consequence of the war. The ship, which was German, sailed from Chinese Islands with a cargo of guano under an English charter and bill of lading for a port in the Mediterranean. She had to put into Calais for repairs and called at Gibraltar for orders, where she heard of the war and there stayed till the end of the war, and then owing to change of orders proceeded to Hamburg and discharged at that port. The court held that the charter-party and bill of lading, although in English, were not of such a specific English character as to make English law govern; but that, however that might be, as the parties had elected Hamburg as the port of discharge, they chose that port as the place for completing the contract, and submitted to the laws of that place; that, therefore, under Art. 708, the ship having put into a harbour of distress and refuge to avoid a danger common to ship and cargo, the cargo must contribute to the expenses at that port; that the only exception to this rule is when the putting into the port of distress is caused by some default on the part of the shipowner (Art. 704); that Art. 637 prescribes that in the case of a ship ceasing to be free in consequence of war having broken out, and of the ship being compelled to remain in port, the division of the expenses of delay is to be settled according to general average, without providing for the case where the cargo has likewise ceased to be free, and that therefore there could be no distinction between the two cases, more especially as the owners of the free goods might easily sustain damage through capture of the ship.

This last decision was affirmed by the Court of Appeal.

latter case by the code, Art. 853 (see post.) The German courts give effect to the fact that charter-party and bill of lading are in English, but hold that a master of a German ship must be supposed to sign them, wishing German law to apply with the exception that where the place of delivery is in England, then as to matters concerning freight and delivery the law to be applied is the *lex loci solutionis*.

The Articles of the North German Code (taken from "Maritime Legislation," by E. E. Wendt), referred to in the evidence and the argument, were as follows:

504. The master shall at the same time take every possible care of the cargo during the voyage in the interest of those who are concerned therein. When special measures are required to avoid or lessen a loss, it is his duty to protect the interests of those concerned in the cargo as their representative; to take their instructions, if possible, and, as far as circumstances admit, to carry the same into effect; otherwise, however, to act according to his own discretion, and generally to take every possible care that those interested in the cargo are speedily informed of such occurrences, and of the measures thereby rendered necessary.

He is in such cases particularly authorised to discharge the whole or a portion of the cargo; in the most extreme cases, if a considerable loss on account of deterioration or other causes cannot be otherwise averted, to sell or hypothecate it for the purpose of providing means for its preservation and further transport; to reclaim it in case of capture or detention; or, if it shall have been otherwise withdrawn from his charge, to take all extrajudicial and judicial steps for its recovery.

505. When the prosecution of the voyage in its original direction is prevented by an accident, the master is at liberty either to continue the voyage in another direction, or to suspend it for a shorter or longer period, or to return to the port of departure, according to the circumstances and to the instructions received, which latter are to be adhered to as far as possible.

In the case of the cancelling of the contract of affreightment, he shall act according to the provisions of Art. 634.

607. The shipowner is answerable for any damage arising through loss of, or injury to, the goods, from the time of their being shipped until their delivery, unless he can prove that such loss and injury has been caused by the act of God (*vis major*), or by the natural condition of the goods, more particularly by *vice propre*, by diminution in quantity, by ordinary leakage, &c., or by such defective packing as could not be noticed externally. Loss and injury arising from a defective condition of the vessel, which, in spite of all possible caution, could not be discovered, are to be considered as loss and injury by the act of God.

631. Either party can withdraw from the contract without being liable for damages.

(1) When, before the commencement of the voyage, the vessel is placed under embargo, or taken possession of for the service of the country or a foreign power; the trade with the port of destination is prohibited; the loading port or the port of destination is blockaded; the exportation of the goods, to be shipped according to the contract of affreightment, from the port of loading or their importation into the port of destination is prohibited; the vessel is by a Government order prevented from putting to sea, or the voyage, or the transmission of the goods to be shipped according to the contract of affreightment, is prohibited.

In all the foregoing cases, however, the Government order justifies the withdrawal from the contract only when the impediment that has arisen, is apparently not of short duration.

(2) When, before the commencement of the voyage, a war has been declared, in consequence of which the vessel or the goods to be shipped according to the contract of affreightment, or both, can no longer be considered free, and would be liable to risk of capture.

632. The contract of affreightment is terminated when, after the commencement of the voyage, the vessel is lost by an unforeseen incident. The charterer shall, however, pay such proportion of the freight for the goods saved or rescued, as the actually performed part of the voyage may bear to the entire voyage (distance freight).

No claim for distance freight shall exceed the value of the goods saved.

634. The dissolution of the contract of affreightment alters nothing in the obligation of the master to take care of the cargo in the absence of the interested parties, even after the loss of the vessel (Art. 504). The master is, therefore, justified and obliged, and in urgent cases even without previous inquiry, as circumstances may require, either to forward the cargo to the port of destination in another vessel for account of the parties concerned, or to have it stored or sold, and in case of its being forwarded or stored, to sell a portion of the same for the purpose of realizing the funds necessary thereto and to its preservation, or in case of its being forwarded, to take a bottomry bond on the whole or as part of it. The master is, however, not obliged to part with the cargo, or to deliver it to another master for the purpose of its being forwarded, unless the distance freight, as well as all other claims of the shipowner, and the contributions due from the cargo for general average, salvage and assistance, and bottomry have been paid or secured.

The shipowner is answerable for the fulfillment of the duties devolving on the master, according to the first section of this article, to the extent of his ship, so far as anything has been saved of it, and of the freight.

636. When, subsequent to the commencement of the voyage, any of the incidents occur to which reference is made in Art. 631, either party has a right to withdraw from the contract without being liable to damages.

When, however, any of the incidents mentioned in Art. 631, No. 1, have occurred, the parties have, before being able to withdraw to wait for the removal of the impediment three or five months respectively, according as the vessel is in a European or in a non-European port. Such period shall be calculated from the day of receiving notice of the impediment, if the master is then at a port, otherwise from that day on which, after having received such notice, he first reaches a port with the vessel. The discharge of the vessel shall, in default of an agreement to the contrary, take place at the port at which it is staying at the time of the receipt of the notice of withdrawal.

The charterer is bound to pay a distance freight for such portion of the voyage as is actually performed. (Art. 632.)

When, in consequence of such impediment, the vessel has returned to the port of departure or to any other port, in calculating the distance freight, the nearest point to the port of destination which the vessel has reached shall be taken as the basis for ascertaining the distance actually performed. The master is likewise bound to act in any such cases, before and after the dissolution of the contract of affreightment, in the interest of the cargo, in conformity with the Arts. 504 and 634.

637. When the vessel, after taking in its cargo, is detained in the port of loading before the commencement of the voyage, or in an intermediate port, or in a port of refuge after its commencement, by any of the emergencies mentioned in Art. 631, then the expenses of such detention (even if the requirements of general average are not present) are divided among ship, freight, and cargo, according to the principles of general average, whether the contract is thereby put an end to, or afterwards completely fulfilled. The expenses of the detention include all the expenses enumerated in the second clause of Art. 708, No. 4; but those of putting into and leaving port only when the vessel has put into a port of refuge on account of the obstacles.

644. After the termination of each single shipment, the master shall sign for the charterer, without delay, and on return of the provisional receipt that may have been given on delivery of the goods, as many bills of lading as the charterer may demand. All copies of the bill of lading must be identical, bear the same date, and state how many copies have been issued. The master is entitled to demand from the shipper a copy of the bill of lading bearing the latter's signature.

645. The bill of lading contains:

1. The name of the master.
2. The name and nationality of the vessel.
3. The name of the shipper.
4. The name of the consignee.
5. The port of loading.
6. The port of discharge, or the place at which orders for the same are to be obtained (port of call).

7. The description, quantity, and marks of the goods shipped.

8. The stipulations respecting the freight.

9. The place where and date on which it has been issued.

10. The number of copies issued.

653. The bill of lading is decisive for the legal position of the shipowner and consignee of the goods towards each other, more especially the delivery of the goods shall take place in accordance with the contents of the bill of lading.

Provisions of the contract of affreightment not embodied in the bill of lading have no legal effect as against the consignee, unless special reference has been made to them. When such reference has been made respecting the freight the contract of affreightment (for instance by the words "freight as per charter-party") the stipulations as to the time for discharging, the days on demurrage and the demurrage, are not considered to be therein included.

As regards the legal position of the shipowner and the charterer towards each other, the clauses of the contract of affreightment remain conclusive.

708. The following cases are especially general average. . . .

4. If the vessel has put into a port of refuge in order to avoid a common danger threatening the ship and cargo in case the voyage were prosecuted, more particularly if the putting into port is for the necessary repair of damage done to the ship during the voyage.

To general average belong in this case the expenses of entering and leaving, the expenses attached to the ship itself during the stay, also the expense of lodging the crew on shore if, and as long as, they could not remain on board; further if the cargo must be discharged as a consequence of the cause which led to the ship putting into the port of refuge, the expense of discharging and reshipping, and the expense of warehousing the cargo on shore up to the time when it might have been put on board again. The several charges for detention are only taken for the time that the cause of putting into the port of refuge remains in force.

853. Should it have been stipulated that the underwriter shall be exempt from the risk of war, but be liable for all other risks even after a molestation of war has commenced, which stipulation is more particularly presumed to have been made when the contract has been concluded with the clause "only against dangers of the sea," the underwriter's risk terminates only with the condemnation of the insured object, or so soon as it would have terminated if the risk of war had not been excepted; the underwriter is, however, not responsible for damages caused immediately by danger of war, &c.

Butt, Q.C. (Oohen with him) for the plaintiffs.—The main question here is whether the delay at Valparaiso after the repairs were completed was reasonable. We submit that the delay was unreasonable, whether English or German law governs the contract; but as the defendants contend that German law governs and is more favourable to them than English law we submit that English law governs. The contract is in the English language, the consignee is English, and the ultimate place of performance is an English port, and the *lex loci solutionis* therefore governs: (*The Wilkes Schmidt*, ante, p. 82; 25 L. T. Rep. N. S. 34.) *The Lundenværster* (see note, ante) shows that the German courts apply that law, and raises a strong presumption that if the port of delivery in that case had been an English port the English law would have been applied. The *lex loci solutionis* is the law applicable to questions of reasonable delay, which is the main question here. The mere length of the delay we do not put forward as the only test of reasonableness. It must depend upon the circumstances of each case.

The Patria, ante, p. 71; 24 L. T. Rep. N. S. 849; L. Rep. 3 Adm. & Eco, 415;

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Pole v. Cetovich, 9 C. B., N. S., 430; 3 L. T. Rep. N. S. 438; 1 Mar. Law Cas. O. S. 2;
The Wilhelm Schmidt (sup.).

According to the evidence of the German advocate, the test in German law is what a reasonable man would do under such circumstances. Whether the court applies German or English law, or even if there be no difference in this point between the two laws, still on the merits the delay was unreasonable. There was no such risk shown as would excuse the master from sailing on the completion of his repairs. Valparaiso was a neutral port, and the vessel would have had twenty-four hours' start. She might have been towed at night far out to sea. The delay of forty days from 13th Nov. to 23rd Dec. is at any rate indefensible, as there was then no French cruisers in the port. The defence that the master had to borrow money on bottomry is of no avail, as he did not advertise for a loan till 12th Dec.

Milward, Q.C. (E. C. Clarkson with him) for the defendants.—The fact that there were French men-of-war not only in the harbour of Valparaiso, but also cruising outside, rendered the risk of capture imminent if a vessel sailed. The rule as to twenty-four hours' start was never tested, and it was not known if it would have been accorded. No vessels left Valparaiso between 18th Aug., when the war was known, and 15th Dec., which shows that it was prudent to stay. There was such risk as to justify the master in remaining at Valparaiso. *The Wilhelm Schmidt (sup.)* decides that English law justifies delay if a risk actually exists; and therefore whatever law applies, the evidence is sufficient to show that the delay was justifiable in this case. But I submit that the German law applies. In *The Teutonia (ante p. 214; 26 L. T. Rep. N. S. 48; L. Rep. 4 P. C. 171)* the Privy Council say, "It was argued, however, on the part of the appellant that to justify this course (deviation) both ship and cargo must be exposed to a common peril. . . . It appears to their Lordships, however, that there is no sound ground for this distinction; if the cargo had been a Prussian cargo it would have been exposed to the same danger as the ship from entering the port of Dunkirk; and it appears to their Lordships that when an English merchant ships goods on board a foreign ship, he cannot expect that the master will act in any respect different towards his cargo than he would towards a cargo shipped by one of his own country, and that it cannot be contended that the master is deprived of the right of taking reasonable and prudent steps for the preservation of his ship because, from the accident of the cargo not belonging to his own nation, the cargo is not exposed to the same danger as the ship." The letter from the defendants' agents show that the master considered he must follow the law of his flag, and he was not bound to put his ship into danger because the cargo was in no danger. He had no orders from the plaintiffs to run any risk. The law to be applied is to be gathered from the incidents of the contract. The ship was German, the owners German, and the ship was not in an English port when the charter was made; these facts were known to the plaintiffs; the charter-party was between Englishmen and Germans, and was partly executed in Germany. Under these circumstances what law did the defendants expect to govern? Could the plaintiffs shipping on a foreign ship

expect anything but German law to be applied? The port of call is the only definite English port named in the charter-party. The ship might have been sent to Hamburg. The freight is payable in English money, but that is now a common standard everywhere. The charter-party contains the exceptions "Queen's enemies, restraints of princes," &c., and the master had only power to sign bills of lading in accordance with this charter-party, of which a copy was given both to the plaintiffs and their agents in Vancouver's Island. The bill of lading is therefore only a receipt for merchandise, and the charter-party is the governing contract.

Sandeman v. Scurr 15 L. T. Rep. N. S. 608; L. Rep. 2 Q. B. 889; 2 Mar. Law Cas. O. S. 446;
 1 Parsons on Shipping 286.

[*Bull.*—I must admit that the charter-party and bill of lading are one contract, and that the defendants are entitled to take advantage of the exceptions if they existed.] Where it is not otherwise expressed in the contract the law of the flag governs: (*Lloyd v. Guibert*, L. Rep. 1 Q. B. 115; 13 L. T. Rep. N. S. 602; 2 Mar. Law Cas. O. S. 26, 283.) If an offence had been committed on board this vessel the German criminal law would have applied, and it cannot be said that as to questions of civil law anything but German law applies. As a matter of convenience the law of the flag should govern, as the extent of the master's authority must be limited by that law: (*The Karnak*, L. Rep. 2 P. C. 505; 21 L. T. Rep. N. S. 159; 3 Mar. Law Cas. O. S. 103, 276.) In *The Wilhelm Schmidt (sup.)* it is held that the naming a port of delivery fixes the law as that of the *lex loci solutionis*; but it is submitted that the governing law is decided at the time of entering into the contract, and it cannot be right that, by naming a port *ex post facto*, the charterer should have the power to change the law. *The Patria (sup.)*; *The Heinrich (ante p. 79; 24 L. T. Rep. N. S. 914; L. Rep. 3 Adm. & Ecc. 424)*, and *Wilhelm Schmidt* do not conflict with *Lloyd v. Guibert (sup.)*, as they all proceed upon the ground that the intention of the parties indicated the governing law. What is the German law? Under certain circumstances the owner of cargo may withdraw from the contract (Art. 631, 636). The master had no right to leave Valparaiso as long as any risk existed, until the owners of cargo had received their option of withdrawing, and this they received by the master's letter, but the risk was ended before their answer came out. We were bound to communicate under Art. 504 and also to stay for the preservation of the cargo, and under Art. 657 the owner of cargo is liable for his share of expenses up to the time he withdraws or the voyage is continued. This was held in the two German decisions cited (see note), and there the law of the flag governed. I submit that even English law would justify the delay, and *a fortiori* German law which ought to govern.

Bull, Q.C. in reply.—Mere risk of capture is not sufficient to justify delay; there must be at least great probability. With respect to the duty of communication with the owners of cargo, I submit that it cannot be the law that where a ship is in a place where there is difficulty of communication—as in Valparaiso—the master need do so. He then becomes their agent, both by English law and under the provisions of Art. 504 of the code. Every case must be considered with regard to its

particular risk, and I submit there is a clear breach both by English and German law.

June 25th.—Sir R. PHILLIMORE.—This is a suit instituted under the 6th section of the Admiralty Court Act 1861, by certain persons as owners and consignees of the cargo against the ship *San Roman*, a foreign vessel, for a breach of contract or duty in respect of the carriage of that cargo. The charter-party, dated the 13th Feb. 1869, was made between the owners of the ship and certain English merchants and charterers, by which it was agreed in substance that the vessel taking an onward cargo from Wales to Japan should proceed to Vancouver's Island, and load a cargo of spars, and therewith proceed as the charterers' agents might order, on the master signing bills of lading, either to a port of discharge direct within the limits thereafter mentioned, or to Queenstown or Falmouth for orders for a port of discharge within those limits. The master was to sign bills of lading without prejudice to the charter-party. The excepted perils were, "The Queen's enemies, the act of God, restraints of princes and rulers," and others. The bill of lading, which the plaintiff pleads as being pursuant to the terms of the charter-party, was dated 20th May 1870. It referred to the charter-party but contained only one excepted peril, "the dangers of the sea." The plaintiffs charge that the contract was violated by deviation from the voyage and by a delay as caused by the excepted dangers. There has been in this case, as in the former cases growing out of the German war (a), a contention as to what law governs the rights of the parties. In this case the ship was German; but the charterers were English and the charter-party, dated at London, was executed while she lay in the port of Hamburg, at both Hamburg and in England, in the English language. The bill of lading was in the same language, dated and delivered at Port Ludlow, in Vancouver's Island. The only material difference between the two instruments for the purposes of this suit is that the charter-party contains amongst its exceptions "the Queen's enemies" and "restraints of princes and rulers," while in the bill of lading the language is "the dangers of the sea only excepted;" but then this instrument refers to the charter-party, and the charter-party provided that the master might "sign bills of lading for the cargo as required by the charterers or their agents, but at not less than the above-chartered rate, without prejudice to this charter-party." I am of opinion that the contract is contained in both these instruments, but that the stipulation of the single exception in the latter does not supersede the stipulations as to the other exceptions stated in the former instrument. The port of call for orders and the port fixed for delivery were English. With respect to the law applicable to the circumstances, I must observe that this is not a case in which the master would be contravening the law of his country by carrying the goods to their destination, but is a case in which, so far as that law is concerned, he might do. The question as to the reasonableness of the delay, with reference to the excepted perils, seems to me, as in the case of the *Wilhelm Schmidt*, to be properly governed by the law of

the place of performance; and this also appears to be the principle on which the Court of Commerce at Hamburg decided the case of the *Landwinder* (sup.). It has been argued that these opinions conflict with the judgment in *Lloyd v. Guibert* (sup.). It is not, however, necessary to decide this point, or whether the case of *Lloyd v. Guibert* be reconcilable with the decision of the Privy Council in the *Hamburg* (sup.), because I agree with Mr. Brett that upon the question of the reasonableness of delay there is really no substantial difference between the law of England and Germany. According to both an apprehension of capture, founded upon circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, would justify delay. The *San Roman* sailed to Port Ludlow, there loaded a cargo of spars, and proceeded on her voyage to Queenstown. The serious illness of her master compelled her to put him ashore, and damage sustained at sea constrained her to put into Valparaiso on the 26th Aug. In the petition of the plaintiffs this putting into Valparaiso was charged as a breach of contract, but this charge at the hearing was abandoned, and the allegation of breach of contract confined to the subsequent remaining at that port. She did not leave it before the 23rd Dec. The necessary repairs were completed on the 23rd Sept., when the ship was ready for sea. It is the delay during this interval of time, namely, from the 23rd Sept. to the 23rd Dec., which the plaintiffs now allege as a breach of contract. The delay is admitted; the defence set up is that it was caused by the danger of capture from French cruisers, which rendered it unsafe to leave Valparaiso, and which brought the delay within the exception in the charter-party, as to "the Queen's enemies." It is admitted that there was a danger of the kind stated, but it is contended that it was not of the degree which warranted this long postponement of the execution of the contract; it was not of that pressing and imminent character which alone would justify a delay; it was a danger rather in the nature of other perils by sea, which it was the duty of the master to encounter. I must not omit to notice one argument addressed to me upon the hypothesis that this case is governed by the law of the flag—German law. That law, it is said, entitles the owner to charge a portion of the expenses incident to the delay, on the principle of general average, upon the shipper, the master is exposed to a strong temptation to remain in port during a war of this kind, certain on the one hand that the loss would only partially affect his employers, and, on the other hand, that he will be the gainer by being employed a longer time, because if he reached the port of destination his employment would be at an end till the war was over. I am not insensible to the force of this argument, but the only effect of it must be to render the court vigilant in ascertaining the character of the danger and the *bona fides* of the excuse. I must also bear in mind that the German law in this case does not, as was proved to me in this case, as also in the case of the *Patria* (sup.) forbid the master to run the risk of capture in fulfilling the engagements. The material evidence as to the delay appears to be as follows:—On the 2nd Sept. the correspondents of the plaintiff and consignees of the ship wrote this letter (His Lordship read the letter as before set out). To this the following

(a) *The Patria* (sup.); *The Heinrich* (sup.); *The Wilhelm Schmidt* (sup.)

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answer was written: (His Lordship read the letter of 19th Oct. from the plaintiff to Sohnte & Co.) This answer, however, did not arrive at Valparaiso till after the 23rd Dec., when the *San Roman* had sailed. I must observe, that in the letter of Messrs. Sohnte & Co. there is on the one hand no suggestion that Captain Hacke was to blame, or that his alleged reason for remaining in port was unsupported by fact; while on the other there is conclusive evidence that he was acting under the advice, indeed the admonition, of his consul not to go to sea, and in the case of *The Tendon* (ante, p. 214; 26 L. T. Rep. N.S.; L. Rep. 4 P. C. 171), the Privy Council, affirming my judgment, held that if a neutral merchant put his goods on board a foreign ship belonging to a belligerent nation, "it cannot be contended that the master is deprived of the right of taking reasonable and prudent steps for the preservation of his ship, because from the accident of the cargo not belonging to his own nation the cargo is not exposed to the same danger as the ship." The following facts are clearly proved: that a French man-of-war or store ship was always in the port; that there were several German ships in it waiting there from the first days in August to 15th Dec.; that during this period one only sailed, on the 5th Aug., for Hamburg; that no German vessel left Valparaiso between the 18th Aug. and the 15th Dec.; that up to the 13th Nov. French men-of-war were in and out of the port; that after this time, according to the register of the commercial exchange of Valparaiso, it was impossible to discover the destinations of the French ships, which "were kept strictly secret," but that it appeared on the registry that they were gone on a cruise (para cruzar); that there had been captures made by the French off Peru and Chili; that even after the 12th Dec. French ships were reported in Peruvian waters; that after the news of the German victories arrived, the first German vessel left Valparaiso on the 15th Dec. I think it is also proved that between the 15th Dec. and the 23rd, when the *San Roman* left Valparaiso, the captain was guilty of no unnecessary delay with respect either to the bottomry bond or to obtaining the average papers necessary for the protection of his employers, and that even then his crew at first refused to go to sea through fear of capture. It has been urged that in spite of the French cruisers, the *San Roman*, having liberty of twenty-four hours' start, might have steamed, with the aid of a tug, out of the reach of the French cruisers. But the evidence satisfies me that this course would have exposed the ship to the greatest possible risk of capture. There were French cruisers without the port and a stationary French store ship within. Some communication was doubtless kept up between them. The evidence shows that the preparations of the *San Roman* to be ready for sea would in all probability have made known her intention, and the evidence as to the usual state of the wind off that coast does not, in my judgment, add any circumstances which would favour the escape from French cruisers, but the contrary. However this may be, I think the defendant has, on the whole, established his defence, that he has exercised "his right in taking reasonable and prudent steps for the preservation of his ship," in refusing, under the advice of his consul, and in all the circumstances of the case, to sail before Dec. 23, and I dismiss the suit with costs.

May 31, June 3, 4, 6, and 25, 1872.

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Damage to cargo—War—Risk of capture—Reasonableness of delay—Governing law—Excepted perils—German law—Duty of transhipment.

By both English and North German law, risk of capture, such as to justify a master whose vessel is carrying a cargo under a charter-party and bills of lading, containing the exceptions, "Queen's enemies, &c." in putting into and remaining in an intermediate port during the continuance of that risk, need not amount to an actual operative restraint (almost a blockade), but must be that risk which would induce a reasonably prudent man, exercising due discretion and fortitude, not to expose the vessel to capture.

Sensible, that where the chances of escape and capture are equal, the master would be justified in remaining in port.

By a charter-party in the English language entered into at Constantinople between the master of a North German vessel, and North German merchants there resident, it was agreed that the vessel should load a cargo, and proceed therewith to Falmouth, Plymouth, or Queenstown for orders for a safe port in the United Kingdom, or on the Continent between Havre and Hamburg, Queen's enemies, &c., excepted. The cargo was laden, and the master signed bills of lading in accordance with the charter-party, also in the English language, but with an endorsement in German, and the cargo was therein consigned to consignees resident in England.

Held, that the law to be applied to the execution of the contract was the North German law. (a)

The vessel sailed, but her master learning on his voyage that war existed between France and Germany, and fearing capture by French cruisers, put into Gibraltar. During the war there would have been great risk of capture off that port and off the ports of call if the vessel had continued her voyage; her master in consequence remained there until the end of the war (nine months). He then sailed, and arriving at a port of call was ordered to an English port. The cargo was damaged by the delay. In a claim by the consignees,

Held, that by both English and North German law the master was justified in putting and remaining in port, and that the shipowners were not responsible for the damage caused by the delay.

By the North German law, when, subsequent to the commencement of the voyage, a war has been declared in consequence of which the vessel or the goods shipped therein under the contract of freightment, or both, can no longer be considered free or would be liable to risk of capture, either party may withdraw from the contract without being liable to damages. On such dissolution of the contract the master is bound, if necessary or if required, to

(a) It is to be presumed that the learned judge in this case meant to decide that the German law applied to the question of transhipment and that only, otherwise the decision would appear to conflict with the *San Roman* (ante p. 317), where it was held that the question of reasonableness of delay was governed by the law of the place of performance. As German and English law appear on this latter point to be nearly identical, it is practically immaterial in the present case by which law the question was governed. The real importance as to the governing law was in so far as it affected the question of transhipment.—Ed.

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tranship and forward the cargo at the expense of the owner of cargo, but he is not bound to part with the cargo unless the distress freight for the part of the voyage performed and other expenses have been paid or secured.

Whilst the master of the vessel was at Gibraltar, the consignees required him to proceed or to transship at his own risk and expense. This the master refused, offering, however, to transship against a reasonable reduction of freight, which offer the plaintiffs would not accept.

Held that, as the master was entitled by the German law to his distance freight and expenses, the demand of the plaintiffs was not such a legal demand within the meaning of that law as compelled the master to transship.

This was a suit instituted under the 6th section of the Admiralty Court Act 1861, on behalf of Messrs. Scaramanga and Co., merchants, of London, against the vessel *Express* and her freight, and her owners intervening, to recover damages for injury sustained to cargo belonging to the plaintiffs, shipped on board that vessel, and caused by alleged wrought and unjustifiable delay and deviation on the voyage whilst carrying the cargo. The *Express* belonged to the port of Rostock, in the Duchy of Mecklenburg, one of the States of the North German Confederation, and was owned by subjects of that Confederation. In May 1870, she was lying in the port of Constantinople, and whilst there her master entered into a charter-party with Messrs. Sobott and Reppen, merchants at that place, and also subjects of the North German Confederation. By that charter party, which was in the English language, it was agreed that the "*Express* North German flag," should proceed to a loading place in the sea of Asoff, as ordered at Berdianski, and there load from the factors of the freighter a full and complete cargo of tallow, wheat, Indian corn, seed, or other stowage goods, at the option of the freighter, and, being so loaded, should therewith proceed to a safe port in the United Kingdom, or to a safe port on the Continent, between Havre and Hamburg, both inclusive, or so near thereunto as she might safely get, calling for orders at Queenstown, Falmouth, or Plymouth, at the master's option, and deliver the said cargo on being paid freight, as there set out, "the act of God, the Queen's enemies, the restraint of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, always excepted." In pursuance of this charter-party, the *Express* proceeded according to orders received at Berdianski, to Taganrog, and there the plaintiffs, who were the factors of the freighters, shipped upon the vessel a cargo of rye in bulk, and the master signed and delivered to the plaintiffs a bill of lading in respect of the cargo which was as follows:

Shipped in very good order and condition by Messrs. Scaramanga and Co. for account and risk of whom it may concern, in and upon the good ship called the *Express*, North German flag, whereof is master for the present voyage William Fretwurst, and now riding at anchor in the port of Taganrog, and bound for Queenstown, Falmouth, or Plymouth for orders, rye in bulk, say two thousand four hundred and ninety-seven cwt. and a half, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at a safe port in the United Kingdom or on the Continent, as per charter-party (the act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind [always excepted], unto Messrs.

Scaramanga and Co., of London, or to their assigns, paying freight, gratuity, and demurrage (if any) for the said goods, and all other conditions as per charter-party, stipulated in Constantinople the 3rd of May, 1870, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affixed to three bills of lading, all of this tenor and date, the one of which three bills being accomplished, the other two to stand void.

Dated in Taganrog 15—27th

June, 1870

Qualitat und quantitat unbekant (quality and quantity unknown)

p.p. Scaramanga & Co.
D. Manouhey.

Wm. Fretwurst.

On the back of the bill of lading there was a receipt by the master for 200l. on account of freight. The rest of the freight would have amounted to 750l.

On 26th June 1870, the *Express* set sail from Taganrog with the said cargo, and proceeded on her voyage, and on 16th Aug. 1870, she cast anchor off Algiers, for the purpose of filling her water casks. On 19th July, war had broken out between France and Germany, and the master of the *Express* learned at Algiers this fact, and thereupon communicated with the North German consul at Gibraltar, and he received a reply from the consul warning him of the risk of capture he would run if he proceeded on his voyage, and advising him to put into Gibraltar as a safer port. Accordingly the master on 18th Aug. sailed and reached Gibraltar on the same day, and there stayed until 2nd Feb. 1871. On 30th Jan. 1871, the master learned that an armistice had been concluded between France and Germany, and thereupon sailed on 2nd Feb. for Falmouth, where she arrived on 17th Feb., and having given notice to the charterers, received orders for London, to which port the *Express* proceeded, arriving there on 26th Feb. 1871. On 28th Feb. the discharge of the cargo began, and it was completed on 2nd March. The cargo was found to be damaged by heating, caused by the delay.

Whilst the ship lay at Gibraltar from Aug. 1870 to Feb. 1871, a long correspondence took place between the master and Messrs. Mosley and Co., of Gibraltar, the plaintiffs' agents, and between Mosley and Co. and the plaintiffs, as to the ship proceeding on its voyage in spite of the war, and as to the transshipment and forwarding of the cargo in another vessel, and as to the amount of freight to be paid to the master. The substance of this correspondence will be found set out in the judgment.

The above facts were undisputed on either side. The plaintiffs' petition after setting out the contract contained in the charter-party and bill of lading was as follows:

3. The *Express* duly sailed on her said voyage with the said cargo on board, and in the course of the said voyage, without justifiable cause or excuse, put into the port of Gibraltar. After the said vessel had so put into the said port of Gibraltar, and whilst she was lying there, her master was requested by the plaintiffs to proceed on the aforementioned voyage, and if he would not do so, then to transship and forward the said cargo.

4. The said master, however, declined to comply with such request, and remained at Gibraltar with his said vessel and the said cargo on board of her for a very considerable time.

5. By reason of the premises the said master wrongfully and without justifiable cause, in violation of the terms of the said bill of lading, deviated from and delayed proceeding on the voyage in the said bill of lading mentioned.

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6. The plaintiffs were and are the owners of the said cargo, and the holders of the said bill of lading.

7. By reason of the premises, the said cargo became and was greatly heated, damaged, and depreciated, and the said cargo was delivered to the plaintiffs in a much worse order and condition than it was shipped in, this not being occasioned by any of the perils, causes, or matters in the said bill of lading excepted, and thereby the plaintiffs have sustained great loss, and have been deprived of divers profits which they would otherwise have derived from the said cargo.

The defendant's answer set out the terms of the charter-party, the bill of lading and the facts as above given, and then proceeded;—

5. Upon arriving at Algeiras, as aforesaid, the master of the *Express* was informed of the outbreak and existence of the said war, and learned that it would be dangerous for the *Express* to proceed upon her voyage owing to the risk of her being captured by French cruisers at sea; and on the 18th Aug. 1870 the master of the *Express*, as he lawfully might do under and by virtue of the laws of Mecklenburgh and of the said Confederation, and as was reasonable and proper for him to do under the circumstances herein set forth, sailed with the *Express* from Algeiras, and proceeded to and on the same day arrived in the roadstead of Gibraltar, which was a safer and more sheltered roadstead than that of Algeiras. It is not the fact that the master of the *Express* without justifiable cause and excuse, or wrongfully or in violation of the terms of the said bill of lading, put into the port of Gibraltar, as alleged in the 3rd and 5th articles of the petition.

7. From the time of the arrival of the *Express* at Algeiras until the 20th Jan. 1871, the said war continued to exist, and during all such time the *Express* would have been liable to risk of capture if she had attempted to proceed on her voyage, and during all such time the French armed national cruisers were cruising off the Straits of Gibraltar, and in the Atlantic Ocean, and in the English Channel, and off the ports of Cork, Falmouth, and Plymouth, with the intention of capturing the *Express* and other North German vessels; and if the *Express* had during the time aforesaid attempted to proceed on her voyage she would almost certainly have been captured by some or one of such cruisers.

8. It is not the fact that the master of the *Express* unjustifiably, or in violation of the said bill of lading, delayed proceeding on his voyage, as alleged in Art. 5 of the petition. On the contrary the said master was always ready and desirous to proceed from Gibraltar as soon as he could do so without being exposed to risk of capture.

9. By the law of the said North German Confederation the master of the *Express* was entitled to keep her at Gibraltar whilst she would have been liable to risk of capture at sea by reason of the said war, and the said master was not, whilst the said war and liability to risk of capture continued, under any obligation to attempt to proceed further upon his said voyage; and, by the said law, the master of the *Express* was not guilty of any breach of contract or duty with or to the plaintiffs in respect of his putting in Gibraltar, or remaining there with the *Express* with the said cargo on board of her, or in respect of not transshipping the said cargo.

10. The master of the *Express* sailed from Gibraltar, with the *Express*, within a reasonable and proper time after receiving notice of the termination of the risk of capture by reason of the said war.

11. On the 17th Feb. 1871, the *Express* arrived in Falmouth harbour, and her master having duly given notice of his arrival to the charterers' agents in London, on the 26th of the said month, received orders to proceed to London, and on the same day the *Express* left Falmouth, and on the 26th Feb. 1871, arrived in London.

12. On the 26th of the said month of Feb. the discharge of the cargo was commenced, and on the 2nd March 1871, such discharge was completed.

13. It is not the fact that the cargo of the *Express* was delivered in a worse order and condition than it was in when shipped.

14. If the said cargo was delivered in worse order and condition than it was when shipped, the deterioration was caused by the detention of the *Express* at Gibraltar, as hereinbefore mentioned, which is an exceptive peril

within the true intent and meaning of the exception of "the Queen's enemies," contained in the said bill of lading, and by the natural condition and inherent vice of the said cargo, and by one of such causes.

15. Whilst the said vessel was detained at Algeiras and Gibraltar, as aforesaid, the master of the *Express* used all due and proper and reasonable care and skill, in ventilating, trimming, and otherwise caring for the safety, order, and condition of the said cargo, and did all things on his part to be done, in taking care of the same, and any deterioration or depreciation of the said cargo, was not caused by any neglect or default of the said master, but was caused by the detention of the said vessel as aforesaid, or by the natural condition and inherent vice of the said cargo, or by both of such causes, and by the law of North German Confederation, regard being had to the terms of the said bill of lading and charter-party, neither the *Express* nor her owners, nor her said master, is or are liable to damages, in respect of the depreciation or deterioration of the said cargo.

The plaintiffs traversed the defendants' allegations of law and fact, and concluded the pleadings.

The evidence was principally directed to the risk of capture, and to the question of transshipment of the cargo and the freight to be paid to the master. A commission was sent out to Gibraltar to take evidence for both plaintiffs and defendants. From the evidence of Michael Porral, a member of the firm of Thomas Mosley and Co., agents for the plaintiffs, it appeared that on the arrival of the *Express* at Gibraltar, he requested the master to proceed on his voyage, and the master proposed to land the cargo in Gibraltar if the whole freight was paid; that the master afterwards proposed a deduction from the freight, but that this the agents, having communicated with the plaintiffs, refused, and that they thereupon entered a protest against the delay, and refusal to transship; that the master again offered to deduct 125*l.* from the freight, but always refused to transship or forward the cargo; that other German vessels remained at Gibraltar on account of the war, but that the witness knew of no French cruisers being in Gibraltar Bay during the war.

The defendant produced six witnesses for examination; under the commission—the North German Consul at Gibraltar, his clerk, Lloyd's agent at Gibraltar, his clerk, and two merchants. From their evidence it appeared that the consul wrote officially to the master of the *Express*, whilst the latter was at Algeiras, to notify to him the existence of the war, and to tell him that if he proceeded he would be liable to be captured by French cruisers, the consul being bound to do this by the instructions of his Government; that whilst the war lasted five or six different French cruisers were frequently in and out of Gibraltar Bay, and passing through the Straits, and some of them more than once, and that they were cruising in the neighbourhood; that this fact was ascertained by the consul's clerk and Lloyd's agent's clerk, whose business it was to keep a look out for French men-of-war, and to report them, the one to the consul the other to Lloyd's; that it was officially reported to the consul that four German vessels had been captured in the Mediterranean by French cruisers, and that this report was communicated by the consul to his Government and also to the master of the *Express*; that nine North German vessels left Gibraltar during the war, but that some of these vessels had, as they came from French ports, safe conducts from the French Government, four or five sailing with such papers; that the German

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masters could themselves see the French cruisers from the Bay; that the Bay was never free from French men-of-war for more than a week together, and usually they came more frequently.

At the hearing, witnesses were called for the plaintiffs, who stated that although they had frequently passed through the Straits of Gibraltar in command of vessels during the war, they had seen no French men-of-war.

For the defendants the master of the *Express* gave evidence to the effect that he at first declined either to proceed or to deliver over the cargo at Gibraltar, except on the payment of full freight, and would not tranship the cargo and forward it at his own expense; that on 24th Sept. he offered to make a reduction of 12½. from his freight, and deliver at Gibraltar, but that the plaintiffs' agents declined to accept this offer, as they had no authority; that as the cargo, becoming warm, in spite of all precautions to keep it in good condition, the master wrote, offering to the plaintiffs to tranship as against a reasonable reduction of freight: that the plaintiffs never offered to pay to the master a distance freight at Gibraltar, but if they had offered it he would ultimately have delivered it at Gibraltar; that if the full freight had been paid to him, he would not have transhipped the cargo, or have forwarded it at the ship's expense; that he remained in Gibraltar because there was great risk of capture all the time; that he stayed not only on account of the ship, but also on account of the cargo, as he was responsible for it as well as for the ship; that he frequently saw French men-of-war in Gibraltar Bay.

Witnesses were also called for the defendants to prove risk of capture off the channel ports, and they proved that French men-of-war were constantly cruising in the channel, and German vessels were often captured there, and similar evidence was given with regard to Queenstown.

It was agreed that the evidence given by the North German advocate in the *San Roman* (ante pp. 347, 250), should be evidence in this case so far as applicable.

He was called again in this case, and gave the following additional evidence:

The master of a North German ship carrying a neutral cargo who deviates from his course from fear of capture and enters a neutral port, is entitled to remain there whilst the risk lasts, and cannot be compelled to go on even if the owner of the cargo wishes him to proceed. The shipowner may order the ship to stay, or the master may stay without an order. No right is given by the code to the owner of the cargo except to withdraw from the contract on payment of distance freight, and the owner of cargo must pay his share of expenses of detention up to the time of withdrawing. The master must have reasonable ground for his delay.

The sections of the North German code referred to in the argument and the judgment will be found set out in the *San Roman* (ante p. 351). It was agreed that the arguments in the *San Roman* (ante p. 352) should be taken as arguments in the present case, so far as they were available.

Butt, Q.C. (Cohen with him) for the plaintiffs.—The delay in this case was 108 days; there was, therefore, time for communication with owners of cargo (German Code, Art. 504), and, if German law applies, there was opportunity for either party to withdraw from their contract, on the plaintiffs paying a distance freight, but the master refused for a long time to accept anything but full freight. The plaintiffs brought themselves within Art. 634,

if the German law applies, and were willing to withdraw. The master only offered to deduct 12½, whereas the two-thirds only of the distance was performed, and the proportionate amount to be deducted was 250. If the contract was put an end to by the acts of the plaintiffs in offering a distance freight the master was bound to tranship under Art. 630, and this he refused to do. As the master refused to discharge his cargo at Gibraltar, or to take a distance freight, then the reasons for delay must be narrowly observed (a). The master delayed after he knew that the cargo was heated, and even then refused distance freight. The danger of capture about Gibraltar was very slight. There was no actual danger, only a dread of capture. We submit that the master was bound by German law to have transhipped, and by English law he should, as a reasonable man, either have proceeded or have transhipped. He was not entitled to keep the cargo on board the ship in part. English law should govern this contract for the reasons stated in the *San Roman* (ante p. 352).

Mileward Q.C. (Clarkson with him), for the defendants.—If either party withdraws from the contract under Art. 634, all the master need do to earn *pro rata* freight is to put the goods ashore. He need not tranship, save at the owner's expense. We submit that the German law applies to this contract. This was a German ship, German master, and the charter was entered into at Constantinople, between German subjects, and although the bill of lading is in English, that portion of it written by the master is in German. There is nothing especially English in the contract, except that the ship is to call at Falmouth, &c., for orders. As to freight and transhipment the only definite proposition that was made to the master was, that he should tranship at his own expense. The master, on the other hand, offered to deliver the goods at Gibraltar, on payment of a reasonable amount of freight, and that must be considered as an offer to take *pro rata* freight or reasonable distance freight. He was not bound to part with the goods without payment of such freight: (Art. 634) As to risk of capture, there was actual danger, and the apprehension of the master was so reasonable as to justify delay. More than a week did not elapse without a French man-of-war being in Gibraltar Bay, and there were more passing through the Straits, and there were actual captures in the vicinity of that port. The *Landwäster* (see note to the *San Roman* ante p. 350) remained in Gibraltar till the end of the war, and the court at Hamburg, held that she was justified in so doing, there being a substantial peril. There was also danger in the English Channel. If there was such risk as made it right for the master to stay a week, then, so long as the risk remained the same, the master was entitled to stay in port any length of time. [Sir R. PHILLIMORE.—The

(a) *Butt* here applied for leave to amend the pleading by inserting words, so as to raise the issue whether distance freight had been offered and refused, and to charge a breach of contract or breach of duty on the part of the master in refusing to deliver the cargo to the owners at Gibraltar, except on payment of full freight or an excessive amount of distance freight. The court refused to amend, intimating that the plaintiff could only use the evidence as to the refusal to deliver, except on payment of full freight or excessive distance freight, as tending to show unreasonableness of delay.

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THE EXPRESS.

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risk must be absolutely imminent, and so great as to induce a reasonable man to delay. In past wars where England was a belligerent, it was unlawful for ships to sail without convoy (38 Geo. 3 c. 76; A. D. 1798; 43 Geo. 3 c. 57). These enactments were passed to prevent merchantmen giving the enemies of the country the chance of enriching themselves by capture.

Abbott on Shipping. Part IV. c. 5, p. 356. (American edition.)

Valin Ordonnance de la Marine. Vol. I., Liv. III., Tit. 4, Art 5, p. 661;

This accounts for there being no cases of this nature arising out of the earlier wars, as it was illegal to sail without protection. The German code has attempted to carry out this same purpose by making vessels stay in port during risk of capture.

Butt, Q.C. in reply.—I submit that to justify delay there must be an actual operative restraint almost approaching to a blockade. If the chances of escape and of capture are equal, a master would be bound to proceed. It has never been decided that mere risk of capture justifies delay, as seems to be the opinion of the German masters. No doubt the master acted with *bona fides*; but it must be remembered that he is of opinion that he might stay as long as he liked whilst making the cargo pay a large portion of the expense as average. Would he have stayed at all if he had supposed that he must bear the expense? It was for his interest, in his view of the law, to remain in port half way, as, by proceeding to his port of discharge he would have had no further claim for expenses of delay against the cargo, and would have lost employment till the end of the war. Reasonable apprehension of danger is not a sufficient excuse for delay; there must be such actual danger as would operate upon the mind of a reasonable man. There is here a contract, and the defendants are bound to perform or to show excuse. The German law, unlike the old convoy Acts, imposes no penalty on masters proceeding to sea without convoy, and, therefore, does not make it illegal. Those Acts were probably passed because the Legislature considered that without enactment, masters were bound to proceed under the bills of lading in ordinary use.

June 25.—*Sir R. PHILLIMORE*.—This is a suit instituted under the 6th section of the Admiralty Court Act 1861, by *Messrs. Scaramanga and Co.*, merchants, owners of the cargo, and holders of the bill of lading, against the foreign vessel *Express*, for a breach of contract or duty in respect of the carriage of that cargo. In the month of May 1870, a charter-party was entered into between the master of the *Express* and certain merchants of Constantinople. In pursuance of this charter-party the *Express* sailed to Taganrog, and took on board a cargo of rye upon the terms of a bill of lading which was as follows: (His Lordship here read the bill of lading as above set out.) In this case the ship was German, her master was German, she was lying at Constantinople, her charterers were German, her charter-party was in English, the bill of lading was in English with a proviso in German. She took on board her cargo at Taganrog; her charter-party provided for a delivery at a safe port in the United Kingdom, or on the continent between Havre or Hamburg. Her port of call in fact was Falmouth. I think in these circumstances the law to be applied to the execution

of the contract is German, though in this as in the case of the *San Roman* (*ante* p. 347), with the exception of the question of transshipment the principles of the English and of the German law would be pretty much the same. On the 30th June 1820 the *Express* sailed from Taganrog. On the 16th Aug. she anchored off Algeiras, there she was informed of the war which had broken out between France and Germany, and on the 18th Aug. she arrived at Gibraltar. On the 30th Jan. 1871, the news of the armistice reached her. On the 2nd Feb. she left Gibraltar. On the 17th she arrived at Falmouth; there she received orders to go to London, where she arrived on the 26th. On the 28th she began to discharge her cargo: and on the 2nd of March the discharge was completed. The questions to be determined by the court are—first, whether the master was justified in putting into Gibraltar? secondly, whether he was justified in remaining there? thirdly, whether he was bound to transship and forward the cargo? The burden of proving the affirmative of the two first propositions, and of the negative of the third lies upon the defendants. I am of opinion that the fair result of the evidence is that the *Express* would have run great risk of capture if she had left Gibraltar at an earlier period than she did leave it. I do not assent to the proposition, that if the chances of capture and escape were equal the master was bound to proceed, but I think the former preponderated. It was contended that there would be what was called "an actual operative restraint." This would seem to indicate that nothing short of a blockade would justify the delay of the vessel to sail. I am not of this opinion; I think a reasonably prudent man, exercising due discretion and fortitude, would not have sailed, thereby exposing his ship to capture at this time. I am of opinion that the master was justified in putting into Gibraltar, and remaining there till the 2nd Feb. The question as to his duty to transship remains to be considered. This is a duty which, I may observe, is set forth in the plaintiff's petition, but which only could arise under the German law. [His Lordship here read Article 634 of the North German Code (see *The San Roman*, *ante*, p. 352).] The most important evidence upon this point appears to me to be contained in the correspondence between *Messrs. Scaramanga and Co.*, and their agents, *Mosley and Co.*, at Gibraltar. The first letter is from *Mosley and Co.* on the 17th Aug., in which they announce the arrival of the *Express* at Algeiras, that the writer has had an interview with the Prussian Consul at Gibraltar, who told him, "that he was going to take upon himself to order the captain, through the Prussian vice consul at Algeiras, not to proceed." The answer to this is on the 22nd Aug., in these words: "In reply to this, we beg to say that the captain is bound to proceed, but if he desires to transship cargo at his risk and expense for United Kingdom or Continent orders, or for Amsterdam direct, we are willing to allow him to do so by first-class vessel or steamer." On the 26th *Mosley and Co.* write that the captain says "he cannot proceed because of their being at a short distance from this port French privateers, he would expose both the vessel and cargo, and that unless the whole freight was paid to him and under the due formalities with reference to his charter-party, he would not transship cargo under

the unfavourable conditions as proposed by you." On the 3rd Sept. they write that, having remonstrated with the captain for asking the whole freight, he said "he was prepared to make an equitable deduction"—200*l.* out of 750*l.*; but they said "they had no authority to enter into any arrangements of this kind." On the 10th Sept. Scaramanga and Co. write that if the captain would pay the charges of transshipment to Amsterdam or Rotterdam, "we should be disposed to accept Gibraltar as port of discharge and pay balance of freight due to him." On the 12th Sept., the captain, through his agent, assures Mosley and Co., that "he will continue his voyage as soon as he can do so in safety." On the 17th Sept. the cargo is surveyed and declared to be "in most excellent condition." On the 24th Mosley and Co. write that they cannot find a sailing vessel for the purpose of transshipment; they add: "We had an interview with the captain and endeavoured to persuade him to accept what you propose. He told us that the only thing he could do is to make a deduction of 125*l.* from the total freight;" and added that he was more liberal than another German captain had been in like circumstances. On the 30th Sept. Scaramanga and Co. wrote that they were not "disposed to modify" their proposition. On the 21st Oct. the captain wrote to Mosley and Co. that the cargo was becoming warm, and that he wished to know whether they "would be inclined to transship the cargo into another vessel here against a reasonable reduction of freight." Mosley and Co. replied that they had no other offer to make than that which they had already proposed; they informed Scaramanga and Co. that they had made this reply. On the 4th Nov. Scaramanga and Co., wrote that the captain's letters "do not call for any special reply, as he makes no definite proposal therein," and said that by making no offer themselves they would "probably be in a better position ultimately to deal with him for loss arising out of his unwarrantable conduct in remaining in port." On the 24th Nov. they wrote that they should be willing to entertain any proposal emanating from the captain. On the 4th Feb. Mosley and Co. wrote that the captain had sailed, and on the 11th that "all the Germans that were lying here have now disappeared." I am of opinion that the only definite proposal made by Scaramanga and Co. to the captain was that he should transship at his own cost and expense; and that they were not authorised by the German code to make such a demand. I therefore pronounce that the defence is successful, both upon the ground of the deviation and delay being caused by a reasonable apprehension of capture, and upon the ground that no legal demand, in the sense of the article of the code for transshipment, was made to the captain. I dismiss the suit with costs.

Solicitors for the plaintiffs, *Thomas and Hollams*.

Solicitors for the defendants, *Clarkson, Son, and Greenwell*.

June 11 and 18, and July 16, 1872.

CARGO *ex* ARGOS.

THE HEWSONS.

County Courts—Admiralty jurisdiction—Limitation to existing jurisdiction—Construction of statutes—County Courts Admiralty Jurisdiction Acts (31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51).

The High Court of Admiralty will not give a decision upon the construction of a statute which would be in direct conflict with the decision of a court of common law, although not agreeing with that decision.

The County Courts Admiralty Jurisdiction Acts, in giving jurisdiction to the County Courts in certain admiralty and maritime causes, give only such jurisdiction, limited in amount, as is already possessed by the High Court of Admiralty. Simpson v. Blues (ante, p. 326, C. 1P.) followed, but doubted.

THESE two cases were appeals from County Courts, and the question in each being almost identical only one judgment was delivered.

CARGO *ex* ARGOS.

THIS was an appeal from a judgment of the City of London Court (Admiralty jurisdiction). The cause was instituted in that court in rem by the following *præcipe*:

We, *Catlarina, Jehn, and Catlarns*, attorneys, hereby institute a suit for freight, demurrage, and expenses on behalf of *Julius Gandet*, of No. 73, Lower East Smithfield, owner of the steamship or vessel *Argos*, against 147 barrels of petroleum lately shipped on board the steamship *Argos* by *W. Horner*, but now lying at *Plaistow Wharf, Plaistow*, in the county of *Essex*, owner or owners unknown, in the sum of 200*l.*, and we consent that all instruments and documents in the said suit may be left for us at No. 33, Mark Lane, in the city of London.

Dated this 28th Dec. 1870.

An appearance was entered in the suit on behalf of *Walter Horner Brown*, the owner of the goods, on the 31st Dec. 1870, and bail was subsequently given.

The *Argos* was a steamer trading between the port of London and the port of Havre, in France, and the petroleum had been shipped on board her to be carried to Havre under a bill of lading signed by the master, by which it was agreed that the goods, being in good order and condition, should be delivered in like order and condition at Havre, the act of God, the Queen's enemies, fire, and all other dangers and accidents of the seas, rivers, machinery, boilers, steam, and steam navigation excepted on payment of freight as agreed, demurrage to be paid if the goods were not taken out within twenty-four hours after arrival. The *Argos* arrived at Havre, but the port authorities refused to allow her to approach the quay, the usual landing place, with the petroleum on board, as there were so many munitions of war lying about that it was dangerous; it was during the Franco-Prussian war, and the Prussians were in the neighbourhood. After various unsuccessful attempts to get permission to land the goods at neighbouring ports, the master was compelled by the authorities to discharge the petroleum into a lighter in the outer harbour. This he did, and was then allowed to discharge the remainder of his cargo at the quay. When his homeward cargo was shipped, he was compelled to rush the petroleum and convey it back to London, as the authorities would not allow it to remain in Havre. On arrival of the ship in London the owners claimed the freight, demurrage, and expenses incurred, but this the appellant refused to pay on the ground that the cargo was not delivered. This suit was thereupon instituted, and resulted in a decree for the respondent (the plaintiff), from which decree the appellant (the defendant) now appealed.

No objection was taken to the jurisdiction in the

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City of London Court, but after the case had been argued on appeal on its merits in the Admiralty Court, the Court of Common Pleas, in *Simpson v. Blues* (ante, p. 326; 26 L. T. Rep. N. S. 697), decided (on 8th May 1872) that under the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), and the Amendment Act 1869 (32 & 33 Vict. c. 51), the County Courts having admiralty jurisdiction had only such jurisdiction as was already possessed by the Admiralty Court, and that those Acts did not confer a more extensive jurisdiction, and a prohibition was granted restraining the Liverpool County Court from proceeding in a cause over which the Court of Admiralty would have had no jurisdiction. The learned judge of the Admiralty Court thereupon ordered this case to be argued upon the question of jurisdiction, as upon the facts shown it was a cause over which he would have no original jurisdiction, under the Admiralty Court Act 1861 (24 Vict. c. 10, sect. 6), nor in virtue of his ordinary jurisdiction. The case now came on for argument (a)

(a) The sections of the statutes referred to are as follow: Admiralty Court Act, 1861, sect. 6.—“The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading, of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales.”

The marginal note to this section is:—“As to claims for damage to cargo imported.”

The County Courts Admiralty Jurisdiction Act 1868, “An Act for conferring Admiralty Jurisdiction on the County Courts.”—

SECT. 3. Any County Court having Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes):

(2) As to any claim for towage, necessities, or wages, any cause in which the amount claimed does not exceed one hundred and fifty pounds:

(3) As to any claim for damage to cargo, or damage by collision; any cause in which the amount claimed does not exceed three hundred pounds.

SECT. 7. If during the progress of an admiralty cause in a County Court it appears to the court that the subject matter exceeds the limit in respect of amount of the admiralty jurisdiction of the court, the validity of any order or decree theretofore made by the court shall not be thereby affected, but (unless the parties agree by a memorandum signed by them or their attorneys or agents, that the court shall retain jurisdiction), the court shall by order transfer the cause to the High Court of Admiralty; but that court may, nevertheless, if the judge of that court in any case thinks fit, order that the cause shall be prosecuted in the County Court in which it was commenced, and it shall be prosecuted accordingly.

SECT. 25. An appeal may be made to the High Court of Admiralty of England from a final decree or order of a County Court in an admiralty cause, and, by permission of the Judge of the County Court, from any interlocutory decree or order therein, on security for costs being first given, and subject to such other provisions as general orders shall direct.

The County Courts Admiralty Jurisdiction Amendment Act 1869, “An Act to amend the County Courts (Admiralty Jurisdiction) Act 1868, and to give jurisdiction in certain maritime causes.”

SECT. 1. This Act may be cited as the County Courts Admiralty Jurisdiction Act Amendment Act 1869, and shall be read and interpreted as one Act with the County Courts Admiralty Jurisdiction Act 1868.

June 11th.—*Milward, Q.C.* for the respondents.—I submit that in sect. 2 of the County Courts Admiralty Jurisdiction Amendment Act 1869 “use” means “demise,” and “hire” means “charter.” Any agreement for the employment of a ship falls within those words, and they relate to a jurisdiction which the Admiralty Court does not originally possess. It is of advantage that local tribunals should have a jurisdiction which can be speedily exercised over ships which are likely to depart at once. It is submitted that power given by the Act is not confined to the original jurisdiction of the Admiralty Court. If it were so, then the Act would give no more than that already given by the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), whereas the second Act is “An Act to amend the County Courts Admiralty Jurisdiction Act 1868, and to give jurisdiction in certain maritime causes.” Under the first Act the County Courts had already the same jurisdiction as the Admiralty Court, only being limited in amount. *Simpson v. Blues* (26 L. T. Rep. N. S. 697) assumes without foundation that the object of these statutes was “to distribute the existing Admiralty jurisdiction.” One ground of that judgment is that holding the County Court to have this jurisdiction would have the effect of indirectly enlarging the jurisdiction of this court, with which the Legislature did not profess to deal. It should be remembered, however, that the only effect of these Acts is to give an appeal to this court, and there must be an appeal to some court, and why not here? Even the transferring suits under sect. 6 of the first Act is only another form of appeal. If the County Court have the original jurisdiction on their Admiralty side, the appeal would naturally be here. The words of the Act are large enough to give an extended jurisdiction. [Sir R. PHILLIMORS.—There was formerly an appeal to this court from the Vice-Admiralty Courts in revenue cases, although there was no original jurisdiction here.] Causes of this nature are intended by the Act of 1869 to be Admiralty causes, and as the two Acts are to be read as one, an appeal lies to this court under sect. 26 of the Act of 1868. The argument in *Simpson v. Blues* is, that because an appeal is given under sect. 2 of the Act of 1869 to this court, a construction, different from their usual meaning, must be put upon the words “use and hire of a ship.” The power to bring up a case by *certiorari* will not give the court so doing original jurisdiction, and yet it may hear and determine the case. If the construction put upon sect. 2 of the Act of

SECT. 2. Any County Court appointed or to be appointed to have admiralty jurisdiction, shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes: (1) As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l*.

SECT. 3. The Jurisdiction conferred by this Act, and by the County Courts Admiralty Jurisdiction Act 1868, may be exercised either by proceedings *in rem*, or by proceedings *in personam*.

SECT. 5. In any admiralty or maritime cause the judge may, if he think fit, or on the request of either party, be assisted by two mercantile assessors; and all the provisions of the County Courts Admiralty Jurisdiction Act 1868, with reference to nautical assessors, shall apply to the appointment, approval, summoning, and remuneration of such mercantile assessors.

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1869 by the Common Pleas is right, then no addition is made to the jurisdiction of the County Courts by that section, as those courts already possessed all the admiralty jurisdiction in these matters by sect. 3 sub-sect. 4 of the Act of 1868. There are no words in either statute which profess to give only a part of the existing Admiralty jurisdiction.

Gainsford Bruce on the same side.—The act of 1869 must be considered to have extended the jurisdiction to some extent. By the act of 1868 sect. 3, the County Courts had jurisdiction over claims for damage to cargo, and that jurisdiction must be considered by analogy drawn from the decisions on the other parts of the same section to have been the same as the Admiralty Court possessed:

Everard v. Kendall, 22 L. T. Rep. N. S. 406; L. Rep. 5 C. P. 438; 3 Mar. Law Cas. O. S. 391.

The Dove, 22 L. T. Rep. N. S. 627; L. Rep. 3 Adm. & Eco. 135; 3 Mar. Law Cas. O. S. 424.

If the second Act only gave the same jurisdiction it would be unnecessary, and, as it cannot be supposed that the Legislature passed a useless Act, it must be taken to extend the jurisdiction. The name given to the causes in the first Act is "admiralty causes," in the second "maritime causes." Then by sect. 5 the Act of 1869, "in any admiralty or maritime cause, the judge may be assisted by two mercantile assessors." By sect. 3, "the jurisdiction conferred by this Act and by the County Courts Admiralty Jurisdiction Act 1868 may be exercised either by proceedings *in rem* or *in personam*." These sections clearly indicate two jurisdictions, one given by the first, and another by the second Act. The whole scope of the Act is to extend the jurisdiction as shown by sect. 4, which gives jurisdiction over all claims for damage to ships whether by collision or otherwise.

The *Admiralty Advocate* (Dr. Deane, Q.C., *Murphy* with him) for the appellants.—In every case where these questions have been raised it has been held by the common law courts that the words of these Acts, though large, must be construed with reference to the existing jurisdiction. In *Simpson v. Blues* (*sup.*) it is said that "we ought not so to construe the words of these County Courts Acts so as to create this large, novel, and inconvenient jurisdiction, when we find from the context that the general intention was only to distribute the existing admiralty jurisdiction." This course was adopted in previous cases.

Everard v. Kendall (*sup.*)

The Dove (*sup.*)

The vice-admiralty courts had original jurisdiction of an undoubted character in revenue questions, and the appeal lay here from them, but in this case it is the original jurisdiction of the County Courts that is disputed, not the appellate jurisdiction only. *The St. Cloud* (Br. & Lueb. 4; 8 L. T. Rep. N. S. 54; 1 Mar. Law Cas. O. S. 309) decided that the claim by an assignee under the Admiralty Court Act 1861 must be a claim such as could be made before the passing of that Act, although the words were wide enough to cover any claim. This court has no original jurisdiction over such a claim as this, and yet, if this claim can be made in a County Court, it can be transferred here by sects. 6 and 7 of the Act of 1868. This would entail enormous inconvenience to small ships. The object of the second Act was to amend the juris-

diction of the County Courts by giving jurisdiction *in rem*, and their jurisdiction is extended by sect. 4. The power to appoint mercantile assessors is also an amendment and extension. Sect. 2 of the Act of 1869 is to be explained by reference to the Admiralty Court Act 1861. That Act, by sect. 6, gave jurisdiction over claims by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales, in any ship, for damage, &c., or for any breach of duty or breach of contract. It was the intention of the Legislature to give this jurisdiction in certain cases to the County Courts. The words in the County Courts Admiralty Jurisdiction Act 1868, giving jurisdiction over any claim for damage to cargo not exceeding 300*l.*, do not give jurisdiction over a claim by the consignee or assignee for breach of contract, as they would not be parties to the contract, and the Act of 1869 was passed to extend the jurisdiction of the County Courts to all suits under the Admiralty Court Act 1861, with a limitation of amount. If the construction contended for by the other side is right, then the County Courts have unlimited (except as to amount) jurisdiction, where this court has none. In addition to these reasons, I submit that this court is bound, in the construction of a statute, by the judgment of the Common Pleas in *Simpson v. Blues* (*sup.*).

Milward, Q.C. in reply.—The title of the Act is to "give jurisdiction in certain maritime causes." Sect. 3 is only directory as to the mode of exercising jurisdiction. There is no limitation as to domicile in either of the County Court Acts, as in the Admiralty Court Act 1861, sect. 6. It cannot be material what court exercises the jurisdiction, it exists in some court in England, and the Legislature has chosen to say that the County Court is a convenient place for its exercise, and this court is chosen as a convenient court of appeal.

THE HEWSONS.

This was an appeal from a final decree of the County Court of Durham, holden at Hartlepool. (Admiralty jurisdiction.) The suit was instituted *in rem* in that court, against the *Hewsons*, for breach of a charter-party. Both plaintiffs and defendants were domiciled in England. The ship was chartered to Geipel and Co. for successive voyages from Hartlepool to the Elbe, with cargoes of coal from 14th March 1870, till 31st Oct. 1870. During the fourth voyage war broke out between France and Germany (19th July), and from the beginning of Aug. until 22nd Sept., the Elbe and the port of Hamburg were blockaded, and the *Hewsons* could not during that time proceed on another voyage under the charter without risk of capture. Her owners on her return to Hartlepool in the beginning of Aug. chartered her for a voyage to Elnor, and she proceeded thither, and did not return till 4th Dec. This was done without the consent of the plaintiffs, the original charterers, who were compelled to hire other vessels at increased rates. The alleged breach was for not taking on board a cargo or cargoes as provided by the charter-party, and for not carrying the same to Hamburg.

The appellants (defendants), in the court below, objected to the jurisdiction of the County Court on the ground that the Acts which confer admiralty jurisdiction on the County Courts, do not give any new or original jurisdiction, but merely s

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portion of the jurisdiction formerly possessed by the High Court of Admiralty exclusively; and that the High Court of Admiralty has not any jurisdiction to try a claim arising out of an agreement made in relation to the use or hire of a ship especially if the owner or any part-owner of the vessel is domiciled in England or Wales at the time of the institution of the suit. See 24 Vict. c. 10 Sect. 6. The case was also argued on its merits. The learned judge of the County Court on 5th Jan. 1872, gave judgment, holding that "although the High Court of Admiralty may not have jurisdiction to try such a claim, yet the Act (32 & 33 Vict. c. 51) for amending the County Courts Admiralty Jurisdiction Act 1868, and for giving jurisdiction in certain maritime causes, expressly confers upon the County Courts jurisdiction to try any claim arising out of any agreement made in relation to the use or hire of any ship, and such jurisdiction is not limited or restricted to cases where neither the owner or any part owner of the ship resides in England or Wales." The learned judge gave judgment on the merits for the respondents (plaintiffs) for £51, and thereupon the appellants appealed.

June 11th and 18th.—*E. C. Clarkson* for the appellants.—What jurisdiction was given to the Admiralty Court by the Admiralty Court Act 1861 sect. 6? It has jurisdiction over claims for actual damage done to goods; over claims for breach of contract in respect to the carriage of goods; and also over claims where the goods have not been delivered at all to the owner:

The Marie Joseph, Bro. & Lush 449; 12 L. T. Rep. N. S. 236; 15 L. T. Rep. N. S. 6; 2 Mar. Law Cas. 190, 304.

Under that section, so long as the holder of the bill of lading is the owner of the goods, the court can go into the construction of a charter party, although the court has only jurisdiction over claims by the owner or consignee or assignee of the bill of lading. Under the County Courts Admiralty Jurisdiction Act 1868, sect. 3 subsect. 3, the words "damage to cargo" could not give jurisdiction over anything in the nature of a mere breach of contract for non-delivery, without there was at the same time damage done to the cargo. By that act the whole jurisdiction of the Admiralty Court was not given to the County Court. The County Courts Admiralty Jurisdiction Amendment Act 1869 gives the jurisdiction which the former Act 1868 did not give. The title of the Act is technical and the Legislature must have referred to causes "civil and maritime," the usual phrase in this court. Under sect. 2 of the Act of 1869, claims for delay in delivery of goods loss of market, breach of contract, would all be included. An owner and charterer may sue under the Admiralty Court Act 1861 in this court, and the second County Court Act gives the same right in those courts. All the terms in that section may be satisfied without extending the jurisdiction beyond that already exercised in this court. Bills of lading are little more than receipts for goods so far as the charterer is concerned (1 Parsons on the Law of Shipping, p. 287), and the charter-party is the controlling instrument. In a claim by the owner of goods and charterer, the court could look at the charter-party to see if there had been any breach as in this court, and could therefore entertain a claim arising out of an agreement made in relation to the use or hire of a ship, and to the carriage of goods, and so

satisfy the largest words of the section restricted only by domicile. There is no "claim in tort for the carriage of goods in any ship" which would not be included in damage to cargo or breach of duty in the Admiralty Court Act. If a cause were instituted on the Admiralty side of a County Court, over which this court had no original jurisdiction, and it should appear that the subject-matter exceeds in amount the jurisdiction of that court, the judge is bound, under sect. 7 of the Act of 1868, to transfer it to the Admiralty Court. It seems improbable that the Legislature intended to give jurisdiction by such a transfer to this court in cases where it has no original jurisdiction. The object of the Admiralty Court Act 1861, s. 6, was to give a remedy to British merchants suffering damage to their goods laden on board foreign vessels, and to give them the opportunity of proceeding at once against those vessels whilst in British ports. If the construction asked for by the respondents be placed upon these Acts, then they apply equally to English ships, and the reason of the legislature in passing the Admiralty Court Act is set aside. It has been decided that in cases of necessities the limitation as to domicile must be imported, although not mentioned in the Act of 1868: (*The Douce*, L. Rep. 3 Adm. & Ecc. 135; 22 L. T. Rep. N. S. 627; 3 Mar. Law Cas. O. S. 424.) It follows, therefore, that this limitation must be imported in other cases where it exists with regard to the Admiralty Court, and that no jurisdiction exists here as the owner is in England. If this is to be considered as a maritime cause, then no appeal lies here as the Act of 1868 (sect. 26), only gives appeals to this court in Admiralty causes. *Simpson v. Blues* (sup.) is binding on this court. The question before the court is as to the construction of these statutes giving jurisdiction to the County Courts, and it has been held that this court is bound upon the construction of a statute, by the decision of a common law court:

The Earl of Auckland, Lush. 164; 3 L. T. Rep. N. S. 796; 5 L. T. Rep. N. S. 558; 1 Mar. Law Cas. O. S. 27, 177;

The Milan, Lush. 388, 402; 5 L. T. Rep. N. S. 500; 1 Mar. Law Cas. O. S. 185;

The Helen, L. Rep. 1 Adm. & Ecc. 1; 13 L. T. Rep. N. S. 395; 2 Mar. Law Cas. O. S. 293.

In the last case a distinction was drawn between the Chancery and common law courts, and it is said that whatever conclusion this court may come to itself, it is bound to follow the decision of the common law courts upon a statute.

Cohen and Phillimore for the respondents.—There is no appeal from the decision of a common law court in prohibition to a County Court: (19 & 20 Vict. c. 108, s. 42.) If there were an appeal, then no doubt this would be bound by the decision, because if the common law court were wrong, its decision could be rectified on appeal, but as there is no appeal, we submit this court is not bound. One great object of prohibition is to secure uniformity of decision throughout all courts and that is attained by the appeal from the courts which have the power to prohibit, lying ultimately to the House of Lords, so that whatever may be the appellate tribunal of an inferior court, a party objecting to its jurisdiction can proceed by prohibition to the highest tribunal. We submit, therefore, that as the decision of the Court of Common Pleas in *Simpson v. Blues* (sup.), cannot be reviewed by an appellate court, this court is not bound by it.

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CARGO *ex* ARGOS—THE HEWSONS.

[ADM.]

If the appellants object to the jurisdiction, let them prohibit this court, and then an appeal will lie to the House of Lords. With respect to "claims in tort," there are cases where a shipper's goods have been injured by the wrongful acts of a shipowner or his master, and yet, because there was no privity of contract between them, the owner of the goods could make no claim in the Admiralty Court; as where the owner of goods has shipped through his agents who have paid freight, and the master has wrongfully thrown the goods overboard at sea. The goods would not then be carried in England or Wales. The Act of 1869 gives jurisdiction over "any claim in tort," and unless such a case as the above is within those words they are negatived, and if so the County Court has a larger jurisdiction than the Admiralty Courts. Such cases are very rightly not called "Admiralty Causes," as they are not such as this court has cognisance of. If the Legislature had meant to give to the County Court the same jurisdiction as this court had, why did it not use the same words in the County Courts Act as gave jurisdiction to this court in sect. 6 of the Admiralty Courts Act 1861? The difference in the words marks a distinction in the jurisdiction. The words in sect. 2 of the Act of 1868, "any claim arising out of any agreement made in relation to the use or hire of any ship" must mean "any claim arising out of any charter-party." No doubt at first it was considered necessary only to arrest foreign ships; but where claims are of a small amount it is a wise policy on the part of the Legislature to allow the arrest of English vessels. There can be little or no inconvenience, because if an owner is solvent he would at once release his vessel from arrest for a small debt, and if he is not solvent then the creditor is entitled to the security of the property. It is erroneous to suppose that the Legislature does not give jurisdiction to inferior courts where the appellate court has no such original jurisdiction. The Consular Courts have a large jurisdiction, and the appeal lies to the Privy Council, which has none of the same original jurisdiction. The Act of 1868 was large enough in its terms to give the same jurisdiction as that possessed by this court under the Admiralty Court Act 1861. The operative words in sect. 3 of that Act are set out as shortly as possible, and jurisdiction is given over claims for "damage to cargo." The marginal note of sect. 6 of the Act of 1861 gives the words "claims for damage to cargo imported," showing that that phrase includes all claims under that section, and that the words are large enough to include all the admiralty jurisdiction on that head; it is a technical phrase always used in that sense (Williams and Bruce Admiralty Practice, c. v., p. 85), and as such used in the Act to give the jurisdiction. *The Douce* (sup.) decided that the County Courts had the same jurisdiction as to necessities as this court up to a certain amount by the words "any claim for necessities" in sect. 3 of the Act of 1868, and it follows from that decision that the words "any claim for damage to cargo" gave the County Courts a similar jurisdiction in respect of such claims, and it has been practically decided in several cases that the whole jurisdiction of the Admiralty Court is given to the County Courts by that Act, the amount only being limited:

The Swan, L. Rep. 3 Adm. & Ecc. 314; 33 L. T. Rep. N. S. 633;

The Nuova Rafacellina, ante, p. 16; L. Rep. 3 Adm. & Ecc. 483; 24 L. Rep. N. S. 321.

If the Act of 1869 is merely to supply the admiralty jurisdiction omitted to be given by the Act of 1868, then no meaning can be given to the words "an agreement in relation to the use or hire of any ship," as such jurisdiction is clearly given without those words at all.

Clarkson in reply.—*The Douce* (sup.) only decides that the jurisdiction of the County Court is limited to that of the Admiralty Court. So here a like limitation must be imported, and the analogy between the cases go no further. [Sir R. PHILLIMORE.—The Court of Common Pleas admit that the words of the Act of 1869 are wide enough to give the jurisdiction sought, but they held that the context of the Act, and the general policy and intention of the legislature, restricts their meaning. They assume, without actually holding, that the words may be satisfied without giving a larger jurisdiction. You must admit that very different language is used in the two Acts.] A charter-party is an agreement for the "use or hire of a ship," and a claim arising out of such an agreement may be a claim for breach of charter-party; and so long as the owner is not domiciled in England or Wales, the Admiralty Court has, in some cases, jurisdiction over claims arising out of charter-parties, as where the charter-party is the governing instrument: (*The St. Cloud*, Bro. & Lush. 4; 8 L. T. Rep. N. S. 54; 1 Mar. Law. Cas. O. S. 309), this interpretation would satisfy the words without giving a more extensive jurisdiction.

July 16th.—Sir R. J. PHILLIMORE.—The case of the *Cargo ex Argos* is an appeal from the City of London Court. The case of the *Hewsons* is an appeal from the County Court of Durham. In the case of the *Cargo ex Argos* the cause of the action is an alleged refusal to pay freight, demurrage and expenses, in respect of certain goods carried from London to Havre. In the *Hewsons* the cause of action is an alleged breach of charter-party, arising independently of any damage to cargo. In both these cases the same question of law arises, namely, the true construction of sect. 2 of 32 & 33 Vict. c. 51. (His Lordship read the section.) In order to put a true construction on this section, the 31 & 32 Vict. c. 71; and 32 & 33 Vict. c. 51, must be read together, for it is expressly enacted by the latter statute that the two Acts "are to be read and interpreted as one act." The title of the former statute was "An Act for conferring Admiralty Jurisdiction on the County Courts." The title of the latter statute is "An Act to amend the County Courts (Admiralty Jurisdiction) Act 1868, and to give jurisdiction in certain maritime causes." What jurisdiction did this Act give? Some jurisdiction, it must be answered, not already possessed. It is necessary, therefore, first to inquire what jurisdiction did the County Court already possess relatively to the subject of the present suit? Sect. 3, sub-sect. 3 of 31 & 32 Vict. c. 71, conferred jurisdiction "as to any claim for damage to cargo, or damage by collision, any cause in which the amount claimed did not exceed 300*l*." The same pecuniary limit is maintained whatever additional jurisdiction is given in the last Act. In the present cause I am concerned only with damage to cargo, but it is not immaterial to observe that the damage done to ships is confined in

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the first Act to one cause, viz., damage by collision, while the last Act (sect. 4 enacts that the 3rd section of the County Courts Admiralty Jurisdiction Act 1868 shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed 300*l*. In this matter of damage to ships, therefore, the jurisdiction of the County Courts is indefinitely enlarged as to the cause of damage, while the pecuniary limitation is expressly continued as to the amount of the damage. This observation is in aid of the contention that not only a new jurisdiction is given to the County Courts, but a jurisdiction which is not possessed by the High Court of Admiralty. For the same object I notice the use in this statute of the broader term "maritime" in lieu of the narrower term "Admiralty," as applied to the jurisdiction, and also what appears to me the significant introduction for the first time of "mercantile assessors" expressly in addition to the merely "nautical assessors" appointed by the former County Court Act. It has been ingeniously argued on the other hand that the first County Court Act gave no jurisdiction as to delay in delivery of the cargo, but merely as to damage of the goods; that the second Act supplied this deficiency, and thereby for the first time made the jurisdiction of the County Court co-extensive with that of the Admiralty Court. It is not, and could not be, denied that the language which it is said confers for the first time this jurisdiction on the County Court is totally different from that which conferred the same jurisdiction on the Admiralty Court (Admiralty Court Act 1861, s. 6). I am unable to assent to this argument as to the construction of the statutes. Sect. 3 of the first Act throughout uses the epithet "any salvage," "any wages," that is to say, whether originally inherent in the court or conferred by the statute. I think that the words "any damage to cargo" must be considered as used in their technical sense, and so conveyed to the County Court the whole jurisdiction given to the Admiralty Court by the 6th section of the Admiralty Court Act. Moreover if the second County Court Act was intended to supply this alleged deficiency in the first, the words "any agreement made in relation to the use or hire of any ship," are very greatly wider than the supply of any such deficiency required. The more I have considered this case the stronger has been my opinion that the Legislature both intended to convey, and did in plain language convey, a jurisdiction to the County Court which the Admiralty Court did not originally possess while it gave an appeal nevertheless, to that court. As I observed during the argument of the first of these cases, it would not be the first time that such a result has been effected deliberately by statute. Not long ago the Admiralty Court had appellate jurisdiction in revenue cases from the colonial Admiralty courts, as to which it had no original jurisdiction. Moreover I think that in conferring from time to time new jurisdiction upon the County Court, the Legislature had not in view so much, if at all, the character of the subject matter, as the pecuniary amount which was at stake in the litigation. It appears to me to have acted more and more in each successive statute upon the principle (with the soundness of which I have nothing to do) of making all commercial or civil transaction within a certain amount subject to

the jurisdiction of these local tribunals. This is my opinion, but am I at liberty to act upon it? The Court of Common Pleas has very deliberately and after hearing arguments come to the opposite conclusion: (*Simpson v. Blues, sup.*). They say, "the words of the section read apart from the context are undoubtedly large enough to create a new jurisdiction in respect to the claim as for a breach of charter-party;" but they are of opinion from the context that the general intention was only to distribute the existing jurisdiction by allowing suits of a limited amount to be instituted in inferior courts, and they appear to have been affected by the fact that, upon any other construction, the Admiralty Court would have appellate where it had not original jurisdiction; and they state other reasons relating to the inconvenience which they think would result from the jurisdiction being given to the County Courts. It seems to me indeed that the practical result of this judgment must be that this last County Court Act was altogether superfluous. At least I do not find in the judgment any such attempt as has been made in argument before me to show that the new Act was necessary to confer some jurisdiction which the Admiralty Court possessed, but which was not conferred on the County Court by the previous statute, nor any attempt to satisfy the words of the new statute otherwise than by their relation to a new jurisdiction over a new subject matter. It has been argued that this judgment is not binding upon me, because unlike the usual cases of prohibition there is no appeal from it. But after much consideration I am satisfied that I ought not, in the matter of the construction of a statute, to make a decision which would be in direct conflict with that of a full court in Westminster Hall. The Judicial Committee of the Privy Council may think themselves justified in pursuing a different course; and having regard to the principles laid down by me in the *Samuel Laing* (L. Rep. 3 Adm. & Ecc. 284; 22 L. T. Rep. N. S. 891; 3 Mar. Law. Cas. O. S. 453), I shall grant an appeal to that court, but I must dismiss both these suits without costs.

Solicitors: *Cargo ex Argos, Heather, Son, and Gill; Cattarna, Jehu, and Cattarna.*

Solicitors: *The Hensons, Clarkson, Son, and Greenwell; Dyke and Stokes.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY
OF IRELAND.

Reported by J. P. ASPINALL, Esq., Barrister-at-Law.

Feb. 8, 12, and 13, 1872.

(Present: Sir J. W. COLVILLE, Lord Justice MEL-
LISH, Sir MONTAGUE E. SMITH, Sir ROBERT
COLLIER.)

SMITH v. THE BANK OF NEW SOUTH WALES;
THE STAFFORDSHIRE.

*Bottomry—Necessity of repairs—Duty of communi-
cation—Loan by ship's agent—Bills of exchange
—Collateral security—Presentation—Subsequent
freight—Bail—Value of ship.*

*A bottomry bond is not invalid merely because the
advance secured by the bond is made by agents of
the ship, provided that they could not be expected
to advance on the personal credit of the owners,*

and gave the master an opportunity of obtaining an advance on the owners' personal credit elsewhere by refusing such an advance.

A bottomry bond can only hypothecate something which is in danger of perishing by maritime risk during the time that the bond is running, and therefore cannot validly pledge freight to be earned on a voyage after that maritime risk is ended and the bond is forfeited.

Where in a bottomry suit bail has been given generally to cover ship and freight, but the ship only is held to be pledged by the bond, the bail is only liable to the extent of the value of the ship at the time of release from arrest, and an inquiry will be directed to ascertain that value.

The S. put into M. requiring repairs. She was consigned by her mortgagee, who managed the ship's affairs, but was not in possession, to ships' agents in M. Her master was part owner to the extent of one-third. The ship was under charter to proceed to Callao, and thence with a cargo of guano to England. She was repaired, and the cost of the repairs exceeded the funds in the ship's agents' hands. The agents refused to advance the money on the personal credit of the owners, and subsequently, the shipwrights having threatened to seize the ship, the master applied to the agents for an advance on bottomry, which they made.

The bond pledged the ship from Melbourne to Callao, and for seven days after arrival there, and the freight to be earned from Callao to England. It was agreed that the master should draw bills on the mortgagee, and that if these bills were honoured in England the bond should not be enforced. The master did not communicate with his owners. Three months were required for an answer, and the charter would have been lost. The ship sailed and arrived in Callao, and, after loading a cargo, sailed for England. The bills on arriving in England were presented at the mortgagee's office; but he was dead, and the executors named in his will would not act, and had not taken out probate. The bills were not presented to them, and were not accepted. Orders were thereupon sent to Callao to enforce the bond, but the ship had sailed. After these orders were sent out the bondholders offered to pay the bills if the bondholders would indemnify them from any loss from the seizure of the ship; but this the bondholders declined. The ship was seized in Queenstown, and bail given for both ship and freight:

Held, first, that the repairs were necessary; secondly, that the money could not have been borrowed on the mortgagee's credit as the master had no authority to pledge it, and that the shipowners had no credit, and the bond was therefore necessary; thirdly, that there was no necessity, under the circumstances, for communication with the owner; fourthly, that the agents having given the opportunity to the master of borrowing elsewhere, could validly lend money on bottomry; fifthly, that the bills were sufficiently presented to entitle the bondholder to enforce the bond; sixthly, that the bond did not validly pledge the freight from Callao to England; seventhly, that the bail was only liable for the value of the ship.

THIS was an appeal from a judgment of the High Court of Admiralty of Ireland (a), pronounced in a

cause of bottomry, instituted in that court by the respondents, a bank, carrying on business in London, and having a branch in Melbourne, as holders of a bottomry bond upon the *Staffordshire* and her freight. The appellant, who defended the suit, was a merchant in London, and owner of 42-64ths. of the vessel. The master, who died before the institution of the suit, was the owner of the remaining 22-64ths.

In Jan. 1869, the appellant and the master had mortgaged the vessel to Mr. Charles Gumm, a shipowner and merchant in London, and had assigned to him as further security for his advances all the freights and earnings of the ship, had appointed him their attorney to receive freight and insurance moneys, had constituted him ship's husband, and sole agent at home and abroad. Mr. Gumm was not, however, mortgagee in possession. The ship sailed from London in Jan. 1869 for Melbourne with a general cargo, and arrived in Melbourne on 4th June 1869. She was under charter to proceed from Melbourne to Callao, and there load a cargo of guano for the United Kingdom; but the charter was conditional on her arriving at Callao before 30th Sept. 1869. The ship was consigned by Mr. Gumm to Messrs. Dickson and Williams, of Melbourne, as ship's agents at that port, and this arrangement was confirmed by the appellant. On her voyage to Melbourne the vessel was much injured by bad weather, and it became necessary to dock and repair her on the patent slip. The master did not know, and could not have ascertained what repairs would be required until she had been put on the slip, but the amount of freight in his or the agent's hands, 2100*l.*, was thought sufficient for all disbursements. The ship did not get on to the slip until after July 16th the next English mail day, and it was then found that the repairs ordered by the surveyors of the Chamber of Commerce would come to about 300*l.*; and by the next mail (13th Aug.) the master wrote to the appellant and also to Mr. Gumm stating the probable amount of the repairs, and telling the appellant that he did not know how he was to raise the money for the repairs and disbursements; but he did not mention bottomry. No reply to these letters could have been received for upwards of four months. The exact cost of the repairs became known on 24th Aug. and was 300*l.* 13*s.* 1*d.*, and there were other disbursements which had to be paid. At that time a reply to a communication from Melbourne to England could not have been received much before Christmas, as there was no telegraphic communication between Australia and Point de Galle, the nearest telegraph station. The master applied to Messrs. Dickson and Williams the ship's agents, to advance the money over and above the freight in hand. They refused at first; but on the shipwrights threatening to put the ship in the Admiralty Court in Melbourne and sell her, they agreed to advance the money on a bottomry bond on ship

31 and 32 Viet. c. 114 (The Admiralty Court Act Ireland), s. 90, the former appeal to the Court of Delegates is abolished, and by sect. 91 appeals lie to the Irish Court of Chancery and thence to the Privy Council, or direct to the Privy Council in the first instance. Sect. 105 provides that all the Acts in force relating to the appellate jurisdiction of the Privy Council in England shall apply to the appeals under this Act, and that the appeals shall be conducted as far as possible in the same manner as appeals from the High Court of Admiralty of England.—Ed.

(a) Appeals from the High Court of Admiralty of Ireland now come ultimately before the Privy Council. By

and freight. They would not have done so except on bottomry. If the ship had been arrested she would have lost her freight from Callao to London. After it was agreed that the bond should be given, the ship's agents suggested that they should take the master's draft on Mr. Gumm for the amount of the bond without premium, charging simply the usual commission, and that if the draft was honoured in London instructions should be given that the bond should not be enforced. This was done to serve Mr. Gumm and to release the ship, and the master consented. The bond was executed on 7th Sept., 1870, for the sum of 328*l*. Before the ship sailed the ship's accounts were made out, and the master drew a bill at ten day's sight on Mr. Gumm in favour of Messrs. Dickson and Williams for the amount due to them, viz., £3586 10*s*. 1*d*. Afterwards the master drew another bill for 19*l*. 7*s*. 5*d*. for some small accounts. The bills were negotiated by the ship's agents with the respondents' branch bank at Melbourne, and the bond was assigned to the bank as security. The bond bound the vessel and her freight to be earned on her then intended voyage from Melbourne to Callao, and the freight thence to any other port or ports, and it was made payable with 50 per cent. premium within seven days after the arrival of the ship at Callao. The ship's agents delivered to the branch bank a duplicate of the bonds, and with the consent of the bank sent the original bond to Messrs. Gibbs and Co., merchants at Lima, instructing them to follow the instructions they might receive from the respondents in London as to enforcing the bond. The bond went by the ship itself. These arrangements were communicated to Mr. Gumm by the ship's agents by a letter dated 11th Sept. 1869, which reached Mr. Gumm's office on the 1st Nov. 1869, and this was the first intimation received in England about the bottomry. On the same day the ship sailed for Callao, where she arrived in safety. Mr. Dickson, one of the agents, left Melbourne on 12th Sept. and arrived in London on 30th Oct. On 9th Oct. 1869 Mr. Gumm died. The drafts reached the respondents' bank in London on 1st Nov. 1869, and were presented for acceptance at Mr. Gumm's office on the same day, but were returned to the manager of the bank with the message that they could not be accepted as Mr. Gumm was dead. The executor appointed by that gentleman's will, one only, a Mr. Hallet, being in England at the time, had refused to act, and no probate or letters of administration had been taken out. The secretary to the bank called again at Mr. Gumm's office and saw Mr. Ford, who had managed Mr. Gumm's business for some years, but he refused to accept. The bills were then presented through a notary, and "no advice" was marked upon them and they were then formally protested. They were not presented to the executor. The respondents then wrote by the next mail (Nov. 6th) to Messrs. Gibbs and Co., at Lima, instructing them to enforce the bond, but before the latter were able to do so, the vessel had sailed for Queeuestown, where she arrived, and was arrested on 13th July 1870, on this suit. On 5th Nov. 1869, the protest of the bills was sent out to Melbourne. On 11th Nov. 1869, and again on 16th Nov. the appellant offered to the respondents to take up and pay the bills, but this the respondents refused unless the appellant would indemnify them for any loss that might occur through seizure of the ship at Lima

The facts as to the presentation of the bills are fully set out in the judgment.

The cause came on for hearing in the High Court of Admiralty of Ireland, on 28th April 1871, and the learned judge of that court pronounced for the validity of the bottomry bond, holding that the bond was not invalid by reason of its including the freight to be earned after the sea risk had ended; that the premium was not excessive; that under the circumstances there was no duty of communication with the owner; that the mortgagee could not be considered as owner for that purpose; that there was necessity for the bond; that there was no fraud between the master and the ships agents at Melbourne; that the money was advanced on the security of the ship, and not on the personal security of the mortgagee, and that although a bottomry transaction cannot be based on personal security, bills may be given as collateral security, which is the usual course; that the agreement to hold over the bond until after the presentation of the bills did not make the bills the primary security; that the bills were presented within the meaning of that agreement. The appellants were condemned in the general costs of the suit. The judgment will be found in the report of the case below (*ante* p. 101; 25 L. T. Rep. N. S. 137).

From this judgment the appellants appealed to the Privy Council. Their grounds of appeal are as follows:

A. Because no attempt was made to procure the money, which was absolutely necessary to enable the ship to leave Melbourne; on the credit of Mr. Charles Gumm, or the appellant.

B. Because no communication was made to Mr. Charles Gumm or the appellant, leading to the inference that it would be necessary to hypothecate, and no opportunity was given to either of them of supplying Messrs. Dickson and Williams with the requisite credit or funds as they would have done.

C. Because no advertisements for tenders were published at Melbourne.

D. Because all the above-mentioned reasons apply with especial force in the present case, on account of Messrs. Dickson and Williams being agents for the ship, and being aware of the mercantile position of Mr. Charles Gumm.

E. Because Messrs. Dickson and Williams, as agents for the ship, were or ought to have been cognisant of the amount which was being expended on the repairs of the vessel.

F. Because the terms of the bond, the items for which the same was given, and the maritime premium thereby made payable, were such as to make the bond, under all the circumstances stated in the case, void against Messrs. Dickson and Williams, as agents for the ship, and against the respondents, who can have no better title.

G. Because the bottomry bond was void by reason of Messrs. Dickson and Williams having taken the bill drawn by Captain Barrett on Mr. Charles Gumm, or become void or inoperative of being put into suit by reason of Messrs. Dickson and Williams having negotiated the bill.

H. Because the agreement and condition upon which the bond was given was violated by Messrs. Dickson and Williams and the respondents.

I. Because the bill was never duly presented nor dishonoured.

K. Because before the maturity of the bill the amount of the bill was offered to the respondents,

who refused to accept the same, except on the fulfilment of conditions which they had no right to impose.

L. Because the respondents, who have no better title than Messrs. Dickson and Williams, acted unjustly and inadequately in giving directions on the 5th Nov. that the bond should be enforced, and by refusing to revoke those directions when the amount of the bill was offered to them.

M. Because, for the reason stated in the answer, the bond could not attach on the freight which was arrested in this cause.

Sir G. Honyman, Q.C. and Cohen for the appellants.—The premium was excessive; the money might have been obtained at a lower rate. The bond is invalid as respects freight not accruing due during the sea risk over which the bond ran. The forfeiture of the ship and freight began seven days after the arrival of the ship at Callao, and the bond hypothecated freight from Callao to England which was then non-existent. The amount expended was not for necessities. The ship was entirely rebuilt. The effect of the bond and the bills being both given to secure the debt is, that both property and personal credit of the owner are bound; and this cannot validly be done.

Stainbach v. Fenning, 11 C. B. 51;

Stainbach v. Shephard, 13 C. B. 418, 441.

This at least indicates that the personal credit of the owners or the mortgagee was good. Independently of the bills the bond is invalid. There was no effort on the part of the ship's agents at Melbourne to ascertain that a necessity for the loan existed, and that the ship could not have proceeded without the loan. The money was advanced at once and without sufficient inquiry: (*Maunder and Pollock's Law of Merchant Shipping*, 436). Unusual care and vigilance is required in ascertaining the necessity for the loan when the advance is made by the ship's agent: 1 *Parsons on the Law of Shipping*, 156, 157.) Where the amount which it will cost to repair the ship is uncertain, the master ought to communicate with the owner so as to give the latter an opportunity of making the choice of paying for the repairs or of leaving the master to raise money as he chooses: (*The Panama*, 3 Mar. Law Cas. O. S. 461; L. Rep. 3 P. C. 199; 22 L. T. Rep. N. 8. 73.) The lender is bound to know that the master's authority to bind the ship and freight by bottomry is founded on necessity alone, and because the advance could not have been obtained on personal credit, and he is bound to make due inquiry as to the necessity for the bond: (*Scarves v. Rahn*, *The Prince of Saxe Cobourg*, 3 Moo. Priv. Co. Cas. 1.) If there had been communication with England there would have been no difficulty as to obtaining this money on personal credit. This advance was made by the ship's agents, and ought, therefore, to be looked upon with suspicion. A ship's agent is not entitled to derive the same large profits as a stranger from transactions entered into without the assent of his principal, unless he or the master can find no other person who will enter into the transaction: (*The Hero*, 2 Dods. 139, 143.) It was the agent's duty to disburse the ship and therefore, to advance such moneys as were necessary for the repairs, and he is estopped from now saying that he did not consider he had sufficient security in the personal credit of the owner or the mortgagee. His undertaking the agency implied that he gave

credit to the owners. Even if the bond be held valid it cannot be enforced. The bond was given on the express agreement that it should not be enforced unless the bills were dishonoured. If the bills when sent over to England had been presented to, and accepted by, the executors, or had been paid to them, the bond could not have been enforced: (*The Ariadne*, 1 W. Rob. 411.) The bills were never duly presented. They should have been presented to the personal representative, that is to the executors of Mr. Gumm, for acceptance.

Byles on Bills 183, 203;

Bailey on Bills 219;

Story on Bills of Exchange, § 372;

Chitty on Bills, p. 246 (10th edit.)

[Lord Justice MELLISH.—Can this be requisite where the executors have not taken out probate?] The executors would have paid; in any case rather than that the ship should be seized. The offer to pay the bills after the refusal to accept was a compliance with the terms of the agreement. There is a distinction between presentment for acceptance and presentment for payment: (*Byles on Bills* (*ubi sup.*) A refusal to pay would have been a breach of the contract, but there was no such refusal. The refusal to accept took place because there was no presentment to the executors. The mere presentment at the office of the deceased mortgagee was not sufficient: (1 *Parsons on Notes and Bills*, 363.) The Court of Admiralty acts on equitable principles with regard to bottomry questions, and should hold that there having been no due presentment of the bills, the bond could not be enforced.

1 *Parsons on Shipping*, 163;

The Jacob, 4 C. Rob. 245.

A master has no power to hypothecate freight, to be earned after the sea risk is ended. *The Jacob* (*sup.*) is the only case where the freight of a subsequent voyage was made to contribute towards the payment of a bottomry bond, and it is submitted that that decision is wrong. At any rate, Lord Stowell gave the decision on the ground that the owners themselves had prevented the bondholders from taking the freight earned on the voyage during which the ship and freight were hypothecated, and the case is therefore distinguishable.

Butt, Q.C. and J. C. Mathew for the respondents.

—As to the necessity for the loan: These repairs were necessary. The ship could not have completed her charter-party without them. The master was the owner of one-third of the vessel, and was the best judge of the necessity. Moreover, the repairs were ordered by surveyors of the Chamber of Commerce, the most competent judges of such a question. To pay for these repairs an advance was required. If they had not been paid for, the ship would have been arrested, and her charter home lost. There was a lien on the ship for these repairs, and that gave the master a right to obtain money on bottomry if it could not be raised elsewhere:

Smith v. Gould; *The Prince George*, 4 Moore P. C. C. 21;

The Karnak, 3 Mar. Law Cas. O. S. 103; L. Rep. 2 Adm. & Eccl. 289; 19 L. T. Rep. N. S. 661.

As to the want of communication: The master communicated all he knew at the time he wrote. He himself was not aware of the actual cost of the repairs. Moreover, the difficulty of communication and the length of time which was required to

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receive an answer did away with any such necessity:

The Lisrie, 3 Mar. Law Cas. O. S. 150; L. Rep. 2 Adm. & Ecc. 254; 16 L. T. Rep. N. S. 71;

The Karnak, (ubi sup.)

As to the money being lent by the ship's agents: It is no part of an agent's duty to advance money without a fair expectation of being reimbursed. If he chooses to secure his repayment by a bottomry bond, he may do so, so long as he announces that he will not advance as agent, and so gives an opportunity to the master to get the money elsewhere, and this was done in this case:

The Lord Cochrane, 2 W. Rob. 320;

The Oriental, 3 W. Rob. 243; 7 Moore P. C. C. 208.

Although the ship and personal credit of an owner may not be pledged by the same instrument, a bond may be given as a collateral security with bills of exchange:

Stainbach v. Fleming (ubi sup.);

Stainbach v. Shephard (ubi sup.);

The Tartar, 1 Hag. Adm. Rep. 1;

The Huntcliff, 2 Hag. Adm. Rep. 281.

As to the presentation of the bills: First, there was no necessity for presentation at all. The executors, the personal representatives, had refused to act, and there was, therefore, no one to whom to present.

Chitty on Bills, 10th edit. 192;

1 *Parsons on Bills and Notes*, 363.

Secondly, if such presentment was necessary, it was made. The bill was presented at the place of business of Mr. Gumm, and his clerk refused to accept. This must have come to the knowledge of those who were acting for him, and it was again presented. If a bill is refused acceptance, the holder is not bound to present again for payment: (*Hickling v. Hardy*, 7 Taunt. 312.)

The subsequent offer to pay the bills was too late, and, moreover, it was subject to an unreasonable condition. The bill not having been originally accepted, it was upon the appellant that any risk of expense should have fallen by reason of the seizure of the ship. The respondents could not be expected to undertake such a risk. As to the freight from Callao to England; The appellant is precluded from now saying that the bond is invalid in this respect. He gave bail generally, and the ship was released, and there can be no inquiry now into the value of the ship and freight, as it was thereby admitted. Moreover the ship was under a charter for a round voyage from Melbourne to Callao, and thence to England, at the time the bond was given, and the freight was in respect of the whole voyage. The master has power to hind freight whether he has earned it or not for the whole voyage:

1 *Parsons on Shipping*, 160;

The Jacob, 4 C. Rob. 245.

Sir G. Honyman, Q.C. in reply.

The judgment of the court was delivered by Lord Justice MELLISH.—This is an appeal from a decree of the Court of Admiralty in Ireland, which decreed in favour of a bottomry bond. There is a very elaborate judgment of the learned judge of the court below, and their Lordships do not think it necessary to go minutely into the facts of the case, as far as regards those parts of the case in which they thoroughly agree with the learned judge in the court below. The general facts were that the ship, the *Staffordshire*, which was the ship bonded by the bottomry bond, had been mortgaged to a gentleman of the name of Gumm, and the freight

to be earned on the voyage to Melbourne and round from Melbourne to Callao and back, taking a cargo of guano from the Chiochoas to England, had also been pledged by a letter to Mr. Gumm, and Mr. Gumm was to have the appointment of the different persons to whom the ship was to be consigned, the different ship agents, so that he might have a control over the freight. He consigned it to Dickson, Williams, and Co., of Melbourne. The part owner Mr. Smith (Barrett the master being also a part owner) wrote confirming that appointment, but as there was a considerable sum, more than 2000*l.*, to be received at Melbourne for the freight on the onward voyage, it was evidently anticipated at first by all parties that that sum would be sufficient to pay the disbursements in Melbourne. The ship wanted some repairs, and the repairs were commenced; but in the letters which were first written, it appeared clearly to have been anticipated that the freight would be sufficient. Then the repairs proceeded, and in August the parties were acquainted that a considerably larger sum was being expended than was anticipated, as much as 2000*l.* Even at the time when they wrote by the mail in August, they do not appear to have made up their minds that any bottomry was necessary; but when the repairs of the ship were finished at the beginning of September, and they amounted to upwards of 3000*l.*, then the agents said that they really could not pay off that large sum, which the persons who had repaired the ship were entitled to receive; in respect of which they threatened to put the ship into the court of Admiralty; they could not pay off that large sum, unless they got a security on bottomry, and on that the bottomry bond was given. The first question to be considered is, whether that bottomry bond was generally good with reference to the rules which are well established in the court respecting bottomry. First it was said that it was not sufficiently proved that it was given for necessities, that a large sum appeared to have been expended in repairing the ship. It was said that the ship had been entirely rebuilt, and that you can only expend in bottomry a sufficient sum for the repairs that were necessary for the particular voyage. When it is considered that the voyage is to go to Callao, and then to the Chiochoa Islands, and take a cargo of guano for England, which is notoriously one of the heaviest cargoes that can be obtained and carried by a ship, it is very difficult, to suppose that more repairs could have been effected than what would be necessary for the purpose of the voyage. But however that might be, it is quite clear that a very large portion, if not the whole of that sum, must have been for necessary repairs. The question of amount is to be referred to the registrar, and therefore it is clear the bond cannot be held bad, because it was not taken for necessary expenses. It is next said that there was not sufficient evidence that the money could not have been borrowed on the personal credit either of Gumm or the shipowner Smith, and that there was not sufficient evidence that the master attempted to borrow money on their personal credit. The answer to that appears to be, that there was no power in anybody to pledge the personal credit of Mr. Gumm. He was not the owner, only the mortgagee of the ship. He had, no doubt, put the ship into the hands of Dickson, Williams, and Co., the ship agents, but it appears very doubtful whether his credit would have been

pledged even to them, and certainly there is no evidence that he gave Dickson, Williams, and Co. any authority to borrow money on his credit from anybody else. Therefore it is wholly immaterial that Mr. Gumm was a person in good credit, because money could not be borrowed on his credit. As respects Smith, the shipowner, there is not the slightest reason to suppose that he was a person in any credit at Melbourne, and it really appears to their Lordships it would have been perfectly idle to advertise for anybody to lend money on his personal credit, because it was plain that nobody would lend money on his personal credit. It was next said that the master ought to have communicated to Mr. Gumm and Mr. Smith in England, before he borrowed the money on bottomry. The answer to that appears to be, that there was really no opportunity of doing it. They did not know certainly before the mail went out in August that it would be necessary to borrow money on bottomry, and it appears very doubtful whether they really knew it then, and whether they fairly knew it before September. But even if it be assumed that they knew it in August, there was no direct communication by telegraph. The message would have had to be sent to Galle by steamer, and by telegraph from Galle to England. Sending in that doubtful way, first writing a letter to the people to frame the telegram at Galle, and then to send it by telegraph, it would have been very difficult to give any thorough account of the state of things; and even if it could be done, it would have taken certainly more than two, and probably full three months before the answer could have been got back. Under the circumstances it appears to their Lordships that it was necessary; it would have been, in fact, very undesirable to have kept the ship at Melbourne all that time, more particularly as Barrett was himself a part owner, and therefore quite as able to judge as Smith was, what was desirable to be done; and more particularly also it is to be taken into account, that after all the parties were not pledged to the bottomry bond because a bill was drawn on Mr. Gumm, and which is very material in another part of the case, it was agreed at the time when the bottomry bond was given, that if that bill was accepted and paid when it became due, then the bottomry was not to be enforced. But then it was urged very strongly by Mr. Cohen that the law looks with great suspicion upon a bottomry bond given in favour of the ship's agents, and that on that account, even although this might have been good if it had been given to some other person, it was not good considering it was given to the ship's agents; and some passages were cited from Lord Stowell's judgment in the case of *The Hero*, (*ubi sup.*), in which he says with respect to an agent, "Cases may possibly arise in which an agent may be justified in so doing. It can be no part of his duty to advance money without a fair expectation of being reimbursed, and if he finds it unsafe to extend credit to his employers beyond certain reasonable limits, he may then surely be at liberty to hold hard, and to say, 'I give up the character of agent,' and as any other merchant might, to lend his money upon bond to secure its payments with maritime interest. If, in such a case, he gives fair notice that he will not make any further advances as agent, and affords the master an opportunity of trying to get money elsewhere, and the master is unable to do so, but is obliged to

come back to him for a supply, then he is fairly at liberty, like any other merchant, to advance the money on a security that is more satisfactory to himself." It appears to their Lordships that practically the agents in this case did really act and do everything that they were required to do as laid down by Lord Stowell, because they did give fair notice to the master that they would not make any further advances. They told the master, "this bill is so very large that we shall not be able ourselves to advance the money to pay it;" and they did give the master the opportunity of borrowing money elsewhere, which does not appear to mean as was argued, to borrow money upon bottomry elsewhere, but to borrow money elsewhere on the personal credit of the owners. It is perfectly plain that the master could not borrow money on the personal credit of the owners. Then he comes back to the agents. The great reason why the law looks with suspicion on money advanced by the agent is, that the agent to some extent, at any rate in most cases, agrees that he will make some advances on the personal credit of the shipowner. The shipowner in ordinary cases has put the ship into his hands and he is dealing with him; but in the present case it would be very difficult to say that the agents, Messrs. Dickson, Williams, and Co., at Melbourne, agreed to advance one farthing on the credit of Smith, the shipowner, the ship really being put into their hands by Mr. Gumm, the mortgagee. They would have been quite willing apparently to advance money on the credit of the mortgagee, Mr. Gumm, but then it was doubtful whether Mr. Gumm's credit was really pledged. As to Mr. Smith, they looked upon him as a person of no credit, and never intended or held out the least in the world that they would advance money to him. It appears to their Lordships that under these circumstances it was a perfectly fair transaction for them to say to the master, "you must give us a bottomry bond; but you shall draw a bill on Mr. Gumm, who is a person in good credit, and who has put the ship into our hands, and who may be desirous to prevent the bottomry premium being incurred, and so, his security on the ship being lessened, he may prefer to pay these expenses rather than to have his security lessened by the bottomry bond being enforced against the ship. Still draw a bill on him, and if he pays that bill well and good; then there will be no bottomry." It appears to their Lordships that under the circumstances that was a perfectly fair mode of dealing on the part of the agents, and that it would be wrong to hold that the bottomry bond was bad on the ground that it was given to agents. Neither does it appear that there was the least reason to suppose that anybody else would have advanced money on bottomry on the same conditions. Other parties very likely might have been found to advance money on bottomry for the voyage. They would have expected to have obtained their bottomry premium at all events if the ship arrived, and it is not likely that anybody else would have been content to draw a bill on Mr. Gumm and take the chance of that being paid, and say, if that is paid, then the bottomry bond is not to be enforced. Therefore, on this part of the case, their Lordships agree with the judgment of the learned judge in the court below, that the bottomry bond was originally perfectly valid. The next, and a very important part of the case is this:—It is said that the bills of exchange

were never properly presented, and never properly dishonoured, and that the Court of Admiralty, as a court of equity, ought to prevent the bonds being enforced, and ought to decree that all that the parties are entitled to is to have the bills paid. The circumstances on that part of the case were these:—The bill was drawn at ten days' sight on Mr. Gumm, and there appears to have been a reason why it was drawn on a few days' sight, and why it was important that it should be accepted immediately, namely, that it was known that the voyage to Callao would probably not last very much longer than the time it would take for the bill to arrive in England, and that if the ship was to be seized, and the bottomry bond was to be enforced at Callao, there would be very little time left after the bill arrived before it would be necessary to send out orders from England to seize the ship at Callao. The bill arrived in England on the 1st Nov., and, unfortunately Mr. Gumm had died some weeks before, which has caused the whole difficulty in this part of the case. The bill had been sold to a bank in Melbourne, and the bottomry bond had been also deposited with the bank as a security for the payment of the bill, and the bill with the bond had been sent over to the bank's agent's in London. The bill was sent to Mr. Gumm's office to be presented in the ordinary way, Mr. Currie, the manager of the bank not being aware that Mr. Gumm was dead. When the person sent comes there he finds Mr. Ford, who had been manager of the business during Mr. Gumm's lifetime. Mr. Gumm had been for some time apparently confined to his bed, and Mr. Ford had had the entire management of his business, and Mr. Ford is found there. The evidence of the different persons did not very accurately agree as to what took place. At any rate Mr. Ford would not accept the bill, but he was the person who first gave information that Mr. Gumm was dead, and that he had left some executors. They came a second time, and a third time, and Mr. Currie came himself and then notice was given that one of the executors was abroad. He does not appear to have been told who the other executor was, neither did Mr. Currie ask. The bill certainly was not accepted, and Mr. Ford says that he had no authority to accept, and he says he did not lead them to believe that he dishonoured the bill on the part of the executors. Their Lordships cannot help thinking that there must have been an impression given to Mr. Currie that Mr. Ford did profess to ask for the executors, and did tell him that the bill would not be accepted. He told them on one of the occasions that he repudiated the transaction altogether, and thought the bottomry was altogether invalid. This having taken place, a notary is sent. The notary appears not to have been told that Mr. Gumm was dead, and therefore he merely presented the bill and caused it to be protested in the ordinary way. Then Mr. Hallett, one of the persons who had been named in the will of Mr. Gumm as executor, was living in London, and Mr. Ford communicated with him; therefore Mr. Hallett certainly had information that this bill had been presented. He referred them to the solicitors who had acted for Mr. Gumm, and were apparently acting for the executors. What precisely passed with the solicitor does not appear, but then communications were had by Mr. Ford with Mr. Smith, or persons acting for Mr. Smith, for the purpose of endeavouring to raise money for paying

the bills, and Mr. Ford called on Mr. Currie on the 5th and left a letter which, whether he had authority from the executors or not, professed to be written by the authority of the executors, and asked that the bill should be presented again when it became due. But they did not hold out or make any promise that it would be paid. Then Mr. Currie told them that the bill would be sent out on the 6th, which was the day when the French mail left, which would take the orders to Callao; and he told them that unless the bill was paid that night, unless they produced the cash, he should send out the bond to Callao for the purpose of being enforced; and it appears to their Lordships that there was no distinct promise that the money should be paid prior to the time when the bond was sent out. The main question to be decided really is, whether the bond was sent out too soon. After the bond had been sent out there were a variety of negotiations, and before the time when the ten days and the days of grace would have elapsed, assuming the presentment to have been good, there was a promise that if the bond and the bills were given up, the amount of the bills would be paid; but then, the bond having gone out that could not be done, and a claim was made for indemnity that was refused; and further negotiations went on, and the result was that the parties never agreed. The first question is, was the bill presented? Their Lordships think that it is hardly necessary in deciding this case to say whether the bill was presented, or that it would have been a good presentment of the bill for the purpose of giving notice of dishonour to prior parties to the bill. There appears to be very little authority indeed as to what is to be done to present a bill under these circumstances. It is laid down in Mr. Justice Byles' book on bills that if the drawee of a bill is dead the party ought to inquire for his personal representative. But in the present case no administration had been taken out, and no will had been proved. Then if a party who presents a bill is informed that there has been a will, and somebody named in the will as executor, but who has not taken out probate, who has not determined whether he will act or not, is he bound to present it to such a person who may or may not afterwards take out probate, or may or may not afterwards turn out to be the executor? There is very great difficulty in that. There seems great difficulty in saying that a person would be bound to take the acceptance of anybody whose authority to give that acceptance, and whose authority as executor had not been recognised by probate being granted. Their Lordships do not think it necessary to give a decisive opinion on that question, because they agree with the argument that they have heard that the real question here is, did the parties do under all the circumstances what was reasonable for the purpose of getting the bill accepted and paid? Their Lordships are of opinion that it is pretty clear that if the bill had been presented to Mr. Hallett, who was the only person named as executor in England, it would have had no effect; that he would have refused to accept it, and that presentment to him would not have really made any difference in the case. Look at what the position of Mr. Hallett was. Mr. Gumm was not liable for this amount. It would have been a very serious thing indeed for any executor to accept a bill drawn upon his testator for a debt for which his testator was not actually liable. Mr. Hallett was informed by Mr.

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Ford of the bill having been drawn and presented. He referred to his attorney, who afterwards appeared in some of the negotiations, and was present at them. If Mr. Hallett had really intended to accept it there was ample opportunity for them to have seen and informed Mr. Currie that the bill would have been accepted; but before the bond was sent out the executor never offered to accept, neither did anybody offer to accept for honour, nor did anybody offer to promise to pay; but all that was said was, "We desire that you should keep this bill for some more days, until in the ordinary course it becomes due, and then present it again." Was Mr. Currie bound to wait under these circumstances? Their Lordships think he was not, and for this reason: The time was very material. It was known that even if they sent out by that mail it was very doubtful whether the bond would arrive out in time at Callao in order to stop the ship. If the ship left Callao, the consequence would be that it would go to the Chinchas, take in a cargo of guano, and there would be all the risk of the voyage from the Chinchas to England; and moreover, though possibly the parties did not know that such was the law, the bond having become due, and being forfeited seven days after the arrival of the ship at Callao, the law appears to be that the bottomry holders would have had no insurable interest to insure the bottomry bond on the subsequent voyage. Under these circumstances it was very material that they should send out the bond by the first mail, and the other parties must have been, or at any rate ought to have been, aware of that. Therefore, on the whole, it appears in their Lordships that the bond was not sent out too early, that there was no violation of the agreement which Messrs. Dickson, Williams, and Company had made, at the time the bond and the bills of exchange were taken, that they would give the opportunity to Mr. Gumm of accepting and paying the bill before they would enforce the bond. No doubt it was a misfortune for which nobody was answerable, that Mr. Gumm happened to be dead. But still their Lordships think that the bill having arrived, and there being several days during which the bank could get neither acceptance nor payment before the next mail went out, they were justified in sending out orders by that mail with the bond, to have the bond enforced. The next question to be decided is this: the bond was drawn as to hypothecate any freight which might be earned between Callao and England, and though the bond was made payable at Callao, and it is objected that though the bond may be generally good, yet it is bad as respects that freight. And their Lordships are of opinion that the bond does not validly hypothecate that freight, although it was admitted that the bond being bad in that respect does not make it entirely bad, but that it is still good as respects the ship. An ordinary bottomry bond beyond all question only pledges the ship, and sometimes the cargo and the freight to be earned on the voyage, which is to be accomplished before the bottomry bond becomes payable; and their Lordships have not been referred to any case in which freight to be earned on a subsequent voyage has been included in a bottomry bond. It was held in the *Jacob* (*ubi sup.*), that the subsequent freight under very peculiar circumstances might be liable, but there is no form of a bottomry bond produced which on the face of it professes to charge and hypothecate the subsequent freight;

and their Lordships are of opinion that subsequent freight cannot be hypothecated, for this reason: That by the very nature of a bottomry bond the person who takes it is to become liable for the maritime risk, and therefore nothing can be hypothecated, except something which is in danger of perishing by maritime risk during the time that the bond is running. But here that freight was not begun to be earned, the cargo was not loaded on board until after the bond was forfeited, and when no maritime risk was being run by the person who had advanced his money on bottomry, because, the bond being forfeited, he already had got the personal security of the master. And, moreover, if there can be a valid pledge of the subsequent freight, it does not appear why there should not be a valid pledge of the freight for ever and ever, until the bottomry holder chooses to seize the ship. It is difficult to see where the end of it would be. The only case which has been cited was the case of the *Jacob* (*ubi sup.*); it is unnecessary to say whether that was rightly decided, but it hardly appears to be an authority on the question, for there the subsequent freight had not been hypothecated; but Lord Stowell came to the conclusion that by deviating from the proper voyage, and from going away too early, the shipowner had wrongfully deprived the bottomry holder of the freight which really was pledged, namely, the freight to be earned in the current voyage, and that therefore it was right, the ship having got away before it could be seized, to hold that the subsequent freight could be seized. Their Lordships give no opinion whether that was right or wrong, but that case does not appear to be an authority for giving a pledge of the subsequent freight. Their Lordships have come to the conclusion that there was no valid pledge of the subsequent freight. The question then arises, what ought to be done? Both ship and freight were seized when the ship arrived at Cork. Bail was given generally, and the ship was released, and earned the freight subsequently. Then it was said that because the bail had been given generally, and ship and freight had been released, there could be no subsequent inquiry into the value of the ship and freight; but, practically, the parties by giving bail must be considered to have agreed that if the bond was held to be valid in any part then the bail would pay the amount of the bottomry bond, which was the amount for which they had given bail. Their Lordships find that that is not the rule in the Admiralty, but that after bail has been given, on a proper case being made out, the Court of Admiralty will go into the question whether the *res* which was seized,—the whole of the property which was attached,—was of more or less value than the amount for which bail was given, and if it is found that it is of less value, then the parties will only be obliged to pay the amount of that. That appears to have been decided by Dr. Lushington in the case of *The Duchess de Brabant* (Swab, 264). That was a case of collision. The note is, "the bail is only liable to the extent of the value of the ship and freight, and not for the full amount of the damage done, even although as in the present case, bail may have been given for a sum beyond the value of the ship and freight;" and there it was decided that on a proper case being made out, a subsequent inquiry may be made into the value of the ship and freight, notwithstanding bail has been given for a larger

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sum. If that may be so when both ship and freight are held to be liable, *a fortiori*, their Lordships are of opinion that it would be the case if the court comes to the decision that though the ship is liable the freight is not; and therefore they are of opinion that the decree of the court below ought to be varied by declaring that the bottomry bond was not a valid hypothecation of the freight earned by the vessel on the voyage from Callao to England, and operated only as a hypothecation of the ship, and by referring it to the Registrar to ascertain what was the value of the ship when released. Subject to that variation, the decree of the court below will be affirmed, but the decree having been varied in a substantial part of the case, their Lordships will humbly report to Her Majesty that it should be affirmed with that variation, but without cost to either side. Their Lordships understand that it will be for the convenience of both parties that the cause should be retained in this court, and that the questions remaining to be determined should come before Her Majesty's Registrar in Maritime Causes. This course may therefore be pursued.

Decree affirmed.

Solicitors for the appellants, *Wastall and Roberts*.
Solicitors for the respondents, *Waltons, Bubb, and Walton*.

V.C. BACON'S COURT.

Reported by the Hon. ROBERT BYTTER and T. H. CARLSON,
Esq., Barristers-at-Law.

April 17 and 19, 1872.

ALEXANDER v. CAMPBELL.

Marine insurance—Mutual society—Policy—Deposites of—Misrepresentation—Arbitration—Pleading—Evidence.

By the rules of a mutual insurance association which were incorporated in their policies, no member, mortgagee, or assignee having a ship insured in the association which should be mortgaged or assigned to any person, should have any claim by virtue of the policy, nor should any assignee of the policy have a claim for any loss or damage which might be sustained by the ship, unless previous to the occurrence of such loss or damage such member, mortgagee, or assignee shall have given an undertaking to pay and discharge all sums which might become due from such member in respect of such ship and her insurance, and of the insurance underwritten on his behalf in the association.

The plaintiff was depositor of a policy for valuable consideration. He did not give the required undertaking, but in fact paid and discharged all payments in respect of the ship and her insurance. The ship was lost:

Held that the plaintiff was entitled to the proceeds of the policy.

In a proposal for a policy the ship-owner in answer to the question "When and where last metalled?" stated "Liverpool, 1867." It appeared from Lloyd's register that the ship was last metalled in 1865, but it was proved that in 1867, amongst other repairs, the metal sheathing was overhauled, thoroughly repaired, and replaced with new where necessary.

Held, that there had been no such misrepresentation as to vitiate the policy.

By the rules of the association all matters in dispute relative to any claim in respect of an insurance

were to be referred to arbitration as a condition precedent to any action at law or suit in equity. Held, that questions of law were not affected by the arbitration clause, and that the jurisdiction of the court was not excluded.

This suit was instituted to recover the money due on a policy of insurance on the ship *Pilgrim*, which had been lost. The ship had been insured in a mutual society called the Alliance Ship Insurance Association, and the plaintiff sued as equitable mortgagee by deposit of the policy. The defendants were the committee and managers of the association.

By the rules of the association, which were incorporated in the policy, it was provided (rule 15), that

No member, mortgagee, or assignee, the whole or any part of whose share in a ship insured in this association shall, at the time of entering or afterwards, be mortgaged or assigned to any person or persons, shall have any claim by virtue of this policy, nor shall any assignee of such policy have a claim for any loss or damage which may be sustained by such ship unless previous to the occurrence of such loss or damage such member, mortgagee, or assignee shall have delivered to the manager an undertaking approved of by the mortgagee or assignee, whereby he shall covenant with the manager to pay and discharge all sums of money which are or may become due from such member in respect of such ship and her insurance, and in respect of the insurance underwritten on his behalf in this association. Nevertheless, such member shall still be liable for, and shall pay his contributions and demands the same as if such mortgage or assignment had not been made. Any member who may prefer to pay the quarter's premium by cash in advance, and on the 20th Jan. deposit a further sum equal to a quarter's premium towards meeting any additional calls, shall have the option of so doing, instead of providing the above-named guarantee.

The rules also provide that

If a difference shall arise between the committee and any member relative to the settlement of any loss or damage, or to any claim for average or any other matter relating to the insurance, such member shall, within twenty-eight days after such difference shall have arisen, select an average-stater of Lloyd's, as arbitrator on his behalf, and the committee shall select another, which two shall have power to appoint a third, which three, or any two of them, shall decide upon the claim or matter in dispute, according to the rules and custom of this association, to be proved on oath by the managers, such decision to be finally binding on each party, but the committee and averted may, by mutual consent, refer such claim on dispute to one person only, whose award or decision shall be final and conclusive; the costs of such reference and of the award shall be at the discretion of the said arbitrators. And it is hereby expressly declared that no member who shall refuse to accept the amount of any loss as settled by the committee in full satisfaction of his claim, shall be entitled to maintain any action at law or suit in equity on his policy until the matter in dispute shall have been referred to and decided by arbitration as hereinbefore specified, and then only for such sum or sums as the said arbitrators shall award; and the obtaining the decision of such arbitrators on the matter in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit.

The plaintiff paid and discharged all sums of money which became due in respect of the ship and her insurance.

The defence raised by the pleadings was that there had been a material misrepresentation made at the time of obtaining the policy by the ship-owner, who in answer to the question "When and where last metalled?" had replied, "Liverpool, 1867," whereas it appeared from Lloyd's Register that the ship was last metalled in 1865, and that she was only overhauled, and new metal put

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where required, in 1867. The defendants also contended that the matters in dispute ought to have been referred to arbitration as a condition precedent to recovering on the policy. It appeared that previous to the filing of the bill, negotiations had been entered into with the object of referring the matters in dispute to arbitration, but as the plaintiff refused to submit questions of law to the decision of the arbitrators, and the defendants insisted that their award should be final on all points, the present proceedings were instituted.

At the bar a certificate of the ship's register was produced, from which it appeared that the plaintiff was a mortgagee of the ship, and it was contended that as he had not complied with the requirements of the 15th rule of the Association he was not in a position to make any claim by virtue of the policy.

Kay, Q.C. and A. G. Marten for the plaintiff.—The statement that the ship was remodelled in 1867 is substantially true. Misrepresentations to vitiate a policy must be substantial and material: (*Gandy v. The Adelaide Marine Insurance Company*, ante, p. 101; 25 L. T. Rep. N. S. 742; L. Rep. 6 Q. B. 746; 40 L. J. 239, Q. B.) If there was any misrepresentation, the defendants must prove it strictly: (*Mowatt v. Blake*, 31 L. T. Rep. 387.) The clause in the articles of association as to arbitration does not apply to questions of law, and does not exclude the jurisdiction of the court. The members of the association are sufficiently represented by the defendants:

Pepper v. Green, 2 H. & M. 479;
Harvey v. Beckwith, 2 H. & M. 423; 10 L. T. Rep. N. S. 632;

Pepper v. Hensell, 2 H. & M. 486; 13 L. T. Rep. N. S. 63.

Swanston, Q.C. and A. E. Miller, Q.C. for the defendants.—The plaintiff, as appears from the ship's register, is the mortgagee of the ship, and, not having complied with the rules of the society, he cannot recover on the policy. This case is on all fours with the case of *Turnbull v. Woolfe* (2 Mar. Law. Cas. O. S. 63; 7 L. T. Rep. N. S. 483; 9 Jur. N. S. 57), except that in that case the owner of the ship was plaintiff, and here the mortgagee is plaintiff. There has also been such misrepresentation as to vitiate the policy:

Marshall on Marine Insurance, 4 edit. p. 836;
Kuch v. The Central Railway Company of Venezuela (Limited) 12 L. T. Rep. N. S. 891; 34 L. J., N. S., 545, Ch.;

Haywood v. Rodgers, 4 East, 590, 597;

Carver v. Boehm, 3 Burr. 1903;

Barber v. Fletcher, 1 Douglas, 306;

The evidence as to whether the matter not communicated was material is not admissible: (*Campbell v. Richards*, 5 B. & Ad. 840), arbitration being a condition precedent, the plaintiff cannot sue until an award has been made.

Scott v. Avery, 5 H. L. Cas. 811;

Kay, Q.C. in reply.—I claim as depositor of the policy. There is no evidence of any mortgage of the ship except the register, and that cannot be admitted, as no such defence was raised by the pleadings:

Phillips v. Phillips, 5 L. T. Rep. N. S. 108, 655; 4 D. G. F. J. 208.

In *Turnbull v. Woolfe* (ubi sup.), a deed was required to be executed by the mortgagee; here it is merely an undertaking. I have paid all the money which the 15th rule is intended to secure, and, although I have not given any under-

taking, I have performed all the conditions required thereby.

The VICE-CHANCELLOR said: In this case, which is not entirely without difficulty, the only safe guide I can follow is furnished by the record. The case of the plaintiff is very simple and plain as stated on his bill. Being interested as depositor in a policy of insurance on a ship, and a loss having arisen, he asked for payment from the insurance company. No question turns upon the policy of insurance. The only important question which arises is upon the 15th rule of the regulations and rules affecting the society. The defendants by their answer raise only two objections to the plaintiff's claim, as I understand it. The first is that upon the original acceptance and execution of the policy, a material misrepresentation was made which has the effect of vitiating the policy and releasing them from the obligations contained therein, and the other, that the regulations having provided for a settlement by arbitration of all questions which should arise under the policy, this court has no jurisdiction to deal with the subject, because the plaintiff has refused to concur in an arbitration. That there is no other objection raised by the answer I think is not only apparent upon the whole answer itself, but by the concluding paragraph in which the defendant states "That the plaintiff's remedy, if any, is at law only, and not in this honourable court, and we claim the same benefit of this objection as if we had demurred to the bill, or pleaded the same objection in bar of the further prosecution of this suit." The objection as to the materiality of the representations is contained in the first paragraph in which it is alleged that "The defendants have discovered since the date of the policy that the proposal for the insurance contained a material misstatement as to the condition of the ship, and the ship had not, in fact, been remodelled so lately as is alleged in such proposal, and we submit for the judgment of this honourable court, whether by reason of such misstatement as aforesaid the policy has or not been avoided or otherwise, and how affected." Now throughout the answer there is no suggestion whatever that the plaintiff's claim can be defeated upon any other than the two grounds I have mentioned. There is no suggestion of infirmity of title on his part. The plaintiff alleges that he was equitable mortgagee by deposit of the policy of insurance; the defendants say only that they know nothing about that. They raise no other objection to the plaintiff's title than that which is contained in the passage which I have referred to, in which they simply say that they do not know whether he has the interest which he claims. Then at the hearing a totally new issue is raised, one not to be found in the pleadings, not having any necessary connection with the facts as they appear in the pleadings, but which acquires very great importance and weight, because of the reference which is made to the case of *Turnbull v. Woolfe* (ubi sup.), which did in some respects resemble the present, and in which it was decided that a man who was not the true owner of a ship, but who had mortgaged it, having effected an insurance, and not having disclosed that fact, was incapacitated from suing in respect of a loss which had happened. The argument there turned upon a clause which is similar in most respects to the 15th clause and

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regulation existing here. The only material difference is that in the case before the court in *Turnbull v. Woolfe*, the important term was that upon some interest being acquired either by a mortgagee, assignee, or any other person in the policy, a deed should be executed by that person which would impress upon him the obligation of performing all the conditions which the assured ought to perform under the original policy. In the present case the regulation only requires that there shall be an undertaking given to that effect. The obvious meaning of this regulation is that, inasmuch as this is a mutual insurance company, and as each of the members is liable to contribute according to his proportion for any loss which may occur during the year for which the policy is to exist, it should not be in the power of the persons effecting an insurance to deal with the interest created, under the policy, and at the same time to escape from the burdens or leave the society without the security they have a right to expect from the terms of the policy. If the assured parts with his interest, then he is to substitute some other person, who at the time of acquiring his interest will undertake the business, and that in the case of *Turnbull v. Woolfe* was to be effected by means of a deed. In the present case it was to be effected by means of an undertaking, and although no doubt much has been said about a certain obscurity of expression contained in the 15th regulation, the general meaning of it is that which I have endeavoured to express. In this case Mr. Alexander, the plaintiff, alleges and proves that at a time subsequent to effecting the policy he became depositor of the policy for a valuable consideration, that he became entitled therefore to all the benefits that might result from the policy. He does not suggest that he was not also bound by all the obligations which attached to the insured, because it is a fact alleged and proved, and not contradicted, that for the whole period for which the policy was effected, all the calls and payments which ought to be made on the part of the assured have been made by him, so that if he had given an undertaking it would not have carried the matter any further. He has, in point of fact, without any such undertaking, performed all the conditions. Then the ship goes to sea and an accident happens, in consequence of which a loss is sustained. Now, consider what are the circumstances of the parties at the time of that loss. Vivian, the insurer, was there and then entitled to demand payment of the amount of the loss. If he had gone to Mr. Alexander he might or might not have procured from him the policy which had been deposited with him. Whether he did or not, either for Mr. Alexander or for himself, at that time he had a right to receive the moneys insured by the policy. Then, has anything happened to change that state of circumstances? Mr. Alexander has a right to all that Vivian could have demanded, and Vivian beyond all question could have demanded the amount of the loss which he had sustained by reason of the accident to the ship. But it is said that *Turnbull v. Woolfe* decided that a man who has insured his ship and who has before mortgaged the ship cannot enforce the insurance against the company unless he has complied with the requirements in that respect, in the case of *Turnbull v. Woolfe* executing a deed, and in this case giving an undertaking. If that case had been raised upon the pleadings it would have been necessary to

examine it much more closely and minutely than I have the means of doing at present. It cannot be said that according to the practice of this court, or any other of the rules by which the proceedings of the court are conducted, that parties should come to the court with plain issues joined between them, the subject of their dispute clearly ascertained, and that at the hearing a question totally different from anything to be found in the pleadings should be raised, and the court should be asked to determine it. That was not the case in *Turnbull v. Woolfe*, where the whole of the facts upon which the court decided were clearly upon the pleadings and in the evidence. Now in this case, bound as I am by the record, and bound as I am not to regard any other circumstances, I find it impossible to engage in any consideration of the point which Mr. Swanton has mainly relied upon, and which nobody can deny would have been of vital importance if it had been raised. For although I agree that there is no evidence of the existence of any mortgage, at the same time I cannot help feeling that the production of those registers gives rise to a sort of presumption that at the time when this insurance was effected there was an existing mortgage in favour of Mr. Alexander. That was a mortgage of a most notorious kind, as mortgages of ships always are, and without saying that this company were bound before they effected the insurance to ascertain or even to inquire whether the ship had been mortgaged, I say that they have to explain and to account to me now, before I can listen to their defence upon that ground, why in their answer they did not state that plain and important fact. If that had been done, I cannot tell what might have been the result of it. I cannot tell what the plaintiff would have had to say as to the existence of the mortgage, or as to its discharge, or as to any other circumstances that might be relative to it. The defendants have chosen not to raise that question by their pleadings, but rely upon this which I have mentioned, namely, that there was a material misrepresentation, and that the remedy is not in this court. How am I at liberty to go beyond the limit of this record? If I thought, as I do not, that the evidence was conclusive as to the existence of the mortgage, I could not possibly adopt it here, because it is a case which the defendant has not upon his pleadings tendered to the judgment of the court. Nor can any injustice be done by it, because I find that all the terms in the strictest manner have been complied with by the plaintiff in this suit, and that no wrong has been done to the defendants (unless indeed they succeed upon the misrepresentation), no infringement of their rules, except only the verbal non-compliance with the stipulations that upon a change of interest an undertaking should be given that the original owner's obligation should be performed. I think, therefore, that being bound, as I feel I am, by the issues raised here, I cannot entertain that question which was so plainly and conclusively decided in *Turnbull v. Woolfe*, and which I should not have ventured in the slightest degree to depart from or suggest any question respecting the propriety of. Then if the case is reduced to a question of material misrepresentation, in that I think that the defendants have plainly failed in their contention. In the course of the argument a good deal has been said about retelling, an expression not to be found in the

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pleaders, but the meaning of which is perfectly obvious. The insurance company, in the ordinary course of their business, sent a set of interrogatories to the person proposing to effect the insurance, requiring answers to them, and no fault is found with the answers except that which relates to the metalling. The question upon the subject is—how it was metalled? and the answer to it is—at Liverpool, in 1867. Upon that subject the evidence of the person by whom the repairs were executed is exceedingly clear and distinct. Mr. Clover says: "My firm received instructions in the month of March 1867, from the plaintiff to do certain repairs and alterations to the ship *Pilgrim*, in the plaintiff's amended bill of complaint mentioned; amongst other repairs, the metal sheathing of the said ship was completely overhauled and thoroughly repaired, and replaced with new where necessary." What I am asked to decide is, whether the answer I have read stating that the ship was metalled at Liverpool in 1867, is a material misrepresentation. It has been suggested that repairing a ship is not metalling a ship. I have no reason to think, and considering the ordinary expression which you apply to a house, I do not know why repairing is not a very proper mode of describing the metalling of a ship, because it cannot be necessary when a part of a ship's metalling has become defective, and only a part of it is to be renewed and replaced, that in order to metal a ship you should scrape off every inch of her sheathing, and it is said that you cannot answer the question when the ship was metalled, unless you are able to prove that every square inch of her metalling was new upon that occasion. It is not suggested on the part of the defendants, there is no evidence whatever upon the subject. It is said that in Lloyd's Register—the admission of which as evidence is of course not to be taken without grave consideration—it is described as having been done in 1865, and then only partially done. But how does the fact that in Lloyd's Register the ship is stated to have had something done to her in 1865, interfere with or diminish the weight of the statement by a competent witness, who says that the ship was completely overhauled and thoroughly repaired and remetalled with new where necessary, that all was done in a workman-like and substantial manner? Then follows this passage, "And in my opinion made the said ship as good a risk for insurance as if the said ship had been entirely remetalled." There is great difficulty, no doubt, in admitting the evidence of experts without qualification. Nobody is more reluctant than I am, I think, to adopt implicitly what experts say upon all occasions. But I do not read this in the sense of the cases which were referred to as expressing an opinion to supersede the judgment of a jury, which has sometimes been attempted. But here an artisan, a man accustomed to the business of mending, repairing, and building ships, and knowing that the state and condition of a ship is the material thing to be considered by an insurance company, says that after he had overhauled and thoroughly repaired the ship in question, she was as good risk for insurance as if she had been entirely remetalled. That is not an expression of mere opinion, but the expression of a fact founded upon personal professional knowledge. He says that no ship which had been entirely remetalled would have been better worthy of insurance than that was after he had finished her. The other

witness on this subject is an underwriter in London, who having read the affidavit that I have just mentioned, says, "In my opinion, if the ship was repaired and overhauled in the manner mentioned in the said affidavit of the said George Robert Clover, the statement in the said exhibit, D, is substantially correct and true, and it would be immaterial for the purpose of affecting insurance upon her, whether or not the said ship had then been entirely remetalled, or that the metal of the said ship had been completely overhauled, and thoroughly repaired, and replaced with new where necessary." Then he adds that which is objected to, "the statement that under such circumstances the ship had been remetalled would not have any substantial effect upon the premium which would be required for effecting such insurance." There again he is speaking of that which is within his own personal knowledge, and his own daily avocations made him acquainted with. He being an underwriter says with the other witness that thoroughly repairing a ship's bottom is as good a thing as putting new sheathing upon the ship's bottom. Against that evidence there is not a suggestion that these witnesses are mistaken. It is true that in reply, but that would not have prevented the defendant endeavouring to give evidence if he could. But there is no suggestion in the answer that the remetalling was not sufficient, unless I refer to that in the eleventh paragraph, where there comes another faint suggestion, "that having regard to the time which had in fact elapsed since the ship had been metalled, as appears from the entries in respect thereof in the books kept for that purpose at Lloyd's, we think it highly probable that such metal on the bottom was, quite irrespective of any damage sustained on the particular occasion in question, much wrinkled." There is as faint a suggestion as can be made, but quite as much as the gentlemen thought it right and safe to make. But losing sight entirely of the fact that in 1867 the ship had been thoroughly overhauled and repaired, and what was defective supplied by new materials, they adopt the date of 1865, as a reason why they say it is no wonder some of the metal was wrinkled because nothing had been done to it since 1865. Looking at it as a matter of evidence upon this subject of material misrepresentation, I think the plaintiff's case is proved in the most distinct manner, without any attempt to meet it. Excepting some of the comments which I have listened to from Mr. Swauston and Mr. Miller as to the terms in which the evidence is given, I think the evidence is very clear and distinct, and I think the answer that the ship was metalled in 1867 is proved to have been a true representation. Upon the question about the arbitration, I do not read the arbitration clause as meaning that if such a question as this arose it must of necessity be referred to arbitration. If a question arose between the parties about the state of the ship, as it did, and the plaintiff was ready to go to arbitration upon that and a variety of circumstances belonging to and not going beyond the subject of the policy entered into, that might very properly be and ought to be disposed of by arbitration. It is a cheaper and more satisfactory mode of settling any such disputes, and the arbitrators are better, perhaps, qualified than any other tribunal that could be selected for the purposes of determining such disputes. But the question of law which is here raised is not a question which, under the arbitra-

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tration clause, it was intended to submit to ship-owners or underwriters. I think the plaintiff's conduct in that respect was exceedingly reasonable and fair. He was willing to go to arbitration upon the only point which he thought was to be concluded by the arbitration. The insurance company seem also at one time to have been inclined to go to arbitration. But they insist as a term that the arbitrator shall decide this legal question raised between the plaintiff, and then I do not think that that was on their part at all reasonable, and I am satisfied that it does not exclude the jurisdiction of this court. I am of opinion, therefore, that the plaintiff has established his claim upon these pleadings, upon which alone I decide, and that he is entitled to that relief which by the bill he asks.

Solicitors for the plaintiff, *Thomas and Hollams*.
Solicitors for the defendants, *Stocken and Jupp*.

COURT OF COMMON PLEAS.

Reported by H. M. HOCKING and R. A. KIRKLAND, and H. F. POOLEY, Esqrs., Barristers-at-Law.

Tuesday, May 28, 1872.

DE MATTOS v. SAUNDERS.

Policy of insurance—Stranding—Partial loss—Mutual credit of premiums—Set off.

Insurance was effected on a cargo of salt from Liverpool to Calcutta. From stress of weather the ship put into the Bristol Channel for safety. She lost both her anchors and her mainmast, and not being able to reach a harbour was, with the assistance of two steam tugs, towed on to a bank outside Cardiff.

The salt was much damaged and stained, part of the cargo being destroyed.

The salvors having instituted proceedings in the Admiralty Court to obtain payment for the services rendered by them, the cargo was sold by auction, but only fetched enough to pay the salvors and the expenses of suit. The plaintiff had assigned the bill of lading and the policy of insurance for on advance, and he now sued on behalf of the assignee thereof. The plaintiff had since become a bankrupt, and executed a deed under the Bankruptcy Act 1861.

The defendant denied that any sufficient notice of abandonment had been given him, and also assuming his liability claimed to set off the money due on account of other premiums unpaid by the plaintiff.

Held, that the plaintiff was entitled to recover for a partial loss.

Also, that there was a stranding of the ship.

Held, also, that the defendant was not entitled to set off the premiums by way of mutual credit.

THIS was an action brought by the plaintiff against the defendant on a policy of insurance effected upon a cargo of salt shipped on board the *Margaret Quale*, and the increased value thereof by prepayment of freight.

The defendant pleaded, first, that the ship was totally lost; secondly, that the plaintiff did not prepay the freight; thirdly, an equitable plea of mutual credit, alleging that the plaintiff duly executed a deed for the benefit of his creditors, under the Bankruptcy Act 1861, and that at the time of his making such deed he was indebted to the defendant, and that at the time of the defendant

giving the plaintiff credit he had no notice of any act of bankruptcy committed by the plaintiff.

The cause was tried before Erle, C.J., at the sittings in London after Michaelmas Term, 1865, when a verdict was found for the plaintiff for the amount claimed, subject to the opinion of the court upon the following case:

1. The plaintiff is a merchant carrying on business in Leadenhall-street, and was until lately engaged in shipping coals and salt to India and elsewhere.

2. On the 25th Sept. 1863, the plaintiff entered into a charter-party with one William Quale, the owner of the *Margaret Quale*, and thereby chartered that vessel to proceed from Liverpool or Calcutta.

3. In pursuance of the charter-party the *Margaret Quale* was loaded with 1059 tons of stored salt and 259½ tons of butter salt, for which on the 29th Oct. 1863, the master signed a bill of lading.

4. On the 29th Oct. the plaintiff in accordance with the terms of the charter-party, gave to the owner of the ship two acceptances, one at two months for one-third of the freight, and the other at six months for one-third of the freight, making together the sum of 992l. 19s., and the following receipt was endorsed on the bill of lading, "Received in advance of the within freight, 992l. 19s., being two-thirds payable as per charter-party, Liverpool, 1863, 29th Oct.—W. Quale." These acceptances were dishonoured when they became due.

5. The following is the invoice made out by the plaintiff, showing the cost of the cargo, and the increased value thereof, by the aforesaid prepayments of freight:

Invoice of a cargo of salt shipped at Liverpool for Calcutta per *Margaret Quale*, and consigned to Messrs. John Ogle and Co. there, for sale on account and risk of the undersigned, returns to Messrs. Mollat, March, and Co.

1059 tons stored salt, 12s. per ton	£ s. d.	635 8 0
259 ½ „ butter salt, 10s. 6d. per ton		188 14 9
100 mats at 4s. 6d. per doz.		22 10 0
Customs, 1s. 6d., B. lading, 2s. 6d.		0 4 0

	£ s. d.	846 16 9
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Freight at 21s. per ton	1490 8 6
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Loss payable in Calcutta	496 9 6
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	992 19 0
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Insurance 990l. at 80 per cent.	39 4 0
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Policy duty	2 5 0
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	41 9 0
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	1861 4 9
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London 30th Oct., 1863, commission at 2½ per cent.	47 0 7
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	1923 5 4
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(Signed) W. N. DE MATTOS.

6. On the 30th Oct. 1863, the plaintiff effected the policy of insurance now sued on, on 1418 tons of salt, and increased value thereof by prepayment of freight valued at 1700l.

7. The defendant underwrote the said policy for 85l.

8. On the 30th Oct. the plaintiff arranged with Messrs. Ogle and Co. of London, for an advance of the sum of 1446l. 4s. 2d. against the said bill of lading and policy of insurance, and agreed to consign the cargo to their Calcutta correspondents. The bill of lading and the policy of insurance were accordingly handed to Messrs. Ogle and Co. by the plaintiff, who procured Messrs. Mellat, March,

and Co. of London, merchants, to advance to them the sum of 1446l. 4s. 2d. upon their delivering to them the bill of lading and policy of insurance as well as other securities. This sum so obtained by Messrs. Mollor, March, and Co. was, on the following day, paid by Messrs. Ogle and Co. to the plaintiff in pursuance of the aforesaid arrangement.

8. On the 20th Nov. 1863, the *Margaret Quale* left the Birkenhead docks in tow of a steam tug, and shortly afterwards encountered severe weather. On the 27th Nov. the steam tug left the *Margaret Quale*, and she then proceeded under sail on her outward voyage. From the 27th Nov. the weather continued very bad, and on the 2nd Dec. she sprung a leak, and the master of the ship finding soon afterwards that the pumps were choked, made for the Bristol Channel in order to put into some port.

10. On the 4th Dec., at 8 p.m., the master finding it impossible to weather Hartland Point, both anchors were let go, but as they did not hold the ship, the mast's head had to be cut away, and on the same day the mate and four of the crew were dispatched for assistance.

11. Between the 4th and 7th Dec. the ship's anchors were slipped and the vessel encountered a variety of disasters not necessary to describe. During that time salvage services were rendered to her by the smack *Ranger*, of Clovelly, and the *Pilot* and *Iron Duke* steam tugs of Cardiff.

12. The said tugs shortly afterwards towed her on to the east bank in the Penarth Roads, where she lay right on her port side for several tides. Whilst she was so lying there she sustained injury by straining in consequence of the strong current, her want of anchors and the damage she had previously sustained.

13. It is usual for vessels to bring up to anchor on the said east bank, there to take the ground and wait at anchor for sufficient water to enable them to enter the Cardiff Docks.

14. On the 10th Dec. the two tugs towed the *Margaret Quale* into Cardiff East Dock, where she was at once taken possession of by Mr. Millar, receiver of wreck of that port. A few days afterwards the ship and cargo were arrested in two salvage suits which had been instituted in the Court of Admiralty in the sums of 1500l. and 3000l. on behalf of the smack and two steam tugs in respect of the salvage services so rendered by them as aforesaid. In these salvage suits the plaintiff did not put in bail, and the cargo consequently remained under arrest.

15. On the 26th Dec. Mr. Millar, who was also Deputy Marshal of the Admiralty Court, proceeded to discharge the cargo in pursuance of a decree of unliability made in the said salvage suits. The discharge was completed on the 21st Jan. 1864, when the salt, which weighed 1227 tons, was warehoused in the Butte Dock, the residue of the cargo having been washed or pumped out of the ship during the voyage.

16. In the said two salvage suits it was agreed between the proctors for the salvors, and Mr. Elmslie, the solicitor for the plaintiff, that the value of the cargo salvaged should for the purpose of those suits be taken to be 8000l. At the time when this agreement was come to Mr. Elmslie had not however informed himself of the actual value of the cargo.

17. On the 28th May 1864, the Court of Admiralty awarded in the two salvage suits the

sums of 133l. 6s. 3d., and 66l. 13s. 4d. to the two tugs respectively as the remuneration payable to them in respect of the salvage of the cargo.

18. When the cargo was discharged at Cardiff it was found to be in a very damaged condition, arising in the following manner from perils of the sea. Sea water which after having come in contact with the iron bolts of the ship fell upon or otherwise reached the salt, had caused it to be coloured with brownish and yellowish specks. A cargo of salt so discoloured is not so merchantable at Calcutta, and in order to have made any part thereof available for sale at that port, it would have been necessary to have picked out such portions as were perfectly clean, or only very slightly discoloured, and to have collected the same for shipment. It would have been possible in this manner to have picked out and collected 300 or 400 tons of salt sufficiently clean to be saleable at Calcutta. This operation, however, would have been attended with great difficulty, and it is doubtful whether the salt so collected would have fetched at Calcutta a price exceeding the import duty payable at that port. Such import duty was about 9l. 2s. per ton, and the price of perfectly clean salt at Calcutta was, including duty, about 12l. 10s. per ton.

19. The plaintiff, who had abstained as aforesaid from putting in bail in the said Admiralty suits, did not in any way interfere with the salt, and in Aug. 1874, Mr. Millar, in pursuance of a commission of appraisement and sale, issued by the Court of Admiralty, caused the salt to be appraised and valued, and the same was accordingly appraised and valued at the sum of 245l.

20. Shortly afterwards, in pursuance of the same commission of appraisement and sale, Mr. Millar having advertised the sale in the usual manner, put up the salt to auction. There was, however, only one bid for the salt, viz., a bid of 2s. per ton. This bid was not accepted by Mr. Millar, who in the following Sept. sold the salt by private contract for the sum of 240l.

21. The expense of discharging, weighing, and placing the salt in the warehouse amounted to 76l. 14s. 3d., and the warehouse rent up to the time of the sale amounted to 158l. 11s. These expenses, which were paid by Mr. Millar, amounted together with his ordinary fees and proper expenses as deputy marshal to the sum of 240l.

22. As regards the ship, she was placed in a dry dock at Cardiff on the 13th Feb. 1864, and was there surveyed a few days afterwards. All the damage she had sustained might have been repaired in three or four months at an expense of 6700l., and when so repaired she would have been worth 8000l., and would have been as good a vessel as she was at the commencement of the voyage, and perfectly seaworthy for carrying any dry and perishable cargo. She was, however, actually repaired at a cost of 13,331l. These repairs, which were completed in Feb. 1865, made her a much better ship than she was at the commencement of the insured voyage, although her value when so repaired was less than the said sum of 13,331l.

23. In March 1865 the said ship, under the name of the *Bockingham Castle* sailed with a cargo from Cardiff.

24. Certain correspondence passed after Jan. 1864 between the following persons, the plaintiff, Mr. Quale, the owner of the said ship, Mr. Sercombe, the broker, who effected the policy sued on

C. P.]

DE MATTOS v. SAUNDERS.

[C. P.]

and who communicated to the underwriters the information he received in the letters contained in the said correspondence, Mr. Elmalie who acted as solicitor for the plaintiff, and also for Messrs. Ogle and Co., Messrs. Duncan, Squarey and Blackmore, the solicitors for Mr. Quale and Messrs. Mollur, March, and Co., the merchants already mentioned in this case.

25. On the 4th Jan. 1864, the plaintiff executed a deed of inspection in accordance with the provisions of the Bankruptcy Act 1861, and was at that time indebted to the defendant in the sum of 47l. 15s. 7d. The defendant has assented to the said deed, and has received thereunder two several dividends upon the said debt amounting together to the sum of 24l. 13s. 9d.

26. The said sum of 1446l. 4s. 2d. has not been repaid by the plaintiff to Messrs. Ogle and Co., nor by the latter to Messrs. Mollur, March, and Co., and this action is brought in the name of the plaintiff by and on account of Messrs. Mollur, March, and Co., in whose hands the bill of lading and policy of insurance still are.

27. The court is to be at liberty to draw all such inferences of fact as a jury would be justified in drawing. The question for the consideration of the court is, whether under the circumstances stated in this case, the plaintiff is entitled to recover on the aforesaid policy from the defendant. If the court shall be of opinion that the plaintiff is entitled to recover for a total loss, then judgment shall be entered for the plaintiff for such sum as the court shall direct, together with the costs of suit.

If the court shall be of opinion that the plaintiff is entitled to recover for a partial loss only, then judgment shall be entered for the plaintiff for such sum and upon such terms as to costs and otherwise as the court shall think fit, the court being at liberty to direct any further inquiry it may think proper for the purpose of ascertaining the sum which in such case the plaintiff is entitled to recover from the defendant. If the court shall be of opinion that the plaintiff is not entitled to recover in this action then judgment shall be entered for the defendant with costs of the defence.

Butt, Q.C. (C. Russell with him) for the plaintiff.—First, there was an absolute total loss of the salt though it existed in specie in a damaged condition, in consequence of the Admiralty proceedings, and the plaintiff could not reasonably have been expected to hail it.

Roux v. Salvador, 3 Bing N. C. 206;

Mullitt v. Sheddin, 13 East, 304;

Stringer v. English and Scottish Marine Insurance Company, L. Rep. 4 Q. B. 676; 3 Mar. Law Cas. O. S. 440;

Phillips, on Insurance, cap. 17, sect. 12.

[On this point the COURT intimated their opinion that there was no total loss.] Secondly, there was a stranding: [*Corcoran v. Gurney, 22 L. J. 113, Q. B.*] In *Kingsford v. Marshall* (8 Bing. N. C. 458), where upon the ehging of the tide a vessel took the ground in a tid; harbour in the place it was intended she should, but in so doing struck against some hard substance by which two holes were knocked in her bottom, and the cargo damaged, it was held there was no stranding, but I cite it as an example that taking the ground is not a stranding within the meaning of the policy; but when she is put aground in consequence of sea peril then it is a stranding. The other side rely on the 13th paragraph, but

this ship had no anchors, and she did not therefore take the mud bank in the ordinary way. [WILLES, J., Tannton puts the case well in *Wells v. Hopwood* (3 Barn. & Adol. 20), where he says that although it is most difficult to reconcile the cases this distinction appears to be bedodnoible, viz., that in instances where the event happens in the ordinary course of navigation, as from the regular flux and reflux of the tide, without any external force or violence, it is not a stranding, but where it arises from an accident, or out of the common course of navigation, it is. The difficulty consists in the application of the rule.] Thirdly, the defendant cannot set-off premiums because the plaintiff is suing as trustee.

Sir G. Honyman (J. C. Mathew with him) for the defendant.—There was no stranding, because the vessel was beached intentionally, and in an ordinary place. The onus is on the plaintiff; there is no allegation of loss by stranding. [THE COURT.—That is not necessary: it is sufficient to aver a loss by the perils insured against.] He cited.

Wells v. Hopwood, 3 B. & Ad. 20;

Bishop v. Portland, 7 B. & C. 219.

As to the mutual credit plea he relied on sect. 197 of 24 & 25 Vict. c. 134. [WILLES, J.—No doubt it is within the clause if it is the plaintiff's debt, or one which would have passed to the assignee. You must consider whether De Mattos had equitably assigned, for the bankruptcy law only attaches to that which is a debt at law and in equity. He referred to *Turner v. Thomas* (L. Rep. 6 C. P. 610; 24 L. T. Rep. N. S. 879.) There was an inspectorship deed, and no assignment was made. At that time the debt was not due to plaintiff. He also cited

Wilson v. Gabriel, 4 B. & S. 242; 8 L. T. Rep. N. S. 502.

WILLES, J.—After the full argument and discussion that has taken place on each point raised in the present case, it seems unnecessary that we should at all hesitate as to the judgment to be pronounced, although the case is undoubtedly one of very great importance. Our judgment must in my opinion, be for the plaintiff for a partial loss. It has been contended that the partial loss was converted into a total loss by the seizure of the salvors and by the proceedings taken in the Court of Admiralty; but that contention cannot hold good. The proceedings in question are not at all the necessary consequences of sea damage, although in this case they were the natural and necessary consequence of the particular sea damage which occurred; and the assured is entitled to recover, not in respect of the proximate consequences of the particular sea damage, but in respect of the consequences of sea damage in general. There is, however, in the present case a link wanting between the damage and the seizure by salvors, and the subsequent proceedings in the Court of Admiralty. If these facts be taken as having the effect of converting a partial loss into a total loss, we arrive at the absurd conclusion, that, if proceedings are taken for a false salvage claim, that circumstance alone would suffice to make a total loss. There is nothing here to convert the sea damage and the proceedings by salvors, so as to constitute a total loss. The cases cited by Mr. Butt, and on the authority of which he founds his argument, are easily distinguishable. In those cases there was a hostile seizure, the natural consequence of which is that the ship is taken into a foreign prize court and condemned. In

such a case you have a hostile seizure to begin with, and all that follows is accessory to the fact. Those cases, therefore, do not apply to the present. Although, however, there is no total loss, there is a partial loss, or a total loss of part—which ever you may please to call it. It is, therefore, not within the policy, unless it is a general average loss (which it is not) or a loss occasioned by the stranding of the ship. It becomes, therefore, necessary to consider the question whether there was a stranding of the ship. [After stating the facts, his Lordship continued.] By reason of the distress to which the ship was reduced, she had to be laid in a place out of the ordinary course, and in a position in which she would not ordinarily be placed. It is contended on behalf of the underwriters, that upon the facts we ought to conclude that this happened in the ordinary course of things, and reliance is placed on the 13th paragraph of the case; but, considering the dangerous position the ship was in under the circumstances stated in the preceding paragraph of the case, we come to the conclusion that she was lying in an unusual place, and had been brought there under unusual circumstances; for it is not to be supposed that under ordinary circumstances a ship would take the ground in such a way as to sustain severe straining. I feel bound to concur in Sir G. Honyman's contention that the mere fact of injury having been sustained, if the ship had been beached in the ordinary course of things, would not convert a purposed settling down into a stranding; but it is impossible to help considering such damage as an element to be dealt with whether the stranding was in the ordinary course of things or not. Adopting the principle laid down by Lord Tenterden, C.J., in *Wells v. Hopwood*, I come to the conclusion that the beaching did amount to a stranding within the meaning of the policy. The remaining question to be dealt with is whether the defendant can set-off sums due to him for premiums. Now it is clear that this claim could not be established under the statutes set-off, nor under the ordinary law applicable to compensation; because it is a rule universally recognised that you cannot set-off liquidated against unliquidated damages, unless in a case where both arise out of the same transaction. But it is on the bankrupt laws that the defendant relies, and if the plaintiff or his assignee had been suing in his own right, the claim to a set-off would doubtless, under sect. 197 of the Bankruptcy Act 1861 (24 & 25 Vict. c. 134), be a good one. But the plaintiff is here suing in the right of a third person, who had made advances, and therefore the bankrupt law is clearly inapplicable, because the assignee of a bankrupt only takes property of which the bankrupt can dispose, and to which he is entitled both at law and in equity. The claim, however, on which the plaintiff in this case relies is one which would not pass to the assignee in bankruptcy. It is, however, unnecessary to consider this matter further as the law is clearly laid down in *Scott v. —*, (Willes, 400); and the case of *Turner v. Thomas* decides that the mutual credit clause only applies to the winding-up of the estate as between the bankrupt and his creditors. Our judgment must be for the plaintiff.

KEATING, J. concurred. Judgment for plaintiff. Attorneys: Hillyer, Fenwick, and Co.; Walltons, Bubb, and Walton.

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs.,
Baristers-at-Law.

Tuesday, April 23, 1872.

THE LIVER ALKALI COMPANY (LIMITED) v. JOHNSON.

Common carrier—Owner of barges—Letting same to anyone for particular voyages—Liability.

The defendant was the owner of several barges, which he was in the habit of letting out to hire to any one of the public to convey goods from the Liverpool docks to different places on the river under his own care, but he was in the habit of carrying for only one party at a time for the same voyage, and under no special contract. Under these circumstances the defendant let a barge to the plaintiffs at Liverpool to proceed some miles up the river Mersey, to a place called Widnes, and there take in a cargo of salt cake for the plaintiffs, and bring it back to Liverpool. Upon its voyage back with the cargo it was wrecked in consequence of a fog, without any negligence on the part of the defendant, and the cargo was lost.

Held, that the defendant was a common carrier, and as such liable to the plaintiffs for the value of the cargo.

This was an action brought to recover the value of a cargo of 60 tons of salt cake, of the value of 179*l.*, which was lost whilst in the barge of the defendant in the river Mersey. It appeared that the defendant was the owner of several barges, which he was in the habit of letting out to hire to anyone who chose to engage them to convey goods from the Liverpool docks to different places on the river under his care, and that he never carried the goods of more than one party at a time. There was no special agreement upon the subject between the plaintiffs and the defendant; but the defendant in the ordinary way let one of his barges to the plaintiffs to proceed to a place some miles up the river called Widnes, to take in there a cargo of salt cake and bring it back to Liverpool. Upon its voyage back to Liverpool the barge was wrecked and the cargo lost in consequence of its being run ashore during a fog. At the trial at the last summer assizes for Liverpool, before Martin, B., the jury found that there was no agreement that the defendant should be a common carrier, and also that there was no negligence on his part. A verdict was taken for the plaintiffs, with leave for the defendant to move to enter it for himself if the court should be of opinion that there was no evidence of his being "a common carrier."

A rule nisi having been obtained accordingly.

Aepinall, Q.C. and T. H. James, showed cause.

—The question is, whether or not the defendant was a common carrier, for if he were such he would be liable, the loss not having occurred either by the lot of God or the Queen's enemies. It is not necessary to constitute a party a common carrier that he should carry to or from any fixed termini: (*Lyon v. Mills*, 5 East, 428.) The defendant held himself out to carry goods for anyone, though he took the goods of only one party in his barge at a time. The true criterion is laid down in *Ingate v. Christie* (3 Car. & Kir. 61). In that case Alderson, B., said, "Everybody who undertakes to carry for anyone who asks him is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for

[Ex.]

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[BAIL.]

everyone? If a man holds himself out to do it for everyone who asks him, he is a common carrier; but if he does not do it for everyone, but carries for you and me only, that is a matter of special contract;" and in summing up he says, "If a person holds himself out to carry goods for everyone as a business, and he thus carries from the wharves to the ships in harbour, he is a common carrier." They referred also to

Morse v. Slue, 1 Ven. 190, 238;
Story on Ailments, paragraphs 495, 496;
Webb v. Chapman, 2 Kelly's American Rep. 353;
Cogge v. Bernard, 3 Ld. Raym. 309.

But, Q.C. and C. Russell in support of the rule. — The facts do not show that the defendant was a common carrier; he did not hold himself out as such. In this case there was a hiring for a particular job. The defendant did not carry for the public generally. [MARTIN, B.—He carried for one person at a time, certainly, but he carried for anyone.] That is opposed to the idea of being a common carrier. The court will not fix a liability unless the evidence is clear. [BRAMWELL, B.—A common carrier is bound to carry goods for anyone if a proper sum is tendered. Would the defendant have been liable for refusing to carry?] It is submitted that he would not be liable. There is really no difference between a charter-party and this agreement. He agrees for each voyage. The defendant was to take his cargo to Widnes for a particular cargo. A contract was made at Liverpool to bring down goods from a distant place. That does not constitute him a common carrier. [CLEASBY, B.—In *Maving v. Todd* (1 Star 72) it was held that the liability of a wharfinger who undertakes to carry goods from his wharf to the vessel in his own lighter is similar to that of a carrier. That, in principle, is very like this case.] They cited also

Pope v. Nickerson, 3 Story, 465;
Care v. Tirrell, 9 Allen, 259 (American).

KELLY, C. B.—I must say that this is a case by no means free from difficulty; the court, however, have bestowed upon it all the consideration which it deserves, and we accede to the neat and able argument of Mr. James, and, looking at the mode in which the defendant was employed, we think that his character of a common carrier is established. It seems to be perfectly well settled that a hoyman, ferryman, and masters of ships, are, as a general rule, common carriers, and here certainly the defendant was a master of ships, and therefore comes within the definition and meaning in *Cogge v. Bernard* (2 Ld. Raym. p. 218.) So far then, he comes within the definition of the common law as "a common carrier." Then comes the next question: whether he came within the doctrine that to be liable, he must exercise a public employment as a carrier? and here we come to the important definition applicable to all common carriers that they must hold themselves out to be ready to carry for all such persons as may be willing to employ them. Now it does not appear that the defendant ever objected to carry for anyone who was willing to employ him, and therefore he comes within this definition. What in this case appears to be the difficulty arises from the fact that he never was in the habit of contracting to carry for more than one party at a time for the same voyage, and that such voyage was in respect of one of the public alone, and there is no instance of his having contracted to carry the goods

of the public generally upon any one voyage, and the question is, whether that takes from the defendant the character of a common carrier? If the hiring of the vessel were in the nature of a charter-party, this liability would not arise, but, looking at the nature of the employment, we do not see that there is any single matter which can be assimilated to a charter-party. When the plaintiffs engaged the defendant to bring down the salt-cake, there was nothing in respect of what vessel was to be employed, and in fact the cargo may have been put upon any one of the vessels belonging to the defendant. Taking, therefore, all the facts into consideration, we are of opinion that the defendant was in this instance a common carrier, and that this rule should be discharged.

MARTIN, BRAMWELL and CLEASBY, BB., concurred.

Attorneys for the plaintiffs, J. and H. Quinn, Liverpool.

Attorneys for the defendant, Bateson and Co., Liverpool.

BAIL COURT.

Reported by JOHN ROSS, Esq., Barrister-at-Law.

Monday, June 10, 1872.

IONIDES v. PENDER.

Marine policy—Unseaworthiness—Plea of—Particulars—Barbarous master—Leaves to plead.

An action having been brought on a marine policy against an underwriter, the defendant obtained a Master's order granting leave to plead several matters, *inter alia* "That the vessel when she set sail on the insured voyage was not seaworthy for the same," upon condition that particulars of the plea should be delivered. The defendant consequently gave the following particulars, *viz.*, "That the master of the B. when she set sail intended to scuttle the said ship on her said voyage."

Thinking that these particulars did not fulfil the condition, the Master of the court discharged his order.

Held, that, as the evidence offered in support of the plea would be limited by the particulars, the plea should be allowed.

But *quære*, whether the fact stated in the particulars would be admissible as proof of unseaworthiness.

RULE to show cause why an order of a Master, by which a former order giving leave to plead several matters was discharged should not be rescinded.

An action having been brought against the defendant, an underwriter, upon a marine policy of insurance on goods, commission, and profits, an application was made to a Master for leave to plead several matters, *inter alia* unseaworthiness, fraud, and concealment; and the required order was granted, upon condition, however, that particulars should be delivered with the plea of unseaworthiness, which was "that the vessel when she set sail on the insured voyage was not seaworthy for the same." The defendant in consequence delivered the following particulars of the plea, *viz.*, "that the master of the B. when she set sail intended to scuttle the said ship on her said voyage."

These were, however, deemed by the Master of the court to be no such particulars as would satisfy the terms of the order, which he accordingly dis-

missed, and his second order discharging the first was upheld by Keating, J., at chambers; whereupon the above rule having been obtained,

F. M. White showed cause.—The particulars mean that the master had a design in his mind to scuttle the ship on the voyage. The plea limited thereby could only be good on the assumption of a warranty against a barratrous master. [HANSEN, J.—But may they not give all the particulars which can under the plea?] "Seaworthiness" includes a competent master for the ship, but not necessarily one who is free from criminal intent. Moreover, this man may have repented directly he left the port.

Watkin Williams in support of the rule.—The defendant will be bound by his particulars, and he surely has a right to put a plea of unseaworthiness on the record in case the plaintiff himself should prove that the ship was unseaworthy. It is laid down in *Tait v. Levy* (14 East, 481) that the master must be a fit and competent person. He would not be such if, for instance, he did not know a particular well-known port by sight, or was an habitual drunkard. And it is a breach of warranty if he is not fit and competent, for the underwriters do not undertake the risk of his fitness. They never meant to insure a ship with this vice, which existed at the commencement of the voyage. It alters the risk entirely. [QUAIN, J.—I want some authority to show that a plea of unseaworthiness is proved by evidence of a criminal intention in the mind of the master.] There is no case supporting that precise proposition.

HANSEN, J.—We are of opinion that this rule should be made absolute. Certainly this is a case in which it makes very little difference to the real question at issue which way we decide. But I am bound to say that the view I should have taken of the matter at chambers would have been this, viz., that the defendant could not make use of the plea for any other purpose than to give evidence under it of the fact mentioned in his particulars. The plaintiff could not be damaged from its remaining as it is. Then it remained for the judge at the trial to say whether the evidence tendered would be admissible or not. The only hesitation I have in acting on that impression is that my brother Keating has affirmed the Master's order; but still I think that I, sitting here, am bound to act upon my own view of the case, which is that these particulars should be allowed to stand, leaving it for the judge at the trial to determine whether the proposed evidence is admissible. The penalty of being compelled to give particulars is that you shall not be allowed to give other evidence than of the matters contained therein. Therefore I am of opinion that the order should be rescinded.

QUAIN, J.—I am of the same opinion. Although the plea appears frivolous, yet the moment we understand that a real question is intended to be raised, it is always best that a fair plea should be allowed, which has the aspect of raising a material question. Here the case really is that there was a conspiracy to scuttle the ship. That may afford a defence to the underwriters under various aspects—loss by perils of the sea, barratry of master, &c. I think, therefore, that, under the circumstances of the case, the order should be rescinded.

Rule absolute.

Attorneys for the plaintiff, *Thomas and Hollams*.
Attorneys for defendant, *Hillyer and Fenwick*.

AMERICAN REPORTS.

Collected by F. O. CHURCH, Esq., Barrister-at-Law.

NEW YORK COURT OF COMMON PLEAS.

ATKINSON AND HEWITT v. THE GREAT WESTERN INSURANCE COMPANY.

Barratry—What it is—Mere negligence—Intention—Stowing cargo on deck—Jettison.

Ninety bales of cotton, insured against barratry of the masters and mariners, were stowed upon deck, and were jettisoned in a storm. Before the ship sailed, one of her agents discovered that the captain was stowing cotton on deck, and opposed it, and desired him to send the cotton by another vessel. He advised the captain of the responsibility he was assuming, and told him substantially that, as he had signed clear bills of lading, he was bound, either to carry the cotton under deck, or to provide for it on deck by extra insurance, and that the insurance taken on a clear bill of lading would not cover cotton on deck. The captain, notwithstanding this remonstrance, continued to stow the cotton upon deck. This, it was contended, amounted to barratry, or "an act of wrong done by the master against the ship and goods." But the court

Held that it did not amount to barratry.

All the authorities on the law relating to barratry elaborately reviewed (a).

DALY, C.J. delivered the judgment of the court.—Among the risks insured against was a barratry of the master and mariners, and the question presented in this case is, whether the ninety bales of cotton were lost through an act which the law would denominate barratry on the part of the master. These ninety bales were stowed upon deck, and were jettisoned in a storm. They were a part of 202 bales covered by the policy, which, by the plaintiff's order, were shipped from Augusta, Georgia, to Charleston, South Carolina, by railroad, thence to be shipped to Liverpool by the barque *Victoria*, the master giving a clear bill of lading for the 202 bales, the plaintiff's agent having engaged freight for the whole by that vessel. For want of room in the *Victoria* the captain sent seventy-seven of the bales by another vessel, the *Albert*, which arrived safely in Liverpool. Thirty of the bales were stowed in the hold of the *Victoria*, and the remaining ninety were carried upon her deck, and in a violent storm were thrown overboard for the preservation of the vessel. Before the *Victoria* sailed, a merchant in

(a) There can be little doubt that the word barratry must be taken to include dishonesty, embracing in that term a wilfully wrongful act which does not amount to crime. We should state the principle thus:—Barratry is the unlawful, fraudulent, or dishonest act of the master or mariners by whatever motive induced causing damage to the owner of the ship or goods. According to the French law the term includes fraud, negligence, unskillfulness, and mere imprudence. The German law holds the underwriter responsible for "risk of dishonesty or default of any member of the crew so far as a loss may thereby be entailed upon the insurer." (Ger. Merc. Code, Art. 824, §. 6). The Americans consider that barratry covers non-feasance, as in failing to prevent an act injurious to the owners, gross and culpable negligence, and gross misconduct. It is hardly possible, in view of the decisions, to say that barratry in the English law covers negligence, even though it be gross, although it would be easy to put cases in which gross neglect amounts to dishonesty as against the insured. The tendency of our law is, however, in favour of the American and Continental interpretation.

Charleston, whose firm was acting as agents for the vessel, discovered that the captain was stowing cotton on deck, opposed it, and wanted him to send the cotton by another vessel. He advised the captain of the responsibility he was assuming, and told him substantially that, as he had signed clear bills of lading, he was bound either to carry the cotton under deck, or to provide for it on deck by extra insurance,—that the insurance taken on a clear bill of lading would not cover cotton on deck; but the captain, notwithstanding this remonstrance, continued to stow the cotton upon deck. This, it is claimed, amounted to barratry on the part of the master, within the legal meaning of that term, in the comprehensive sense in which it has been defined by Lord Hardwicke, as “an act of wrong done by the master against the ship and goods.” *Levin v. Suasso*, *Portleth Dict. Assurance*, which is commended by Arnould as the tersest and perhaps best definition of the word. (Arnould on Insurance, 821, note A.) This definition of Lord Hardwicke is too general to be of much practical value in determining whether the act of the captain in stowing the ninety bales of cotton upon deck, without providing for the increased peril by extra insurance, was or was not barratry. It was an act of negligence for which he or the owner of the ship may have been responsible, and in that sense was a wrong to the goods or the ship within the language of Lord Hardwicke; but it does not necessarily follow from this that it was what the law denominates barratry. What was said by Lord Hardwicke, moreover, has not the weight of a decision. It was but a general observation. The question in the case was, not whether barratry had been committed, for the captain there was the general owner of the ship, which he had bottomried and mortgaged, but of which he had the control and navigation, and the point determined by the court, so far as can be gathered from the imperfect report of the case in an elementary work, was that the owner of a ship could not, either at law or in equity, be guilty of a barratry concerning the ship. In the solution of the question before us, therefore, we must look beyond this definition to get a clear idea of the exact legal meaning of barratry, and the inquiry is by no means an easy one, for the question is one that has greatly perplexed the courts, and from what has been said respecting it, in comparatively recent cases, the meaning of it has become nearly as uncertain now as when the question was first agitated in Westminster Hall one hundred and fifty years ago. It was first considered by the English courts in 1724, in the case of *Knight v. Cambridge*, reported in 8 Modern Rep. 230, afterwards in 2 Ld. Raym. 1349, and again in *Strange*, 841. In the first report, in 8 Modern Rep., the court is put down as saying that “Barratry is a word of more extended signification than only to include the master’s running away with the ship; it may well include the loss of his ship by his fraud or negligence;” but in the second edition of the volume it is stated in the margin, that fraud or negligence would not have been good; but this was afterwards omitted in the fifth edition, known as the corrected and standard one of the Modern Reports. In Lord Raymond’s report of the case, which is a very brief one, he states that the ground was taken that, as the owner of the goods has his remedy against the owner of the ship for any prejudice he receives through the fraud or negligence of the master, there is the less reason that the in-

surer should also be liable to him for the act, as an act of barratry, and that if barratry imports fraud, it does not import neglect; the allegation having been that the ship was lost through the fraud and neglect of the master; a point which the court met by saying, “Barratry imports fraud, and he that commits a fraud may properly be said to be guilty of a neglect, viz. of his duty!” to which the court added the general observation that barratry was not confined to the running away with the ship “because it imports any fraud.” The report in *Strange* is still more brief, but if correct, more important, because it states that the objection taken was, that the allegation fraud and negligence of the master was more general than the word barratry, and was, therefore, not within the policy, and that the court said: “The negligence certainly is not but the fraud is.” . . . It further appears in respect to this case, from the argument of Buller, J., and the statement of Lord Mansfield in *Vallejo v. Wheeler*, Cowp. 143, that the act of the master in *Knight v. Cambridge* was sailing without paying the port duties, which Buller argued might have been by accident as well as by design, but which, as it subjected the ship to forfeiture, was held to be barratry. Lord Ellenborough afterwards referred to a manuscript note of Mr. Ford, in respect to the question in this case of *Knight v. Cambridge*, which, after stating that fraud was barratry, added: “If the master sail out of the port without paying port duties, whereby the goods are forfeited, lost or spoiled, that is barratry.” This, Lord Ellenborough thought, was probably the question decided upon the trial, and at the argument, (*Earle v. Rowcroft*, 8 East, 126), and the act of the captain may possibly have been regarded as coming under the category of fraud, upon the ground that the design or effect of it was to defraud the government of the port duties. The next case was *Stamma v. Brown* (*Strange*, 1173), on which it was held, that a deviation from the voyage by the master for the benefit of the owners was not barratry, although it led to the destruction of the ship and the loss of the goods insured, the court holding, according to the report in *Strange*, that to make it barratry, there must be something of a criminal nature, as well as a breach of contract. In a further account of this case, it is stated that Lee, C.J., defined barratry to be “some breach of trust in the captain, *ex maleficio*,” and said (it being a policy upon goods) “barratry must be *ex maleficio* with intent to destroy, waste, or embezzle the goods,” per Lord Ellenborough in *Earle v. Rowcroft* (*sup.*). The next case was *Elton v. Brogden* (*Strange*, 1264), in which the crew compelled the captain to return contrary to his orders. It was held that this was not barratry for two reasons. 1. That the act of the master was excused by the force which he could not resist. And 2. Because the ship was not run away with to defraud the owners. This was followed in 1774, by *Vallejo v. Wheeler*, reported in Cowp. 143, and more fully in Loft. 631, in which the legal meaning of the word was elaborately discussed; the argument of Allyn for the plaintiff, as reported in Loft, being especially distinguished for its research and learning. In the first case (*Knight v. Cambridge*, *sup.*) the court said that barratry came from *barat*, signifying *fraud* and *dolus* (fraud and deceit), for which it would seem, from the marginal note, the court relied upon the glossary of Dufresne and Du Cange, and the French dictionary of Faretier

In the succeeding case of *Stamma v. Brown, sup.*, the plaintiff's counsel cited in support of the same meaning the Italian and Spanish dictionaries, respectively, of Florio and Minshew, and in support of these lexicographers, Alleyn, in *Vallejo v. Wheeler*, cited this definition from Ferriere's *Dictionnaire de Jurisprudence*. "Barratrie en terme de marine est un tromperie ou une malversation qui se commet par patron ou capitaine d'un vaisseau, pour faire perdre les marchandises à ceux à qui elles appartiennent." The following from Savary's *Dictionnaire de Commerce*: "Barratrie de patron en terme de commerce et marchandise veut dire les larcins, les dissuagements et eltorations, des marchandise, qui peuvent causer le malice et l'équipage d'un vaisseau, et généralement tout les supercheres et malversations qui si mettent souvent en nege, pour tromper les marchand, chargeur et autres qui ont intérêt au vaisseau," and gave this definition of this word from Denisart's *Collection de Decisions Nouvelles*, etc., relative to the *Jurisprudence*; a work which had been published but some two or three years before in Paris: "Ce mot signifie malversation et tromperie par un capitaine ou patron de navire marchand, dans ce que a rapport à la qualité et à la quantité des marchandises." He also claimed that it meant deceit or malversation in the master, in the Ordinances of Louis XIV., article 28, and showed that the Ordinances of Rotterdam, number 43, and of Copenhagen, number 38, distinguished between barratry and neglect. Lord Mansfield, in delivering the judgment of the court, declared that the previous English cases did not afford any precise definition of what barratry was; that the nature of it had not been judicially considered or defined in England with accuracy, and then undertook to inquire into the etymology of the word, which ended by his leaving that inquiry no farther advanced than he found it. Aston, J., however, so far from agreeing with Lord Mansfield, expressed his astonishment that there should then be any doubt as to what was meant by barratry, and declared, as his language is reported in Cowper, that it "comprehended every species of fraud, knavery, or criminal conduct, in the master, by which the owners or freighters are injured," and still more strongly as his words are given in *Lofft*: "I think it (barratry) has always been the same in idea and general meaning, though differing in terms and not always settled in practice, *deceit, villainy, knavery, and fraud*," and the entire court united in the opinion that it is barratry where a master goes out of his course for the purpose of smuggling for his own benefit, in the course of which deviation the vessel and cargo are injured. The authorities referred to in this case by Mr. Alleyn show that as barratry was then understood in France, it meant, in general terms, fraud and malversation. But Emerigon, whose work was published some few years after this case was decided, gives it, at least in France, a much more extended signification. He says that it commonly implies the crime of which a captain is guilty in being faithless or treasonable to his office; that every fault into which a captain falls is not barratry, unless accompanied by deceit or fraud; but then, as contradicting this general rule, he adds, still, among us (the French), it comprises the case of simple faults, as well as that of fraud, and relies upon Valin and Pothier for the statement that in addition to all kinds of fraud, it embraces simple

imprudence, want of care or unskillfulness, either in the master or the crew (Emerigon by Meredith, p. 292). Boulay-Paty, in his edition of Emerigon, t. 1, p. 370, says, that the commissioners of the French Commercial Code intended by barratry only wilful infidelity, or treason to his duty, on the part of the master, or the seaman, but that the *Cour Royale de Rennes* decided that custom had given the word a more extended meaning, and that it included simple faults. If such a change has been brought about in France by custom since the adoption of the Code de Commerce in 1807, it has not been the case in this country nor in England, and with us the inquiry as to the meaning of the term is embarrassed by no such consideration. On looking into the authorities, moreover, to which Emerigon refers, I doubt if the question has ever been examined as carefully in France as it has been in England, and the onus referred to has probably grown up from the impressions conveyed by the observations of Valin, Pothier, and Emerigon, writers who gathered their idea of barratry chiefly, if not exclusively, from what is found respecting it in *Le Guidon de la Mer*, ch. V., § 6, ch. IX., the unknown author of which compilation had not very clear ideas about it, as Pardessus has pointed out (*Us et Coutumes de la Mer*, t. 2, p. 406, a 1, 3, edit. 1847). Pardessus' criticism of the first and third articles of the ninth chapter of *Le Guidon* being, that the author considers as barratry accidents or events (*evenements*) in which there is not and cannot be any fault in the master, by drawing a distinction between barratry on his part, which is obligatory (*forcé*) or voluntary (*volontaire*), a distinction which the learned commentator declares to be absurd, and as demonstrating that the author did not himself understand the subject on which he was speaking. The passages in *Le Guidon* respecting barratry, upon which Emerigon, Valin, and Pothier rely, are, even in the amended text of Pardessus, exceedingly obscure. They may be rendered in English substantially as follows: "Barat or Baraterie; changes or elterations by the master; changes which he makes in the vessel or the voyage; deviations, by going to other ports, places, or havens; malversations, robberies, larcenies, alterations, disguising the merchandise, all proceeding from the negligence of the master, or the crew; of which the insurer takes the risk, and indemnifies the insured; with the understanding, however, that if the owner, or his factor, is in a place where he can have justice, it shall be his duty, in the first instance, to proceed against the master, that the damage may be lessened out of the freight before he addresses himself to the insurer" (Ch. IX.) "On the other hand, if it is found that the loss or injury was caused from defects in the ship, as if the stays or hatches were not well fastened or caulked; or the vessel was not staunch from the want of repair, and through that cause the water entered and destroyed or injured the merchandise, the master bears the loss, which is to be deducted from the freight, without the insurer or the merchandise contributing. And, generally, the master is answerable for all which arises from his fault, or that of the ship, if he have wherewith to pay, or where the loss did not exceed the freight. If it exceeds, and he has not the means to make restitution, the insured is held to diligence by the law of Baraterie of the Master, and must make it appear that he did all in his power before he can

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come upon the insurer" (Ch. V, § 6; Cleviac. Ronen, 1671, pp. 213, 244). In the early commerce of the Mediterranean and the Baltic, as will appear from numerous passages in the *Consolato del Mare* and in other primitive maritime codes, the master and the ship were answerable for loss or injury to goods, arising from negligence or other culpable cause. And where he was not an owner of the vessel, which he commonly was, in whole, or in part, he was answerable for injuries to it through his fault. After the practice of marine insurance came into use in the thirteenth century, it was, in some of the maritime cities, customary to hold the insurer responsible for such losses, and in others it was not. And where the insurer was responsible, the practice was, no doubt, as stated in *Le Guidon*, that he was answerable only where the owner, after due diligence, was unable to obtain indemnity from the master. Magens, the author of the earliest English treatise upon the law of insurance, published in 1755, after referring to a policy made in Florence in 1523, and another made in Ancona in 1567, under which the insurer was answerable for the barratry of the master, and after pointing out the regulations upon the subject in the ordinances of Stockholm and Amsterdam, and that such a liability existed in the policies which were then, in 1755, made in London and in Antwerp, gives it as his opinion that the insurers are not answerable, under a barratry clause, for the small pilferings or extraordinary leakages proceeding from bad casks, or where the injury to the goods arises from bad stowage, or by their being put in a place exposed to wet, or from a deficiency in caulking of the decks, or otherwise (1 Magens, p. 75, 76, 50), showing that, at that time, negligence in this description was not barratry. In this connection, however, he refers (p. 51, vol. 1), to an ordinance of Florence, in 1523, which declared, that if the goods are stowed on deck with the permission of the insured, then the insurers are not answerable for the damages; but if the master stowed them on deck without the leave of the owner, or of the person who made the insurance, then the insurers shall be obliged to pay, and may have their redress against the master; which is substantially the case now before us. He refers also to another provision in the same ordinance, which he says declares that the insurer shall first pay and afterward go to law. The liability of the insurer in this early Florentine ordinance is predicated upon the remedy which it is therein recognised he had against the master, after paying the insurance; but the existence of any such remedy, under the system of law prevailing at the present day, there being no privity of contract between the insurer and the master, is denied by the elementary writers upon the law of insurance: (2 Phillips on Insurance, 2003.) Lord Kenyon, in a *Nisi Prius* case (*Bird v. Thompson*, 1 Esp. 339), thought that the insurers might maintain an action against the master when the loss paid by them was occasioned by his barratry. He admitted, however, that he "knew of no action of that sort ever having been brought," and it has been decided in several well-considered cases, that no such action can be maintained by the insurer against the incendiary, to recover for the loss paid upon a fire policy, or to recover from the person whose negligence caused the death, the loss paid upon a life policy, cases certainly analogous in principle: (*Bootham Insurance Co. v. Boshier*, 39 Me. 253;

Connecticut Ins. Co. v. The New York and New Haven R. R. Co., 25 Conn. 265.) Valin, in his commentary upon the ordinance of Louis XIV, infers that loss or injury arising from any fault or negligence in the master is barratry, and there is certainly a foundation for that construction in the very general language of the twenty-eighth article of that ordinance, and the opinion of Pathier is to the same effect. But it is to be borne in mind that when Valin wrote his commentary, the maritime law in France had fallen into great neglect (Reddie's Historical View of the Law of Maritime Commerce, part 4, ch. 4, § 6), and that Potbier, by his own admission, had given but little attention to maritime law, indeed, so little, that his inexperience, in the opinion of his editor, Estrangin, involved him in gross and palpable errors: (Meredith's Introduction to Emerigon, XIII, XXII, XXXVI.) When the full meaning of a word is obscure, and the extent to which it can be applied doubtful, the proper course is to inquire into its origin and history, which, if ascertainable, will disclose its exact and full meaning; for, etymology frequently sheds light where all other sources of inquiry fail. This was one of these eminent French writers attempted. Indeed, Emerigon knew so little respecting the term, that he speaks of it as a barbarous word, unknown to antiquity. In fact, such an inquiry at that time was difficult. Park, writing at the close of the last century said: "The derivations of barratry have rather tended to confound than to throw any light upon the subject; for its root has been so frequently altered, according to the caprice of the particular writer, that it is impossible to decide which is the true one:" (Park on Insurance, ch. 5.) This is rather an exaggerated statement. The previous inquiries in England had mainly been in the right direction, and the embarrassment was not so great as Park supposed, while the advances that have since been made in philological inquiries will enable us to trace the word to its origin, and to show that the English tribunals have been right in the construction they have put upon it, and that the French jurists have expressed opinions upon insufficient information. It came into use in England after the Conquest, as an Anglo-Norman word, signifying strife, contention or wrangling; being in that sense, as I infer, directly derived from an old French word *barrate*, signifying the tossing up and down of the contents in a churn (Cotgraves' French and English Dictionary, London, 1632), and was used in that sense by early English writers in several forms, *barratt*, *baret*, *barratte*: (Boucher's Glossary; Coleridge's Dictionary of Old English Words; Kelham's Norman Dictionary; Wright's Provincial Dictionary. It had also the further meaning of deceit and fraud, from another old French word *barat*, signifying deceit, trickery, or cheating, and which, like the other French word *barrate*, came from a common origin. From these sources, two words came ultimately into use in England, *barratry* and *barrator*, and Coke, in defining barratry, has left us a very clear idea of the legal meaning of both words. He is, says Coke, "a mover, stirrer up and maintainer of strife in three ways: 1. In disturbing the peace. 2. In taking or detaining the possession of houses, lands, or goods, which are in controversy, by craft or deceit. 3. By sowing calumnies, etc., whereby discord ariseth between neighbours:" (Case of Barratry, 8 Co.

366.) We have here both meanings, strife and contention, and deceit or fraud, growing out of the compound origin and synonymous use of the word. Indeed, in the sense of strife and contention, it was used in connection with policies of insurance as late even as the middle of the last century. Kersey, in his edition, in 1707, of Phillips' *New World of Words*, gives, as the sole definition of *barratry*, "a word that is used in policies of insurance for ships, signifying dissensions and quarrels among the officers and seamen," and Martin, in his *English Dictionary* of 1748, says, *barratry* "in insurance, signifies dissensions and quarrels among officers and seamen." But Kersey, who published a dictionary of his own between these periods, incorporates it simply as a law term as follows: "*Barratry* (L. T.), when the master of a ship cheats the owners or insurers, either by running away with the ship or embezzling their goods;" (Kersey's Dictionary, 3rd edit. 1721.) In the succeeding and fuller work of Bailey, it is given as a term in commerce, thus: "*Barratry*, *barrettry* (in commerce), is the master of a ship cheating the owners or insurers, either by running away with the ship, sinking of her, or embezzling the cargo" (Bailey's Dictionary, folio of 1736), and this exposition of its meaning has been substantially followed by the lexicographers to the present time. Ash, in his dictionary of 1755, succinctly defines it as "the crime of the shipmaster who cheats the owners," and Webster, in a more elaborate definition, limits it to a fraudulent breach of duty, a wilful act of illegality or breach of trust, with dishonest views, by the master or mariners, to the injury of owners of the cargo or ship, without the consent of the party injured: (Webster's Quarto Dictionary, 1864.) How the same words came to express things so distinguishable from each other, as strife or quarrelling, and deceit or fraud, is explainable by its origin and history. The root or parent is to be found in the Sanscrit *Bharat*, meaning *war* (Haughton's Sanscrit Dict., Lond. 1833.) From this was formed in the Sanscrit another word *Bharatar*, meaning an act which is a trespass against morals or justice, or an unjust or immoral action (*id.*), probably used in its first formation to designate an unjust war, and which afterwards acquired in the Sanscrit a more general signification; both of which words have survived and are now in use in modern Hindustani; the latter slightly modified in form, *bhaari*, *barki*, *burai*, and with other words formed from it, as *bharani*, *bharamani*, but retaining in their various forms the same general signification, which may be illustrated by a word now in very general use in India, *barakat*, evil (Forbes' English and Hindustani Dict., Shakespeare's Hindustani and English Dict.). These two primitive words, *Bharat* and *Bharata*, with significations more or less equivalent, are to be found in some form or other, in the tongues of all the nations of the Indo-European group, that derive their language from this parent source. Thus *barathrum*, both in the Greek and in the Latin, was the name of the pit into which the condemned criminals were thrown, and, as a word for pit, dungeon, or the infernal regions, became *baratro* in the Spanish, and the Portuguese, and *baratro* in the Italian. In the Latin *barratus* was the tumultuous shout of the Roman or German armies when about to engage (Cole's Latin and English Dict., London, 1679; Andrew's Latin Lexicon, *baritus*.) In the earliest forms of the

tongues that prevailed in France *barat* was the word in general use for deceit, cheating, decoying, finesse, and trickery, and in this sense was incorporated in the form of the prayer used by the penitents in the churches in asking forgiveness (Du Cange and Dufresne's *Glossarium*, Paris, 1773; Menage Dict. *Etymologique de la Langue Française*, Paris, 1750). In old Armorican it meant perjury (Necot. Dict. *Francis Latin*, Paris, 1573; Menage *id.*). In old Breton, *barad* was the word for treason (Pelletier Dict. Breton, Paris, 1752.) In Provençal *barat*, *baratel*, and *baratin*, are all words signifying deceit or deception (Roquefort *Glossaire de la Langue Romane*, Paris, 1808; Honorat, Dict. Provençal, Paris, 1846). The same word in many forms, was in extensive use throughout Europe in the middle ages, at the fairs, and in the rude commerce of the Mediterranean. In the Basque it was *barata*; in the old Castilian *baraja*; in the Spanish *barato* and *barata*; in the Portuguese *barata*, *barateria*, and in the Italian *baratta*. In all these languages *barat* or some word formed from it by a change in the termination, meant strife, contention, or quarrelling, confusion or disorder, intentional wrong, deceit, cheating, maliciousness, and also bartering and selling. It was used in the fairs, as a word descriptive of the strife, noise and contention that existed in bartering and trying to get the advantage in exchanging one commodity for another, which was the early mode of trading, and as these noisy marts gave rise to a great deal of the deception, trickery, and cheating, that may be practised in trade, this word came to be applied also to denote dishonesty in dealing. Thus, we have in the Italian of the period a series of words, expressing a like to struggle, to contend, to cheat, to deceive, to barter, to exchange, &c., such as *barratta*, *barare*, *baratto*, *barattare*, *barateria*, *baramento*, &c., and the same peculiarity existed in the Spanish, in the Portuguese, and in the French. Menage relates that there was a cattle fair near Lyons in France, called the fair of *Char-Barat*, *char* denoting dear or high-priced, and *barat* to cheat; which name, he says, was applied to it because those who cheated at that fair were not obliged by its regulations to return the animals. (Menage, *Dictionnaire Etymologique*, &c., *barat*.) The Italian abounds in offshoots of this word of like import, such as *barattiere*, corruption *barratore*, a briber or bribe taker; *baratatore*, an imposter, *barro*, one who cheats at cards; *baro*, a knave, and the Spanish is equally fruitful of words from it of the same kind (Taboada, Dic. Español, &c. Paris, 1838; Velasquez Spanish Dictionary; Baret's Italian Dictionary). In fact, the curious result of this inquiry is, what has frequently been proved in the history of language, that this word, with an origin so remote, has, during so many ages, in the different countries through which it has passed, and amid the many changes in its form, tenaciously adhered to the general signification of the two parent words out of which it sprang. It was first used as a marine term in the Basque; at least the first form of it in that sense, which I have been able to discover, is in that tongue now one of the oldest languages in Europe. In the Basque *bara-baratu* signified delaying a vessel, abandoning her, seizing and giving her over, together with all that followed therefrom, and *barat-gaidu*, stranding, sinking, or scuttling her (Don

AMERICAN REFS.] ATKINSON AND HEWITT V. THE GREAT WESTERN INSURANCE CO. [AMERICAN REFS.]

Pio De Zuaga Dec, by De Larramendi, San Sebastian, 1853). In the Basque, the original word was *barata*, very little, if at all, changed from the original word in the Sanscrit *dharaṭa*, and the above compounds were formed from it. The Basque or Biscayans were, from a very early period, distinguished as a maritime people, whose power and whose language, at one time, extended across the whole of the north of Spain, from the Bay of Biscay to the Mediterranean, and the Spanish word *barar*, which has the same general marine signification, was, according to the Spanish lexicographers, derived from these compound Basque words (De Zuaga, *id.*). From *barar*, therefore, and from *barata*, which has long been and still is in use in Spanish, came, as I suppose, the Spanish word *barateria*, the meaning of which is best expressed in the Spanish definition of it. *La perdida causada á los dueños de un barco, ó sus aseguradores por dolo ó malicia del capitán ó tripulación (Velasquez)*—the loss or damage sustained by the owners of a ship, or insurers by the fraud, deceit, artifice, or wickedness of the captain or the crew. It was probably formed and first used in Catalonia, in connection with insurance, for the Catalan and the Castilian, the languages of Catalonia, have an admixture of Basque words, and the earliest laws respecting insurance that we know of are found in the ordinances of Barcelona, a Catalonian city, that carried on an extensive maritime commerce with the south of France and with the countries of the east, from the tenth to the sixteenth centuries; having a judicial tribunal exclusively devoted to the consideration of questions of maritime law and usage (Reddie's Historical View of the Law of Maritime Commerce). And the word, in its marine sense, does not appear, as far as I can find, to have been in the early Italian or French dictionaries. In *Lockyer v. Offley* (1 T. R. 269), Willes, J. who delivered the unanimous opinion of the court, after stating that many definitions of *baratry* were to be found in the books, said: "Perhaps this general one may comprehend all cases. *Baratry* is every species of fraud or knavery in the masters of ships by which the freighters or owners have been injured." In the succeeding case of *Nutt v. Bourdieu* (1 T. R. 323) Lord Mansfield declared that *baratry* must partake of something criminal, and that it must be committed against the owner of the vessel either by the master or the mariners. In *Havelock v. Hancill* (3 T. R. 277). Lord Kenyon simply held that when the master in defiance of his duty took on board certain commodities which subjected the ship to seizure, it was *baratry*, and in *Ross v. Hunter* (4 T. R. 35), it was decided that it was *baratry* where the master, after having deviated from his course, left the vessel for a fraudulent purpose and was never heard of afterwards; there being ground for believing that the vessel had been lost. Buller, J. in that case said "baratry was a question of law arising out of facts," that it was well settled, and was in one sense of the word "a deviation by the captain for fraudulent purposes of his own," and that that was "the distinction between deviation, as it was generally used, and *baratry*." This observation of Buller, J. is important, if the distinction made by him is a correct one, as it tends to show that negligence merely is not *baratry*. Deviation in the law of insurance, in its general sense, is any change or varying of the risk, without necessity or just cause, by which the

risk is enhanced (Phillips on Insurance, sects. 977, 979, 460, 984.) It means voluntary acts or acts of neglect, not arising from necessity or just cause, and if it does not come within this exception, it is wholly immaterial with what motive the act is done, which is a deviation or a departure; for if, after the risk is assumed, it is enhanced, or varied, the deviation discharges the policy. This is what Buller, J. refers to when he speaks of "deviation as it is generally used," and the case now before us is a familiar illustration of deviations of this kind, which discharges the policy; for it is well settled that the exposure of the goods in a greater degree to the perils of the sea, by stowing them upon the deck, is an enhancement of the risk which discharges the underwriter, unless he is notified of it before the risk, or it is provided for in the policy, or the article is one that is generally so carried, or must be from its character: *Lennox v. United States Insurance Company*, 3 Johns. Ch. 178; *Tannton Copper Company v. Merchants' Insurance Company*, 22 Pick. 108; *Smith v. Mississippi Fire and Marine Insurance Company*, 11 La. 142; *Brooks v. The Oriental Insurance Company*, 7 Pick. 259; *Blackell v. The Royal Exchange Assurance Company*, 2 Crompt. & Jer. 250; *Creech v. Holly*, 14 Wend. 25; Phillips on Insurance, ss. 469 and 985.) Now the stowing of the cotton upon deck by the master of the *Victoria*, would not within Buller, J.'s distinction, be *baratry*, unless it was done by him for some fraudulent purpose of his own, and of this there is no pretence, nor anything at least in the evidence that would warrant us in assuming it. In *Moss v. Byron* (6 T. R. 379), cruising by the master of an armed merchantman for prizes contrary to the orders of his owner, was held to be *baratry* for the reason that, if any loss or accident had happened to the ship during that time, the owners would have been liable to the freighters. It is not, however, a very satisfactory case, nor very well reasoned. A much more important one is *Phyn v. The Royal Exchange Assurance Company* (7 T. R. 505), for there the entire Bench, Lord Kenyon and Ashurst, Gorse, and Lawrence, JJ., held, that there must be fraud to constitute *baratry*. Each judge expressed himself to that effect, and the point may be said to have been directly involved, for it was a deviation from the vessel's course, either from ignorance, negligence, or other cause, which led to her capture, and Lord Kenyon told the jury, that it could not be *baratry* without a fraudulent purpose in the captain at the time, and he left that question, the existence or not of a fraudulent purpose, to the jury, who found that the deviation was owing to ignorance or something else, but that it was not fraudulent; and the court unanimously refused to disturb the verdict. Lord Ellenborough, in the case already cited (*Earle v. Rovercroft*, 8 East-126), gave as the result of the preceding cases, and what he evidently meant to be a definition, "that a fraudulent breach of duty by the master in respect to the owners, or a breach of duty in respect to his owners with a criminal intent or *ex maleficio*, is *baratry*," and in a subsequent case said, "that the term was large enough to include every species of fraud or *malus doli* committed by the master." (*Boehm v. Combe*, 2 M. & Selw. 172.) While in *Todd v. Ritchie* (Stark, 240), in which the vessel having sprung a leak, put into the Bay of Gaspie, where the master, before any survey had

taken place, broke up her ceiling and bows with crowbars, by which the ship was much injured and weakened—an act relied upon as having been done to procure the condemnation of the vessel, and therefore amounting to barratry. Lord Ellenborough said: "In order to constitute barratry, which is a crime, the captain must be proved to have acted against his better judgment," and added "as the case stands there is a whole ocean between you and barratry." This, however, was a *Nisi Prius* case. The facts are not very fully reported, and, without knowing how the case stood upon the evidence, it is not possible to know the exact reasons upon which he relied for nonsuiting the plaintiff. This discrimination is the more necessary, as there are two other cases decided by this eminent judge which can scarcely be reconciled with this case in *Starkie*. In *Heyman v. Parish* (2 Camp. 140), the captain, contrary to his orders, sailed in a foul wind having before refused to sail when the wind was fair. He disobeyed the instructions of the pilot, and an anchor having been got out, to prevent the ship from going on shore he cut the cable and allowed the vessel to drift upon the rocks. Lord Ellenborough said, "that, upon this evidence, it was a clear case of barratry," and Parke, for the defendant, having suggested that there did not appear to be any fraud, Lord Ellenborough replied that that was not necessary; that it had been decided that a gross malversation by the captain in his office is barratrous. In the other case (*Pipon v. Cole*, 1 Camp. 434), the vessel was seized in consequence of the mariners smuggling goods on board; and although this was done without the knowledge of the master, Lord Ellenborough held that it was a clear case of gross negligence on his part; that it was his duty to have prevented the repeated acts of smuggling by the seamen; that, by neglecting to do so, he had allowed the risk to be materially enhanced, and, by doing so, had discharged the underwriters. This case would seem to have given rise to the impression that, if the loss arises through an act of gross negligence on the part of the captain, it is barratry: (*The Patapasco Insurance Company v. Coulter*, 3 Pet. U. S. 234; *Lawton v. The Sun Mutual Insurance Company*, 2 Cosh. 500; *Park on Insurance*, 84, 2 Am. edit.) and as the correctness of this will be hereafter considered, it may be well here to distinguish precisely what was decided in this case which was this: that a master of a vessel cannot recover the insurance under a policy containing a barratry clause, where the loss arose through barratrous acts of the mariners, which might have been prevented by a proper exercise of vigilance on his part. It will not be necessary to follow consecutively the succeeding English cases, for they all conform substantially to the exposition of barratry given in the decisions that have been examined. The last of these, however, is a very important one (*Grill v. General Iron Screw Collier Company*, 2 Mar. Law Cas. O. S. 362; 3 *Id.* 77; *Eng. L. Rep.* 1 C. P. 600; in error, 3 *Id.* 476; 14 *L. T. Rep.* N. S. 711; 18 *L. T. Rep.* N. S. 485), for there a collision arose from the steersman of a vessel starboarding the helm, contrary to the regulations of the Merchant Shipping Act (17 & 18 Vict. c. 104), although the statute declared that if any damage should arise from the non-observance of the regulations, it should "be deemed to have been occasioned by the

wilful default of the person in charge of the deck of the ship," the court held that this was not a loss arising from barratry. That it did not appear what was the extent of the default in improperly starboarding the helm, which may have been anything from simple negligence to actual malfeasance; that there was therefore no proof of barratry but for the statute, and that the statute was not passed to decide such questions, but merely to regulate ships and the rights of shipowners, as between themselves. This case may be regarded as distinctly excluding from barratry what the law denominates negligence, for the judge, at the trial, left it to the jury to say whether the collision which caused the loss of the goods was occasioned by the negligences of the defendant's crew, and the jury found specially that there was negligence on the part of the defendant's vessel. As barratry was among the excepted perils in the bill of lading, the defendants insisted that it was error in the judge not to distinguish in this case between ordinary and gross negligence, upon the assumption, as I infer, that if the collision arose from gross negligence it was barratry, a loss for which the defendants were not answerable. But the court refused to disturb the verdict upon any such ground, holding that gross in connection with negligence was a mere word of description and not a definition, and that no meaning could be attached to it in connection with the case before the court. *Lloyd* against the same defendants (3 H. & Colt. 284), was a case arising also out of the same collision, which came before the Court of Exchequer upon the pleadings. The averment in the declaration there was that the collision and consequent injury was caused by and through the gross carelessness, negligence, mismanagement, and improper conduct of the defendants, their servants and mariners; an averment upon which the defendants replied, as showing that the loss was within the excepted perils, one of which was "barratry of masters or mariners;" but the court held in effect, that it was an averment of a loss by negligence and not by barratry. Bramwell, J. distinguishing that there might be wilful negligence and yet not barratrous: that barratry implies a secret and fraudulent act against which the shipowner cannot guard; whereas negligences may be prevented by employing a skillful master and proper mariners. The cases in our own State are to the same effect. In *Grimm v. The Phoenix Insurance Company* (13 Johns. 451), the vessel being, as the case now before us, fully laden, thirty-six kegs of gunpowder were stowed in the cabin, close up to the companion way, the plank of which towered the binnacle being but half an inch thick, and the plank of the binnacle but an inch thick. The candle in the binnacle, having burnt down to the socket on a stormy night, and the socket being too hot to put another candle in it immediately, a seaman, as it was blowing hard at the time, stuck the candle temporarily against the side of the binnacle, which, within twenty minutes, set the binnacle on fire, and before the fire could be extinguished, the vessel blew up, killing every one on board, except one passenger. Here there was negligence on the part of the master in stowing the gunpowder close up to the companion way adjoining the binnacle, where a lighted candle was kept constantly throughout the night, and gross carelessness in the seaman, whose act was the proximate cause of the destruction of

the vessel. The negligence of the master in that case was of the same general character as the negligence of the master in this. It was an act of improper stowage, and was, like the negligence in this case, the remote, though not the direct, cause of the loss; the direct cause here being the jettison, and there the fire. Barratry was one of the perils insured against, and it was claimed that the negligence there established, as it is claimed that the negligence here establishes, a loss by barratry. Indeed, that case was even stronger than this, for there the negligence of the mariner co-operated with the previous negligence of the captain in bringing about the loss. But the court said that it was "impossible to consider the negligence by which the loss was occasioned as amounting to barratry;" that it was "well settled that an act to be barratrous must be done with a fraudulent intent or *ex maleficio*. In *The American Insurance Company v. Bryan* (26 Wend. 578), Senator Verplanck said, that barratry must mean and include all fraud, knavery, breach of trust, or other criminal conduct of the master or mariners, whereby the owner or freighter suffers loss or the subject insured is destroyed;" and Chancellor Kent, in his Commentaries, defines it, to the same effect, but more precisely, as meaning "fraudulent conduct on the part of the master, in his character as master, or of the mariners, to the injury of the owner, and without his consent, and includes every breach of trust committed with dishonest views;" (3 Kent's Com. 4th edit. 305). It is clearly deductible from these cases that a loss arising from what in law is denominated negligence, is not barratry. But Johnson, J. declared, in *The Palapaco Insurance Company v. Coulter* (3 Pet. U. S. 234), that negligence itself, when gross, is evidence of barratry. Park, in his work on insurance, says that any act of the master or mariners, which is grossly negligent, tending to their own benefit to the prejudice of the owner of the ship, and without their consent and privity, is barratry; (Park on Insurance, 2nd Am. edit. 84) Show, C.J. says, in *Lavelle v. The Mutual Insurance Company* (2 Cush. 500), that the act must be wilful, and not caused by negligence, unless the negligence be so gross as to amount to fraud, and Phillips includes in the general definition of barratry very gross and culpable negligence in the master or mariners, contrary to their duty to the owners, and that might be prejudicial to him or to others interested in the voyage or adventure (1 Phillips on Insurance, 1062). This had led to a renewed misapprehension of barratry, by coupling negligence with it. The effect of referring to or using the term "gross negligence" is to mislead; for in the science of the law there is no such thing as degrees of negligence. There may be degrees of care, as more care is required in certain cases than in others, and it has become the habit to distinguish between slight, ordinary, and great care; but, whatever may be the degree or amount of care demanded in the particular instance, it is the neglect to bestow it which is expressed in the law by the word "negligence." The legal meaning by negligence has, in a recent elementary work, been comprehensively and very accurately defined, as including every breach of trust not clearly intentional, as signifying the want of care, caution, attention, diligence or discretion in having no positive intention to injure; consisting either in the care-

less performance of obligations assumed by contract, or the neglect of those which are imposed by law: (Shearman and Redfield on Negligence, cap. 1.) And barratry, as has been shown, means much more than this. As a marine term it means an intentional injury to the vessel or to the cargo; or some unlawful, fraudulent, or criminal act, whereby, or in the prosecution of which, loss or injury arises to the owners of the vessel, or of the cargo, or to the insurers, and does not embrace what in the law is denominated negligence. So far, therefore, as the plaintiffs seek to recover under the policy for a loss arising from barratry, this action cannot be maintained. It is now settled in the law of insurance that if the proximate cause of the loss was the peril insured against, and the remote cause was some act of negligence on the part of the master or the mariners, the underwriters are liable, as where fire is one of the perils insured against, and the fire which produced the loss is attributable to an act of negligence in the master or any of the crew: (See the cases collected in Phillips on Insurance, sect. 1096.) Here the proximate cause was the jettison, and the remote one the negligence of the master in stowing the cotton upon deck, and a loss by jettison was one of the perils insured against. But I do not understand that this rule applies where there has been a deviation or departure, producing a change of risk so material as to discharge the underwriters from the policy, or where they insure goods upon a clear bill of lading, there is an implied warranty that the goods are or will be stowed in the usual and ordinary manner, which is in the vessel's hold, and if this is not done, but the goods are carried on deck, except in a case where that is justifiable, the policy never attaches, for the reason that it is a greater risk than the underwriter agreed to take: (1 Phillips on Insurance, sects. 460, 686, 704; 1 Arnould on Insurance, 213, Am. ed.; *Lennox v. The U. S. Ins. Co.*, 3 Johns. Ch. 178; *Smith v. Wright*, 1 Car. 44; *Woleott v. Eagle Ins. Co.*, 4 Pick 429.) Goods carried upon deck are not within the protection of the policy, nor can there be any claim for contribution upon a general average, if they are jettisoned, except in the cases where they are generally or must necessarily be so carried; or where it is done with the knowledge and implied consent of the underwriter (Phillips *id.*, cap. 15, sect. 21, which was not the case here. The plaintiffs therefore have no cause of action against the underwriters upon the policy. The only remedy is an action against the master or his principal for the damages sustained through the negligence of the master in carrying the cotton upon deck. The verdict should be set aside and a new trial ordered.

HOUSE OF LORDS.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

June 29 and 30, 1871; Feb. 15, and April 30, 1872.
(Present: Lord CHELMSFORD, Lord WESTBURY,
and Lord COLERIDGE.)

IRELAND AND OTHERS v. LIVINGSTON.

Principal and agent—Ambiguous instructions—Less quantity than that ordered by principal purchased and shipped by agent—Construction. The defendant, a merchant in Liverpool, wrote to the plaintiffs, commission agents at Mauritius, directing them to purchase for and ship to him,

500 tons of sugar, at a certain limit to cover cost, freight, and insurance. The letter also contained this clause: "50 tons more or less no moment if it enables you to get a suitable vessel." The plaintiffs used all diligence, but from the circumstances of the trade in Mauritius were unable to procure more than 400 tons, without exceeding the limit fixed by the defendant. The plaintiffs having bought and shipped this quantity, the defendant refused to accept the sugar on the ground that the plaintiffs had not followed the instructions given to them:

Held (reversing the judgment of the Court of Exchequer Chamber), that the defendant was bound to accept the cargo; for that, whatever might be the proper construction of the terms of the defendant's letter, the plaintiffs, having bona fide adopted a construction of which the document was fairly capable, were not to be held responsible for the loss arising out of the transaction.

ERROR from a judgment of the Court of Exchequer Chamber, upon a special case stated for the opinion of that court.

The material facts were as follows:—

The plaintiffs were commission agents in the Mauritius; the defendant was a merchant at Liverpool.

In July 1864, the defendant sent to the plaintiffs the following letter:

Liverpool, July 25, 1864.

Dear Sir,—My opinion is that should the best crop prove less than usual, there may be a good chance of some being taken up by importing cane sugar at about the limit I am going to give you as a maximum, say 25s. 9d. for Nos. 10 to 12, and you may ship me 500 tons to cover cost, freight, and insurance; fifty tons more or less no moment if it enables you to get a suitable vessel. You will please provide insurance and draw upon me for costs thereof, as customary, attaching documents, and I engage to give same due protection on presentation. I should prefer the option of sending vessel to London, Liverpool, or the Clyde, but if that is not compassable, you may ship to either Liverpool or London.

After the above letter had been written, Mr. Maitland, the plaintiffs' agent at Liverpool, called at defendant's office, and, having been shown a copy of the letter, suggested, though without instructions from the plaintiff to do so, that it would be prudent for the defendant to send the following telegram to Mr. Ireland:—

In writing to Mauritius, say Mr. Livingston's insurance is to be done with average, and, if possible, the ship to call for orders for a good port in the United Kingdom.

The defendant accordingly sent this telegram, which was forwarded by Mr. Ireland to the plaintiffs at Mauritius.

On 6th Sept. 1864, the plaintiffs wrote to the defendant as follows:—

We are in receipt of your esteemed favour of July 25, and take due note that in the hope of some good being done by importing sugar, you authorize us to purchase and ship on your account a cargo of about 500 tons, provided we can obtain Nos. 10 to 12 D.S., at a cost of not exceeding 25s. 9d. per cwt., free on board, including costs, freight, and insurance; and your remarks regarding the destination of the vessel have also our attention, &c.

When the letter of 25th July reached the plaintiffs at Mauritius the price of sugar and rate of freight were too high to admit of the plaintiffs purchasing and shipping at the limit prescribed by the defendant in his letter. In the course of September the plaintiffs obtained an offer of freight at 2l. 10s. per ton by the ship *Ilma*, that freight being

lower in consequence of the ship's agents being anxious to complete her cargo and despatch her, as her time charter had not much longer to run. The plaintiffs then succeeded in purchasing from several brokers, in fourteen distinct lots, nearly 400 tons of sugar, of the specified quality, and shipped that quantity in the *Ilma* by Sept. 27. The plaintiffs, though using all due diligence, were unable to obtain any more sugar of the specified quality, except at a price which would have exceeded the defendant's limit.

On Oct. 26 the plaintiffs received from the defendant a letter, dated Sept. 24, in which was this passage:—

It escaped me to write to you in August, but I am hoping that the tenor of my letter in giving you limits will have prevented your acting for me until I have further written to you, &c., conjecturing that your advice from other correspondents would supply the information as to a fuller supply of beet. The large receipt from Cuba, &c., has completely upset our prices for sugar, and it is difficult to form any opinion as to the future of the article. I would prefer for the present to do nothing, and am satisfied that low rates must rule for some time. . . . I will write to you further by the French steamer, on Oct. 7; but I fear your prices are not likely to fall to a point commensurate with our probable rates."

This letter did not, of course, arrive till after the *Ilma* had sailed.

The plaintiffs duly insured the sugar, and the cost price, together with other expenses, amounted to 9468l. 11s.; for this sum the plaintiffs drew a bill on the defendant, and remitted it to him, with the usual shipping documents, in letters of Sept. 20 and 30.

The bill became due in Feb. 1865, but the defendant refused to pay it, and to accept the sugar, on the ground that the sugar was not bought in accordance with his instructions, the quantity being less than he had directed, viz., 400 tons instead of 500 tons.

The sugar was then sold, the sale realizing 7065l. 7s. 3d., after deducting expenses of the sale.

This action was then brought for the difference between this amount and that of the bill.

To the pleas, alleging that the instructions of the defendant were not followed by the plaintiff, the plaintiffs demurred, and on these demurrers the Court of Queen's Bench gave judgment in favour of the plaintiffs: (15 L. T. Rep. N.S. 206; 39 L. J. 50, Q.B.)

On the trial of the issues before Cockburn, C.J. the verdict was entered for the plaintiffs, subject to the opinion of the court on a case stated; and in Nov. 1869 judgment was given for the plaintiffs.

The Court of Exchequer Chamber, however, reversed this judgment (Kelly, C.B. Martin and Channell, B.B. and Keating, J.; Smith J. and Cleasby, B. dissentientibus): (L. Rep. 5 Q.B. 516; 30 L. J. 282 Q. B.)

Thereupon the present appeal was brought.

The following judges were present at the hearing: Martin, B. Byles, Blackburn, Smith, and Hannen, JJ. and Cleasby, B.

Giffard, Q.C. and Raymond, for plaintiffs in error.

Sir J. B. Kerslake, Q.C., Butt, Q.C., and Crompton, for defendant in error.

The following cases were cited:—

Kreuger v. Black, 23 L. T. Rep. N. S. 128; L. Rep.

5 Ex. 179; 3 Mar. Law Cas. O. S. 470;

Price v. Wray, 3 Ex. 93;

Trueman v. Leder, 11 A. & E. 389

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IRELAND AND OTHERS v. LIVINGSTON.

[H. of L.]

Bellingham v. Freer, 1 Moo. P. C. 333;
Johnston v. Kershaw, 15 L. T. Rep. N. S. 485; L. Rep.
 2 Ex. 82.

The following question was proposed to the judges: Whether judgment ought to be entered for the plaintiffs or the defendant in error?

Feb. 15.—CLARKE, B.—My Lords, the question put to the judges in this case is, whether judgment ought to be given for the plaintiffs or for the defendant; and I answer it by saying that in my humble opinion the plaintiffs are entitled to judgment. I have already expressed my opinion to that effect when the judgment in this case was given in the Exchequer Chamber. Upon further consideration I adhere to the judgment and reasons then given, and I am unwilling to occupy unnecessarily the time of your Lordships by repeating what is there expressed. It may be summed up in a few words. The answer to the question put depends upon the proper construction of two letters (the 25th July 1864, from defendant to plaintiffs, and 6th Sept. 1864, from plaintiffs to defendant), with an addition to the first contained in a telegram. The second letter is only an acceptance of the instructions contained in the first, and the last sentence in the first letter gives a decisive key to its proper construction. It is in these words: "I should prefer the option of sending vessel to London, Liverpool, or the Clyde, but if that is not compassable you may ship to either Liverpool or London." There are two events contemplated, because there is a preference. The preference is given to having a vessel at the disposal of the defendant as regards its destination. This involves necessarily that the whole cargo should belong to the defendant. He could not give a destination to a vessel containing cargo of other persons. The other alternative is shipping to one of two designated ports, London or Liverpool; and this can be as well done whether what is shipped is part of a cargo or a full cargo. As the first alternative of engaging a vessel to call for orders could not be had, the other alternative only remains, viz., to procure and ship 500 tons (500 tons, more or less) to London or Liverpool. And the question raised is, whether, though the defendant's cargo need not occupy the whole ship, it is not essential that it should form one shipment on board one ship. Independently of any consideration founded upon the customary and necessary mode of executing such an order at the Mauritius, it would be a reasonable construction of the instructions to say that if a vessel bound for one of the designated ports was ready to take 400 tons at an easy freight it would be right for the agent and his duty to take the opportunity afforded of acting upon the order; for the plaintiffs at that time had by this letter of 6th Sept. accepted the employment of the defendant for the usual commission and reward, and were his agents, and bound to use due and reasonable care and diligence as such. It was not a mere contract between vendor and vendee (like the case of *Kreuger v. Blanck*, which will be shortly noticed), although after the goods were shipped a relation like that of vendor and vendee might arise. But when an order of this description is given to be executed at the Mauritius (not an order of an unusual nature, but, as appears from the case, a customary one), it seems to me it would be unreasonable in dealing with the conduct of the agent to exonerate from consideration

the usual and customary mode of executing such orders. And one statement appears to be conclusive of the case. For it is found as a fact that, supposing the instructions not to be limited to the engagement of an entire ship to call for orders, the plaintiffs in shipping the 392 tons acted in conformity with the usage, as it was, I submit, their duty to do. One case was referred to in the course of the argument, and much relied upon by the learned counsel for the defendant: (*Kreuger v. Blanck*, 3 Mar. Law Cas. O. S. 470; L. Rep. 5 Ex. 179; 23 L. T. Rep. N. S. 128). The decision in that case has really no bearing upon the present, for the following reasons: First, the propriety of executing the order by more than one shipment (which is the real question in the present case) was never under consideration; secondly, in that case the question did not arise between principal and agent. The plaintiffs were timber merchants at Calmar in Sweden, and the defendant had ordered of them a certain cargo of laths. It was a case between vendor and vendee; there was one indivisible contract for a certain quantity, which the vendee was entitled to have executed before he could be called upon; thirdly, in that case the plaintiff had shipped a cargo much larger than the cargo ordered by the defendant, and upon the defendant refusing this larger cargo, the plaintiffs, when the vessel arrived at the port of discharge, selected out of the cargo a quantity corresponding with the defendant's order, and tendered it to him. There was no shipment made of the defendant's order, and the defendant thereby lost the benefit of giving a destination to the vessel; for the charter was to the Penarth Roads, to call for orders in the Bristol Channel, and the defendant could not give these orders without accepting the whole cargo. As this case has no bearing upon the present, I express no uncalculated opinion as to the correctness of the judgment. In my humble opinion the plaintiffs are entitled to succeed, and the judgment of the Queen's Bench to that effect ought to be upheld.

BLACKBURN, J.—My Lords, I will, with your Lordships' permission, deliver along with my own the answer of my Brother Hannen, who authorises me to say he agrees in the reasons I am about to give to your Lordships. In answer to your Lordships' question, I have to say that in my opinion the judgment ought to be entered for the plaintiffs. The question depends almost entirely on the true construction of the letter of the 25th July 1864, from the defendant to the plaintiffs. In that letter, as set out in the pleadings and case, occurs the following passage: "The limit I am going to give you as a maximum one, 26/9 for numbers 10 to 12, and you may ship any 500 tons, to cover cost, freight, and insurance, 50 tons more or less, of no moment," &c. Probably if we had access to the original we should find that this is misquoted, and that what was written was: "The limit I am going to give you as a maximum, say 26/9, to cover cost, freight, and insurance, for Nos. 10 to 12, and you may ship me 500 tons, 50 tons, more or less of no moment," &c. Perhaps the words, to cover costs, freight, and insurance, were interlined in the original, and the copyist has inserted the interlineation in the wrong place. At all events the letter must be construed as if the words were placed as I have suggested. The terms at a price, "to cover cost, freight, and in-

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insurance payment by acceptance on receiving shipping documents, are very usual, and are perfectly well understood in practice. The invoice is made out debiting the consignee with the agreed price (or the actual cost and commission, with the premiums of insurance, and the freight, as the case may be), and giving him credit, for the amount of the freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee which he is bound to accept (if the shipment be in conformity with his contract) on having handed to him the charter-party, bill of lading, and policy of insurance. Should the ship arrive with the goods on board he will have to pay the freight, which will make up the amount which he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowner. In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way. If the consignor is a person who has contracted to supply the goods at an agreed price, to cover cost, freight, and insurance, the amount inserted in the invoice is the agreed price, and no commission is charged. In such a case it is obvious that if freight is high the consignor gets the less for the goods he supplies, if freight is low he gets the more. But inasmuch as he has contracted to supply the goods at this price he is bound to do so, though owing to the rise in prices at the port of shipment making him pay more for the goods, or of freight causing him to receive less himself, because the shipowner receives more, his bargain may turn out a bad one. On the other hand, if owing to the fall in prices in the port of shipment, or of freight, the bargain is a good one, the consignee still must pay the full agreed price. This results from the contract being one by which the one party binds himself absolutely to supply the goods in a vessel such as is stipulated for, at a fixed price, to be paid for in the customary manner; that is, partly by acceptance on receipt of the customary documents, and partly by paying the freight on delivery, and the other party binds himself to pay that fixed price. Each party then takes upon himself the risk of the rise or fall in price, and there is no contract of agency or trust between them, and therefore no commission is charged. But it is also very common for the consignor to be an agent, who does not bind himself absolutely to supply the goods, but merely accepts an order by which he binds himself to use due diligence to fulfil the order. In that case he is bound to get the goods as cheap as he reasonably can, and the sum inserted in the invoice is the actual cost and charges at which the goods are procured by the consignor, with the addition of a commission; and the naming of a maximum limit shows that the order is of that nature. It would be a positive fraud if, having bought the goods at a price including all charges below the maximum limit fixed in the order, he, the commission merchant, were instead of debiting his correspondent with that actual cost and commission, to debit him with the maximum limit; nor can I doubt that in an

action brought against him as an agent for not accounting properly, this extra sum would be disallowed. The contract of agency is precisely the same as if the order had been to procure goods at or below a certain price, and then ship them to the person ordering them, the freight being in no ways an element in the limit. But when, as in the present case, the limit is made to include cost, freight, and insurance, the agent must take care in executing the order that the aggregate of the sums which his principal will have to pay does not exceed the limit prescribed in his order; if it does the principal is not bound to take the goods. If by due exertions he can execute the order within those limits he is bound to do so as cheaply as he can, and to give his principal the benefit of that cheapness. The agent, therefore, as is obvious, does not take upon himself any part of the risk or profit which may arise from the rise and fall of prices, and is entitled to charge commission because there is a contract of agency. I should apologise for stating so precisely what your Lordships doubtless know already, if it were not that I think one of the learned judges in the court below has fallen into a fallacy from not recollecting what I am sure he well knew. It is quite true that the agent who in thus executing an order ships goods to his principal is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. There is no more privity between the person supplying the goods to the commission agent and the foreign correspondent than there is between the brickmaker who supplies bricks to a person building a house, and the owner of that house. The property in the bricks passes from the brickmaker to the builder, and when they are built into the wall, to the owner of that wall; and just so does the property in the goods pass from the country producer to the commission merchant; and then, when the goods are shipped, from the commission merchant to his consignee. And the legal effect of the transaction between the commission merchant and the consignee who has given him the order is a contract of sale passing the property from the one to the other; and, consequently, the commission merchant is a vendor, and has the right of one as to stoppage *in transitu*. I therefore perfectly agree with the opinion expressed by Martin, B. in the court below, that the present is a contract between vendor and vendee; but I think he falls into a fallacy when he concludes therefrom that it is not a contract as between principal and agent. My opinion is, for the reasons I have indicated, that when the order was accepted by the plaintiffs there was a contract of agency by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property at the actual cost, with the addition of the commission; but that this appended sale is not in any way inconsistent with the contract of agency existing between the parties, by virtue of which the plaintiffs were under the obligation to make reasonable exertions to procure the goods ordered as much below the limit as they could. If this view be correct, it shows that the point raised at your Lordships' bar as to whether the evidence received was that of a custom does not really arise. A commission merchant using

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reasonable exertions to get the goods as cheap as possible ought to buy them in small parcels if the state of the market in the country is such that it is the reasonable way to get them. If the merchant would get the goods cheaper by giving a wholesale order to the manufacturer, which probably would be the case in England, where Manchester goods are ordered from a London or Liverpool commission agent, he ought to give the wholesale order. The evidence shows the circumstances under which the plaintiffs acted, and that the course they pursued was a reasonable one under those circumstances. Having said thus much, I now come to what I take to be the real question, namely, what is the construction of the letter of 25th July, 1864? One question is, whether the order required the plaintiff to procure a vessel which should carry the defendant's sugar and no other goods? I am of opinion that it does not. The letter expresses a wish that, if possible, the defendant should have the option of sending the vessel to London, Liverpool, or the Clyde. It is rarely possible to obtain a ship which is to call for orders unless the whole ship is chartered, and, therefore, it is probable that in order to give the defendant this option the plaintiffs would have required to charter the whole of a vessel. If a vessel could have been procured willing to obey the defendant's orders, and deliver his goods as required, I do not see what harm it would do the defendant if that ship was larger than was required, and the superfluous space was utilised in any way consistent with his contract. And, therefore, if necessary, I should advise your Lordships to reconsider the decision of the Court of Exchequer in *Kreuger v. Blanck* (L. Rep. 5 Ex. 179; 23 L. T. Rep. N. S. 128). But it is not necessary to reconsider it, for the defendant gave the plaintiffs the alternative of shipping either to Liverpool or London; and there is no reason at all why the shipper of goods direct to a port should take up the whole of the vessel. The second question is, whether the order for 500 tons, fifty more or less no object, and which, therefore, clearly required the plaintiffs, if practicable, to procure the defendant at least 450 tons, is complied with by procuring about 392 tons, and shipping them in one vessel with the intention, if practicable, to procure the remaining quantity required to make up the order and ship them by another. As the defendant countermanded the order before the plaintiffs could procure the other sixty tons, the case must be considered as if the plaintiffs had actually procured and shipped the remaining sixty tons. This I have felt to be a more plausible objection than the other, according to the view which I take of the law the plaintiffs, having accepted the defendant's order, were not only entitled but bound to fulfil it in any reasonable way which they could. In *Story on Agency*, sect. 170, it is said, "The principal is not bound by the authorised acts of his agent, but is bound where the authority is substantially pursued, or so far as it is distinctly pursued. But the question may often arise whether in fact the agent has exceeded what may be deemed the substance of his authority. Thus, if a man should authorise an agent to buy 100 bales of cotton for him, and he should buy fifty at one time of one person, and fifty at another of a different person, or if he should buy fifty only, being unable to purchase more at any price, or at the price limited, the question might arise whether

the authority was well executed. In general it may be answered that it was; because in such a case it would ordinarily be implied that the purchase might be made at different times of different persons, or that it might be made of a part only, if the whole could not be bought at all, or not within the limits prescribed." In the case of *Johnston v. Kershaw* (L. Rep. 2 Ex. 82; 15 L. T. Rep. N. S. 435), the Court of Exchequer acted on this doctrine. In that case the order was from a Liverpool merchant to one at Pernambuco for 100 bales of cotton, and though the order does not expressly say so, it is clear (from the usage of trade and the fact) that the 100 bales were to be shipped to Liverpool. The plaintiff purchased and shipped ninety-four bales only, and yet recovered their price, my brother Channell saying, "I may add that the observation of Story, J. seems to me replete with common sense, and I take it the basis of my judgment. I am, therefore of opinion this order must not be taken as an order to buy 100 specific bales of cotton at one time, but that the plaintiff by purchasing ninety-four bales has executed it with due and reasonable diligence." This case was not noticed in the judgments in the Exchequer Chamber, but it is impossible to suppose that the three judges, Kelly, C.B., and Martin and Channell, BB., who decided it, either overlooked their own decision, or intended to overrule it. I must, suppose, therefore, that they distinguished it on the ground that in the order in the case at bar there was enough to show that the defendant required one shipment, and one only, of the whole of what he ordered, so as to prevent that which would ordinarily have been due and reasonable diligence in the fulfilment of an order from being so in this special case. I do not doubt that the defendant might, by the use of proper terms, have so limited the plaintiffs' authority, but I do not think he did so in fact. On this part of the case, my brother M. Smith, J. has, in his judgment in the Court of Exchequer Chamber, accurately and clearly expressed what is my opinion. I cannot improve on what he has said, and, therefore, I refer to it without repeating it. It will be for your Lordships to decide whether the letter has the effect of so limiting the plaintiffs' authority. For the reasons I have given, I think it had not, and I am, therefore, of opinion that the judgment of the Exchequer Chamber is wrong.

BYLES, J.—My Lords, I think judgment ought to be entered for the plaintiffs in error. The decision turns mainly on the construction of the letter of the 25th July, 1864; which letter seems to show that the relation existing between the parties was not that of vendor and vendee, but of agent and principal. The following expressions appear to me to indicate the relation of principal and agent; some of them more clearly, others less clearly; but all of them to be more naturally and easily reconcilable with the relation of principal and agent, than of buyer and seller. Without fatiguing your Lordships with separate observations on every one of these expressions, I would call attention to the words "*circulars*," "*orders*," "*limit*," "*maximum*," the expression "*to cover cost*," "*draw upon me for costs*." Moreover the words, "*50 tons more or less are of no moment, if it enable you to get a suitable vessel*," are, as it seems to me, very strong to show that this was an order from a principal to his agent: for otherwise the buyer would have put it into the power of the

seller and exposed him to the temptation, should the price rise or fall, to vary the quantity sold to the extent of 20 or 25 per cent. to the disadvantage of the buyer. From the plaintiffs' answer of the 6th September it is plain that they understood the defendant's letter as an authority to purchase and ship. I see nothing in the letter or telegram to make it an implied condition in the order that the whole quantity should be shipped in one ship, although that may have been and probably was contemplated by the defendant as the more probable event.

MARTIN, B.—My Lords, the question in this case is whether the defendant in error was bound to accept a bulk of 392 tons of sugar which was brought to London from the Mauritius in a vessel called the "Ilma," It depends almost entirely, if not altogether, upon a letter by the defendant to the plaintiffs, dated the 25th July, 1864. The material part of the letter gives a limit as a maximum of 250. 9d. per cwt. for certain qualities of sugar, and continues thus: "You may ship me 500 tons, to cover cost, freight, and insurance, 50 tons more or less of no moment, if it enables you to get a suitable vessel. You will please provide insurance and draw upon me for costs thereof as customary, attaching documents, and I engage to give same due protection on presentation. I should prefer the option of sending vessel to London, Liverpool, or the Clyde, but if that is not compassable you may ship either to Liverpool or London." About the same date a telegram was sent to one of the plaintiffs, by the authority of the defendant, viz.: "In writing to the Mauritius, say Mr. Livingston's (the defendant) insurance is to be done with average, and, if possible, the ship to call for orders for a good port in the United Kingdom." The question is, whether this order must be performed by one bulk of sugar in one ship and conveyed to one port, or whether it may not be performed by two or more bulks of sugar in two or more ships. I do not think there can be any doubt as to the relation created between the plaintiffs and the defendant upon the former accepting the order contained in the letter. The plaintiffs were merchants and commission agents, not planters, and upon accepting the order undertook to use due diligence to carry it out. When they bought the sugar they did so on their own account; and when they had collected a sufficient quantity to enable them to perform the order, and thought fit to appropriate it for or to the defendant, the relation of vendor and vendee would arise: *Pieze v. Wray*, 3 East, 93. *A priori*, I should think it likely that a Liverpool merchant ordering 500 tons of sugar from abroad to the United Kingdom would desire that it should constitute the entire cargo of one ship; this would give him greater facility for selling the cargo abroad, or for having the ship call for orders at Cork or Falmouth, and other advantages. I also think there is nothing more unlikely than that a merchant giving an order for 500 tons of sugar should intend that it was to be forwarded to him in several bulks, viz., 100 tons in one ship to London, another 100 tons in another ship to Liverpool, a third 100 tons in a third ship to Glasgow, and so on, or indeed in several separate bulks to one and the same port. I cannot think that a man of sense and intelligence would intentionally subject himself to be so dealt with. A merchant

or agent abroad could not perform such an order by sending the 500 tons in bulks of a ton each in 500 different ships; and if he can forward it in more than one ship it must of necessity (in case of litigation) be a question for a jury whether the shipments were in reasonable bulks—a question, upon the result of which no man could form a judgment beforehand, and which would have to be decided by what is called the discretion, or, in other words, the caprice of a jury, and much more likely by their prejudices. I do not believe that any sane man would intentionally give such an order or subject himself to such a litigation. The question, however, must be decided by the letter and telegram. A similar question arose in the Court of Exchequer in the case of *Kreuger v. Blanck* (*ubi sup.*), and my Brother Cleasby there stated in substance, as applicable to this case, and I think correctly, "that the order is contained in the letter, that the question turns on the construction of it, and that the court ought to shade by the natural meaning of the word used, unless exceptional circumstances were found to the contrary." There are no exceptional circumstances in the present case, and the question is, what is the natural, grammatical, fair, and reasonable meaning of the letter? "Vessel" in the singular number is twice used. First, "a suitable vessel to carry 450 to 550 tons of sugar;" secondly, the defendant states his preference of the option of sending "the vessel" to London, Liverpool, or the Clyde. Again, the telegram states "if possible, the ship" is to call for orders for a good port in the United Kingdom. To me this seems to indicate in the clearest manner that there was to be one ship, one port, and one bulk. I have repeatedly read and considered it, and I could understand, if the plaintiffs had bought all the sugar that could be procured at the Mauritius within the defendant's limits, and had shipped it in one vessel for one of the named ports, it might have been contended that the defendant was bound to accept it as a fulfilment and completion of the order, but I cannot understand why it should be deemed the essential part of the order that 500 tons should be forwarded, but a non-essential part of the order that it should be forwarded in one vessel to one port. I do not desire to occupy your Lordships' time by further verbal criticism, but beg to refer you to the considered judgment of the Chief Baron and my brothers Channel and Keating, whose reasoning is, in my opinion, conclusive in favour of the defendant. As I have already said, I think the case depends upon the letters of the 25th July, and I think the custom stated in the case has no bearing upon it, but I desire to call attention to the letter of the plaintiffs to the defendant of the 6th Sept. 1864, which to my mind clearly shows that the plaintiffs understood the defendant's letter of the 25th July in the sense in which I understand it. The plaintiffs there write: "By the arrival of our packet of the 25th ultimo, we are in receipt of your esteemed favour of the 25th July, and take due note that in the hope of some good being done by importing sugar, you authorize us to purchase and ship on your account a cargo of about 500 tons, provided we can obtain Nos. &c., at a cost not exceeding 25s. 9d. per ton free on board, including cost, freight, and insurance; and your remarks regarding the destination of the vessel have also our attention."

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Now, here it is to be observed that the plaintiffs twice indicate their understanding of the defendant's letter; first they speak of a "cargo" about 500 tons, which clearly indicates one bulk, the full loading of a ship; and, secondly, they speak of the destination of the vessel in the singular number. This to my mind speaks as clearly as words can speak, that they were to provide one cargo, and forward that cargo to England in one ship; and I cannot but think any intelligent practical man would understand it in the same sense. I therefore think that the defendant was under no obligation to accept the 393 tons shipped in the "Ilma," and in my opinion the judgment of the Court of Exchequer Chamber was right; and my answer to your Lordships' question is that judgment ought to be entered for the defendant in error.

April 30.—Lord CHELMSFORD.—My Lords, the difference of opinion which has prevailed amongst the judges in this case, shows that the order given to the plaintiffs by the defendant in his letter of 25th July 1864 (upon which the question principally turns), is of doubtful construction; and this, in my mind, is a sufficient ground in itself for bringing me to the conclusion at which I have arrived. I would preface what I have to say by stating my opinion that the question is to be regarded as one between principal and agent, though the plaintiffs might, in some respects, be looked upon as vendors to the defendant, so as to give them a right of stoppage *in transitu*. But the transaction began as a contract of agency, and in that light I am disposed to consider it. Now, it appears to me that, if a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bona fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorised because he meant the order to be read in the other sense, of which it is equally capable. It is a fair answer to such an attempt to disown the agent's authority, to tell the principal that the departure from his intention was occasioned by his own fault, and that he should have given his order in clear and unambiguous terms. This view of the case will, in my opinion, dispense with the necessity of determining which is the more correct construction of the contract, that which was adopted unanimously by the Court of Queen's Bench, and by two of the judges of the Exchequer Chamber, or that which the four other judges of the Exchequer Chamber considered to be the right interpretation of it. It is sufficient for the justification of the plaintiffs, that the meaning which they affixed to the order of the defendant is that which is sanctioned by so many learned judges. It would be most unjust, after the plaintiffs have honestly acted upon what they conceived to be the wishes of the defendant, as expressed in his order, that he should be allowed to repudiate the whole transaction, and throw the loss of it upon the plaintiffs, in order (as his correspondence shows) to escape from a speculation which had become a losing one in consequence of the market prices of sugars having fallen. The short ground upon which I think the case may be disposed of, renders it unnecessary for me to express my opinion as to the proper interpretation of the letters upon which the courts below have proceeded. I own that if I were called upon to do so I should have great difficulty in arriving at any

satisfactory conclusion upon the subject, though, after much hesitation, I should have been inclined to adopt the opinion of the majority of the judges as to the construction of the contract. But this very difficulty confirms me in the view I have taken of the mode in which the case ought to be dealt with, for all the doubt and perplexity which hang over it have been occasioned by the defendant failing to express clearly and precisely how he wished the plaintiffs to act. The plaintiffs have construed the meaning of the defendant's language in a manner for which there is a reasonable excuse, if not a complete justification, and with an honest desire to perform their duty to him, and have obeyed his order according to their understanding of its meaning. In determining who is to bear the loss arising out of the transaction, it would be hard and unjust to make it fall upon the plaintiffs, the innocent agents, who have followed what they honestly considered to be the directions of their principal, and it ought, in justice, to be borne by the defendant, who has brought it upon himself by his want of precision and certainty in the language employed by him in communicating his order to the plaintiffs. I submit to your Lordships that the judgment of the Court of Exchequer Chamber ought to be reversed.

Lord WESTBURY.—My Lords, this is a case which depends entirely on its own peculiar circumstances. There is hardly any principle involved in it. The question turns on the construction of a certain letter. So far as it is necessary to express my opinion, I am of opinion that the conclusion arrived at by the majority of the judges on that question of construction is right. But whether it be right, or whether it be open to question, I concern entirely in the principles of the decision which has just been enunciated. I therefore come to the conclusion that the four judges in the Exchequer Chamber were wrong, and that judgment ought to be given for the plaintiffs in error.

Lord COLERIDGE.—My Lords, I have only a few words to add. I do not know that we are compelled to fix absolutely the construction to be put on these documents. I am certainly of opinion that the construction put upon them by the Court of Queen's Bench is the true construction. I think that, in the position in which the plaintiffs were placed as agents for the defendant, they were, in the circumstances which occurred, perfectly entitled to send the goods as they did. But I also think that the view taken by my noble and learned friend who first addressed the house is very conclusive of the case, and that it is unnecessary for us to go farther than to arrive at that conclusion. The agents who sold the goods are not to be held responsible for having adopted one of the constructions of which the document, as transmitted to them by their principal, was fairly capable.

Judgment reversed.

Attorneys for the plaintiffs in error, Francis and Bosanquet.

Attorneys for defendant in error, Field, Roscoe, Field, and Francis.

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JOYCE v. THE REALM MARINE INSURANCE COMPANY.

[Q. B.]

COURT OF QUEEN'S BENCH.

Reported by J. SHORRY and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Friday, May 31, 1872.

JOYCE v. THE REALM MARINE INSURANCE COMPANY.

Marine insurance—Re-insurance—"To commence from loading at as above"—Outward cargo to be homeward interest after a certain time.

*Declaration upon a policy of insurance underwritten by defendants for 1000*l.*, declared to be upon cargo, being a re-insurance subject to all clauses and conditions of the original policy, in the ship D., at and from any port or ports in any order on the West Coast of Africa to the vessel's port or ports of call and discharge in the United Kingdom, the insurance to commence "from the loading" of the goods at as above; that it was a clause and condition of the original policy that the insurance made by it should be for 1000*l.* upon the cargo valued at 3500*l.* of the said vessel D., at and from Liverpool to any ports in any order backwards and forwards and forwards and backwards on the coast of Africa, and thence back to a port of discharge in the United Kingdom, with leave to increase the valuation of the cargo on the homeward voyage; "outward cargo to be considered homeward interest twenty-four hours after her arrival at her first port of discharge;" that goods were shipped at Liverpool, and the vessel, with goods on board, departed from a port on the West Coast of Africa, and in the course of the voyage in the original policy described, and more than twenty-four hours after she had arrived at her first port of discharge, the goods were lost by perils insured against in the original policy.*

Demurrer on the ground that it appeared from the declaration that the goods were not loaded at any port on the West Coast of Africa.

Held, that the goods, though shipped at Liverpool, were within the policy of re-insurance after the lapse of twenty-four hours from the vessel's arrival at her first port of discharge on the West Coast of Africa. As the policy was declared to be a re-insurance, subject to all clauses and conditions of the original policy, and by the original policy outward cargo was to be considered homeward interest twenty-four hours after the vessel's arrival at her first port of discharge, the words "from the loading" were not to be construed strictly.

DEMURRER to a declaration.

Declaration stated.—That the plaintiff on the 13th Sept. 1871 caused to be made a policy of insurance with certain memorandum thereunder written in the words and figures following, that is to say: Whereas J. H. Joyce, Esq. (meaning the plaintiff), agent, has represented to the Realm Marine Insurance Company Limited (meaning the defendants), that he is interested in, or duly authorised as owner, agent, or otherwise, to make the assurance hereinafter mentioned and described with the said company, and has promised or otherwise obliged himself to pay forthwith for the use of the said company, at the office of the said company, the sum of 30*l.* as a premium or consideration at and after the rate of 60*s.* per cent. for such insurance. Now this policy of insurance witnesseth that, in consideration of the premises, and of the said sum of 30*l.* the said company promises and agrees with the said J. H. Joyce, as above, his exe-

cutors, and administrators, and assigns, that the said company will pay and make good all such losses and damages hereinafter expressed, as may happen to the subject matter of this policy, and may attach to this policy in respect of the sum of 1000*l.* hereby insured, which insurance is hereby declared to be upon cargo, being a re-insurance subject to all clauses and conditions of the original policy, and to pay as may be paid thereon general average and salvage charges to be settled as per foreign statement, if so made up, in the ship or vessel called the *Daybreak*, whereof—is at present master, or whoever shall go for master of the said ship or vessel, lost or not lost, at and from any port or ports, place or places, in any order on the West Coast of Africa, to the vessel's port or ports of call and discharge in the United Kingdom; and the said company promises and agrees that the insurance aforesaid shall commence upon the freight and goods or merchandise aforesaid from the loading of the said goods or merchandise on board the said ship or vessel, at as above, and continue until the said goods or merchandise be discharged and safely landed at as above; and that it shall be lawful for the said ship or vessel to proceed and sail to, and touch and stay at, any ports or places whatsoever in the course of her said voyage, for all necessary purposes, without prejudice to this insurance; and touching the adventures and perils which the capital, stock, and funds of the said company are made liable unto by this insurance, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of marque and counter-marque, surprisals, and takings at sea, arrests, restraints and detentions of all kings, princes and people, of what nature, condition, or quality soever, barratry of the masters and mariners, and of all other perils, losses and misfortunes that have or shall, to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance, or any part thereof, and in case of any loss or misfortune, it shall be lawful to the insured, their factors, servants and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the aforesaid subject-matter of this insurance, or any part thereof, without prejudice to this insurance, the charges whereof the said company will bear in proportion to the sum hereby insured, &c., and thereupon, in consideration that the plaintiff paid the defendants 30*l.* as a premium for the insurance of 1000*l.* upon the said goods in the said policy mentioned, the defendants became and were insurers to the plaintiff as aforesaid, and duly subscribed the said policy and affixed their common seal thereto as such insurers to the said 1000*l.* upon the said goods to be carried in the said ship on the said voyage; and the plaintiff says that it was a clause and condition of the said original policy in the first-named policy mentioned that the insurance made by the said original policy should be for 1000*l.* upon the cargo, valued at 3500*l.*, of the said vessel *Daybreak*, at and from Liverpool to any port or ports, place or places, in any order backwards and forwards and forwards and backwards on the coast of Africa and African islands during her stay and trade, then and thence back to a port of call and discharge in the United Kingdom, with leave to call at or off any ports or places for any purpose, and to discharge, exchange, and take on board goods wherever she might call at or proceed to, and to tranship, sell, or barter all or any goods or pro-

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perty on the coast of Africa and African islands with any vessels, boats, factories, and canoes, and to transfer interest from this vessel to any other vessels, and from any other vessels to this vessel in port and at sea without being deemed a deviation; outward cargo to be considered homeward interest twenty-four hours after her arrival at her first port of discharge; and divers goods being the goods in the said first-named policy mentioned were shipped at Liverpool aforesaid in and on board of the said ship to be carried therein on the said voyage, and A. Boyd, H. D. Pickford, &c., or some or one of them then and thence until and at the time of the loss hereinafter mentioned were or was interested in the said goods to the amount of all the moneys insured thereon by the said first-named policy, and the said first-named insurance was made for the use and benefit and on the account of the person or persons so interested; and the said vessel with the said goods on board thereof departed from a port or place on the West Coast of Africa, to wit, Cabenda, on and in the course of her said voyage in the said original policy described as aforesaid, and afterwards while the said ship was proceeding on her said voyage within the meaning of both the said policies, and more than twenty-four hours after she had arrived at her first port of discharge within the meaning of the said original policy, and during the continuance of the said risk, the said goods being then on board of the said ship, were, by the perils insured against by the said original policy, wholly lost, and the sum of 1000*l.* became payable, and was paid by the aforesaid interested person or persons on the said original policy, in respect of such loss, and otherwise thereon, and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to be paid the said sum of 1000*l.* by the defendants, yet the defendants did not pay the same.

Demurrer on the ground that it appears from the declaration that the goods were not loaded at any port or place on the West Coast of Africa.

Joinder in demurrer.

Wood Hill in support of the demurrer.—The policy is one of re-insurance, subject to all clauses and conditions of the original policy, from any port or place on the West Coast of Africa to any port in England, the insurance to commence "from the loading." The goods never having been, in fact, loaded, the policy never attached. The argument will turn on the effect of the words in the original policy, "outward cargo to be considered homeward interest twenty-four hours after her arrival at her first port of discharge," the goods having been lost more than twenty-four hours after the vessel had arrived at her first port of discharge. [BLACKBURN, J.—The question seems really to be reduced to a comparatively narrow one—whether the stipulation in the original policy, by which the cargo, although loaded at Liverpool, was, a certain time after the ship's arrival at Africa, to be considered as home cargo, is to be incorporated in the present policy?] The ground of demurrer is that the goods were not loaded at any port or place on the West Coast of Africa. [LUSH, J.—If the goods had been discharged on the West Coast of Africa and immediately after taken on board again, you would have been out of court.] That is so. If there had been anything amounting to a substantial re-loading of the vessel the defendants would have no ground for resisting the action.

The words at the beginning of the policy show that the time at which the risk was to commence was "from the loading of the said goods or merchandise on board the said ship or vessel, &c." that is from the loading on the West Coast of Africa. [BLACKBURN, J.—But we must not omit to notice that it is stated to be a re-insurance, "subject to all clauses and conditions of the original policy," one of which is that the outward cargo from Liverpool, twenty-four hours after it has got to Africa, is to be treated as homeward interest, which means, I suppose, that it should to all intents and purposes, be considered as loaded there.] It is submitted that the words "from the loading" determine the time at which the risk is to commence. The authorities decide this. [BLACKBURN, J.—This would not, I think, be disputed unless there is something to show that these words do not really mean what they *prima facie* would import. *Herschell, Q.C.—Rickman v. Carstairs* (5 B. & Ad. 651), is conclusive on that point.] There the policy was on ship and goods, ut and from the coast of Africa to the ship's port of discharge in the United Kingdom, with liberty to load at all ports and places whatsoever and wheresoever, to trade backwards and forwards in any order, &c., beginning the adventure on the goods from the loading thereof aboard the said ship twenty-four hours after her arrival on the coast of Africa, including the risk in boats in loading and unloading, with liberty to load, unload, sell, barter or exchange with any ships or factories wheresoever she might call. It was held that the policy did not protect an outward cargo shipped before the vessel's arrival on the coast of Africa. [BLACKBURN, J.—It was doubtless because of that case that the persons who prepared this policy have inserted the phrase "outward cargo to be considered homeward interest twenty-four hours after her arrival at her first port of discharge."] It is submitted that these words were inserted merely for the purpose of value, to determine what was the amount of interest to be included in the risk—the meaning being, directly the vessel arrives on the coast of Africa, and discharges its cargo and takes any small portion of cargo on board, from that moment, the risk having commenced, the defendants would consider that as the value of the plaintiffs' interest. These words affect only the value of the homeward interest when the policy has once attached; but they cannot have the effect of accelerating the time at which the risk was to commence, i.e., from the loading. [BLACKBURN, J.—We have not got the whole of the policy set out. There may be something in it which would throw light on this.] In the margin of the policy are written the words "with leave to increase the value of the cargo on the homeward voyage." Then follow the words about outward cargo being considered homeward interest twenty-four hours after the vessel's arrival; and the re-insurance is on a valued policy. [BLACKBURN, J.—The addition of these words might make an important difference as to your argument that the other words were inserted for the purpose of value. Is it not desirable in order to decide upon the real matter that the declaration should be amended by setting out the actual words of the policy?]

By consent the declaration was amended by inserting before the words "outward cargo to be deemed homeward interest, &c.," the words "with

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leave to increase the valuation of cargo on the homeward voyage."

Hill, in continuation.—The only clause in the policy which relates to the time at which the risk is to commence, fixes it at the time of the loading of some goods, however small the quantity may be. [LUSH, J.—If the policy had said in terms, as it does say in effect, that the goods forming part of the outward cargo shall be deemed to be goods put on board on the coast of Africa, if they are not removed within twenty-four hours after the vessel's arrival, that would be "from the loading thereof" within the meaning of the policy.] If it had said both on outward and homeward cargo. [BLACKBURN, J.—I conjecture that the parties did not notice, or that they forgot the existence of, the printed words "shall commence upon the freight and goods or merchandise aforesaid from the loading of the said goods or merchandise on board the said ship or vessel as above." LUSH, J.—Do not these words mean from the time the goods are reloaded on the West Coast of Africa?] It does not say so. [LUSH, J.—But you must admit that if the cargo had been unshipped on the West Coast of Africa, and put on board again the next day, the policy would have attached. Why should they not have agreed to dispense with that unnecessary term?] If that had been done, there would then have been a substantial reloading of the cargo, as pointed out by Cockburn, C. J. in *Carr v. Montefiore* (5 B. & S. 422). The insurance in that case was at and from port or ports in the River Plate to the United Kingdom, &c., "beginning the adventure upon the said goods and merchandise from the loading thereof aboard the said ship at as above." The cargo had been shipped in Patagonia on board the ship, then bearing another name, destined for England. She arrived at Monte Video, in the River Plate, in a damaged state, and a portion of her cargo was taken out for the purpose of repairing her, and then reloading. On being repaired, she and her cargo were purchased by parties at Monte Video, who changed her name, and the above insurance was afterwards effected. An average loss of the ship and cargo having taken place, it was held that the underwriters were liable. "It is true," said Cockburn, C. J. "there has not been an actual loading on board this ship at Monte Video: and if the authorities establish the conclusion that an actual loading must take place in the port mentioned in the policy, no doubt the defence of the underwriter would be sufficient. But I think *Nonnen v. Kettlewell* (16 East, 176) establishes sufficiently for the present purpose that there may be a constructive loading at a particular place so as to satisfy the language of such a policy as this. In that case, the cargo having been put on board at a port, the vessel came to that from which she was insured, in order to have the amount of duties ascertained, and the cargo was examined with that view. A portion of it was taken out for the purpose, and when the custom house officers discharged their functions it was put back again; and this was held a sufficient loading of the whole cargo at the second port to satisfy the terms of the policy. According to the authority of that case, therefore, a constructive loading will suffice." In that case there was some loading and unloading; in the present there was none whatever. There must be an actual loading as to part in order that there should be a constructive loading as to the

whole. In *Rickman v. Carstairs* (ubi sup.), Lord Denman, C. J., referring to the memorandum which declared the insurance to be "on the cargo, valued at 4800*l.*," said: "it occurred at one time, to a part of the court, that this raised a presumption that the parties contemplated such a cargo to be the subject of the assurance, as was capable of being valued at the full amount insured, when the policy had attached, *i.e.*, when the ship had arrived twenty-four hours on the coast of Africa, and that the entire cargo, consisting of outward and homeward goods, would alone answer that description. If this were clearly the meaning of this clause, we agree that we might reject or qualify the words "from the loading thereof aboard the said ship," as we certainly might have done if it had been said expressly in the memorandum that the insurance was on the cargo, both outward and homeward, valued at 4800*l.* But the difficulty is to make out that this is clearly the meaning of the memorandum in question." [BLACKBURN, J. referred to *Bell v. Hobson* (16 East, 240), where the policy was on goods at and from G. to any port in the Baltic, beginning the adventure from the loading thereof on board the ship, and the policy was declared to be in continuation of a former policy, which was a policy from V. to her port of discharge in the United Kingdom, or any ports in the Baltic, with liberty to take in and discharge goods wheresoever, to return 12 per cent. if the voyage ended at G. It was held that the assured were entitled to recover, although the goods were not loaded on board at G., but at V., and although the defendant was not an underwriter on the former policy. Lord Ellenborough, C. J., said: "A very strict, and certainly a construction not to be favoured, and still less to be extended, was adopted in the case of *Spitta v. Woodman* (2 Taunt. 416), where it was held that the words "beginning the adventure from the loading on board," were to be confined to the place from whence the risk commenced. But if there be anything to indicate that a prior loading was contemplated by the parties, it will release the case from that strict construction. Then can there be anything more indicative of such an understanding between the parties than the statement made at the foot of this policy, that it was in continuation of former policies, which was distinctly upon a voyage from Virginia? This was taking up the voyage from a period in the former policies. The conclusion, therefore, which was drawn in *Spitta v. Woodman* is completely rebutted by the reference in this policy to an antecedent loading." Is there not the same indication of intention in the present case?] The intention of the parties in that case was to keep the goods continuously insured. There was no continuation here of a former insurance, but a mere getting rid of part of the original insurer's liability.

Herschell, Q. C. (with him Gully), for the plaintiff, were not called upon.

BLACKBURN, J.—I do not think we need trouble Mr. Herschell. Mr. Hill has no doubt, said everything that could be said, but notwithstanding that, I think that his contention is wrong. The ordinary and general rule in the case of a policy of insurance of course is, that we are to take the policy itself; it is in a printed form, with written parts introduced into it, and we are to take the whole together, both the written and the printed parts. Although it has sometimes been said that we ought

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to bestow no more attention on the written parts than on those printed parts that are uniform in all policies of insurance, there is no doubt that we do, and ought to, make a difference between them. The part that is specially put into a particular instrument is naturally more in harmony with what the parties are intending than the other parts, although it must not be used so as to reject another part, or to make it have no effect. One of the printed parts of a policy, and here it has not been struck out, is that the insurance "shall commence on the freight and goods and merchandise, from the loading of the said goods and merchandise on board the said ship or vessel at as above," which would refer to the voyage as above. That means that the underwriter is not responsible for the goods until they are put on board the vessel for the voyage that is insured, unless there is something stated to the contrary, and so it has been decided. But then in *Bell v. Hobson* (*ubi sup.*), which rather derogates from this rule, Lord Ellenborough says it had been held that the words "beginning the adventure from the loading on board" were to be confined to the place from whence the risk commenced; but he adds, "If there be anything to indicate that a prior loading was contemplated by the parties, it will release the case from that strict construction." That I understand to mean that if there be anything on the face of the written instrument (we cannot construe it as importing other matters) to show that the loading was to commence at a prior time, or that the word "loading" was used in a sense different from the mere putting on board, then such a sense should prevail. In the particular case of which Lord Ellenborough was speaking there was a policy on the goods "from the loading at as above," which would mean, apparently, goods loaded at Gottenberg; but it was stated to be in continuation of a policy which was on goods from Virginia to Gottenberg *inter alia*, and it being so stated, Lord Ellenborough says, "Can there be anything more indicative of such an understanding between the parties than the statement made at the foot of this policy, that it was in continuation of former policies, which were distinctly upon a voyage from Virginia. This was taking up the voyage from the period in the former policies. The conclusion, therefore, which was drawn in *Spitta v. Woodman* (that is, that they were to be loaded during the voyage) "is completely rebutted by the reference in this policy to an antecedent loading." Now what is there in that reasoning—which seems to me to be very good and sound sense—which does not apply here? The insurance here is an insurance of 1000*l.* "which insurance is hereby declared to be upon cargo, being a re-insurance subject to all clauses and conditions in the original policy, and to pay as may be paid thereon general average and salvage charges to be settled as per foreign statement;" and then the policy proceeds immediately after to say, "lost or not lost, at and from any port or ports, place or places, in any order on the West Coast of Africa to the said vessel's port or ports of call and of discharge in the United Kingdom. And the said company promises and agrees that the insurance aforesaid shall commence upon the freight and goods or merchandise aforesaid, from the loading of the said goods or merchandise on board the said ship or vessel, as above, and continue until the said goods or merchandise be discharged and safely

landed at as above." There was nothing to show that the parties contemplated beginning earlier or taking up a prior loading. The goods would appear to be goods shipped on the coast of Africa, and not the outward cargo. But when we look at the policy of re-insurance, which is said to have all the clauses and conditions of the original policy included in it, we find a policy of insurance which, no doubt, began upon cargo at and from Liverpool to any port or ports in Africa, and backwards and forwards to the United Kingdom, with liberty to discharge, &c., valued at 3350*l.*, and "with leave to increase the valuation of the cargo on the homeward voyage, outward cargo to be deemed homeward interest, twenty-four hours after arriving at her first port of discharge." From this it appears that the original policy was to cover the goods that were put on board at Liverpool, to cover the cargo whilst at Africa, and to cover the cargo homeward from Africa. I quite agree with Mr. Hill, that it was quite necessary for the insured, who had leave to increase the valuation of the cargo on the homeward voyage, to say which of these it was; and they say that the cargo loaded at Liverpool, when it had been twenty-four hours on the coast of Africa, and going backwards and forwards, was to be considered as on the homeward voyage; so that the insurance, we may presume, was made after the ship had arrived on the coast of Africa, and does not cover, or propose to cover, any portion of the risk out to Africa. But the case does appear to show, quite as distinctly as was shown in *Bell v. Hobson*, an indication on the face of the policy that it was intended to cover goods as, in that sense, loaded at Africa, which were on board the ship twenty-four hours after her arrival there, which were, in the former policy, declared to be considered between the parties as part of the homeward interest. It seems to me to be clearly shown that the parties did mean this; that the underwriters meant to say: "We run the risk whilst the ship is at Africa, on all the cargo that is on board at Africa, although it may have been put on board at Liverpool; for such was the prior policy that we are undertaking to re-insure." Taking this view of the matter, I think the plaintiffs are right in their declaration, and that our judgment should be for them.

MELLOR, J.—I am of the same opinion. I think that the case of *Bell v. Hobson* (*ubi sup.*) is an abundant authority on the question that has arisen.

LUSH, J.—I am of the same opinion. The policy in question reinsures. It is an agreement by way of indemnity to the plaintiffs, the underwriters on the original policy, for the risk which they had incurred on the homeward voyage. They had insured outward and homeward; and this policy undertakes to guarantee and indemnify them against the risks which they had incurred upon the homeward voyage. The policy says that it shall be subject to all the clauses and conditions of the original policy. The risk was to commence from the loading of the goods on board the ship at some port or place on the coast of Africa. Now by one clause in the original policy the plaintiffs, the other underwriters, had agreed, in effect, that whatever portion of the outward cargo might remain on board for twenty-four hours after the arrival of the vessel on the coast of Africa, that portion should be deemed to have been shipped upon the homeward voyage. That I take to be the meaning and effect of the

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word "onward cargo to be deemed homeward interest twenty-four hours after her arrival at her first port of discharge." The parties had agreed therefore, that whatever remained of the outward cargo should be just in the same position, as to the liability of the underwriters, as if it had been shipped on the coast of Africa on the homeward voyage. The defendants say, "we will reinsure, and subject to all the claims and conditions of that policy." That, I think, at once enables us to put a meaning upon the terms which express the time when the risk was to commence. It was to commence upon the goods "from the loading thereof on board the said ship." It shows that what was meant by the parties was not the actual loading, but a constructive loading, which was what the original underwriters had agreed to treat as a loading on board for the purpose of the homeward voyage.

Judgment for the plaintiff.

Attorneys for plaintiffs, *Chester and Urquhart*, for J. H. E. Gill, Liverpool.

Attorneys for defendants, *Newman, Dale, and Stretton*.

COURT OF ADMIRALTY.

reported by J. P. ASPIWALL, Esq., Barrister-at-Law.

Monday, June 10, 1872.

THE WARRIOR.

Collision—Sailing vessel and tug with tow—Duty of tug—Sailing rules—Articles 15 and 19.

The fact that a steam tug is towing a vessel against the wind involves no such danger of navigation, and no such special circumstances within the meaning of Article 19 of the Regulations for Prevention of Collisions at Sea, as will justify a departure from the rule (Art. 15) that a steamship shall keep out of the way of a sailing vessel.

THIS was a cause of collision instituted on behalf of the owners of the schooner *Triumph* against the steam tug *Warrior*, and her owners intervening. The collision occurred off the Skerries, at about 5.30 a.m. on 17th Feb. 1872. The *Triumph* was closehauled on the starboard tack, heading S.S.W., and going above knots when she sighted the two mast head lights and starboard light of the *Warrior*, which was heading due west, and was towing a vessel of about 800 tons burden. The wind was west and blowing a strong breeze, and the tide was flood about three-quarters of an hour before high water, but not running strong. The remaining facts are fully stated in the judgment. The question was whether it was the duty of a steam tug towing a vessel head to wind to give way to a sailing vessel.

Myburgh (*Butt*, Q.C. with him) for the plaintiffs. —The tug and tow are to be considered as one vessel, and as the motive power was in the steam tug, the two together are to be considered as a steamer, and it was their duty to get out of the way of the schooner: (*The Cleodora*, 4 L. T. Rep. N. S. 157; 1 Mar. Law Cas. O. S. 41.) The two vessels were approaching, and it would have been an improper manoeuvre on the part of the schooner to go about under the bows of the steamer. If the schooner was right in assuming that the steamer would give way, and go under her stern, going about would necessarily have brought the vessels together more rapidly. The master of the tug

was bound to have stopped or slowed his engines earlier than he did.

W. C. Gully (*Aspinall*, Q.C. with him) for the defendants. —The schooner might have avoided the collision by going about when she sighted the steamer a mile off. A steam tug towing a ship cannot be considered as a free ship; and it is much less inconvenient for a sailing vessel close hauled to change her course than for a steam tug. It is the duty, therefore, of a sailing vessel to get out of the way of a tug and her tow: (*The Independence*, *The Arthur Gordon*, 4 L. T. Rep. N. S. 563; 1 Mar. Law Cas. O. S. 88; Lush. 270.) In that case a sailing vessel close hauled was held liable for not getting out of the way of a tug and tow; but the tow was also held liable for not taking measures as soon as the danger became imminent. Here, however, the tug stopped and reversed as soon as she saw the schooner persisted in holding on her course, and is, therefore, not to blame. By law we were not bound to do anything until that time.

Butt, Q.C. in reply. —*The Independence* (sup.) is distinguishable, as that collision took place in the daylight, and the vessels could see each other; whilst here there was no means of knowing the steamer's course. Moreover, that case was decided in 1861, and the new sailing rules were made in 1862; and by Art. 18, where one of two ships is to keep out of the way, the other shall keep her course. A steamer is bound to make way for a sailing vessel, and therefore the schooner was bound to keep her course. There was no peculiar danger at the time which qualified the rule so as to bring the tug within art. 19.

Sir R. Phillimore. —This is a case of collision between a vessel called the *Triumph*, of 82 tons, with a crew of three hands, and laden with coal, going from Queen's Ferry, in Flintshire, to Duddalk, in Ireland, and the *Warrior*, a steam tug of 72 tons register, with engines of 80-horse power, and manned by a crew of eight hands. The *Warrior*, at the time of the collision, was towing a ship called the *Woocong*, of about 800 tons. The place of collision was four or five miles off the Skerries—to the east of the Skerries. The wind at the time was W., and the tide was flood, about three-quarters of an hour before high water. The night was what is called dark but clear, a description which we are very familiar with in this court. Now the schooner was close hauled on the starboard tack, and heading S.S.W., and, according to her evidence and her narrative, she saw a starboard light and two towing lights of a steamer three points on her port bow about a mile off. The schooner deliberately, as her master has told us this morning, kept her course, conceiving that she lay under an obligation to do so according to the sailing rules. The steamer struck her on the port quarter about the main rigging, and she sank soon afterwards. The steamer was towing, as I have said, a ship of 700 or 800 tons, and she saw the port light of the schooner on her starboard beam about a mile off. Now she says that she did nothing till within a hundred yards, continuing to approach the schooner, and when she had come within that distance the schooner heeled her to go astern, which she attempted to do, but she did not quite succeed, and struck the schooner as I have said. The rules applicable to this case are the 15th which is—"If two ships, one of which is a sailing ship and the other a steam ship, are proceeding in such direction as to involve risk of collision, the steam ship

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shall keep out of the way of the sailing ship;" the 18th, "Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course subject to the qualifications contained in the following article," and the 19th, "In obeying and coöperating these rules due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger." The steamer's contention is that her case falls under the 19th rule; that there were dangers of navigation and particular circumstances which justified her in expecting that the schooner would get out of her way, and she alleges that the schooner might safely have done so by tacking or by going under the stern of the vessel in tow, I presume. I have of course taken the opinion of the Elder Brethren on these points, and they are of opinion that there were no dangers of navigation, and no special circumstances which justified a departure from the ordinary rule that a steam ship shall keep out of the way of the sailing vessel, on the contrary, they think that the *Warrior* might have avoided the collision, according to the evidence of her own master, either by starboarding or by porting at an earlier period than she did, or that she might have stopped at an earlier period, in which case again there would have been no collision. I have considered the case of *The Arthur Gordon* and *The Independence* (Lush. 270), but it does not appear to me to affect the conclusion at which I have arrived. I pronounce the *Warrior* alone to blame for the collision.

Solicitors for the plaintiffs: *Thornely and Archer*.
Solicitors for the defendant: *Wright, Stockley, and Beckett*.

June 13 and 14, 1872.

THE GLENGABER.

Salvage—Collision—Salvor to blame—Right of owners to recover in respect of another vessel—Employment of salvor.

A vessel rendering assistance to another which she has injured in collision cannot claim salvage reward if the collision takes place by her default. The owners, master, and crew of a vessel which renders assistance to a vessel injured by collision are not deprived of their right to salvage reward by the fact that some of the owners are also owners of another vessel by whose misconduct the collision takes place.

A vessel rendering salvage assistance is not deprived of her right to reward by the fact that she is employed by a vessel whose misconduct renders her employment necessary.

Salvage services were rendered by four steamers; one of the steamers had come into collision with the vessel salved, and was found to blame, and she rendered the principal services. The value of the property salved was 22,200*l*.

Held, that the three vessels not to blame were entitled to reward. The court awarded 410*l*.

Two causes of salvage were instituted against the ship *Glengaber*, her cargo and freight; the one on behalf of the owners, masters, and crews of the steamships *Black Prince*, *Sir George Grey*, and *Warrior*, the other on behalf of the steam ferry-boat *Bee*. The two causes were heard at the same

time before the learned judge, assisted by Trinity Masters.

The *Black Prince* was a tug of 101 tons register, and had disconnecting engines of ninety-five-horsepower nominal, working up to 650 actual. The *Sir George Grey* was a tug of forty-nine tons register, and had a single engine of fifty-horsepower nominal, working up to 150 actual. The *Warrior* was a tug of seventy-two tons register, with disconnecting engines of ninety-horsepower nominal, working up to 360 actual. The *Glengaber* was an iron ship of 658 tons register, and was at the time of the services rendered laden with a cargo of wheat and flour. The value of the ship cargo, and freight was 22,200*l*.

At about 10.15 p.m. on the 8th April, 1872, the *Black Prince* was engaged in towing the barque *Strathmore* up the river Mersey past Monk's Ferry. Soon afterwards her master who was on the bridge perceived what he described as a black object, which afterwards turned out to be the *Glengaber*, carrying, as he alleged, no lights, about sixty or seventy yards distant. He immediately stopped his engines and reversed full speed and hailed the *Strathmore* to starboard her helm and slipped the hawser. The *Black Prince* brought up short of the port bow of the *Glengaber*, but the *Strathmore* going past the tug struck the *Glengaber* on her starboard bow. The *Glengaber* dragged her anchors and drifted to the southward with the *Strathmore* laying across her bows. The *Strathmore* soon afterwards sunk. The *Glengaber* came into collision with the barque *Indus* and set that vessel adrift, and both vessels went away to the southward. The *Glengaber* was considerably damaged by the collision. The *Bee*, which was a double-ended steamer working up to about 200-horsepower, took hold of the *Indus*, and afterwards made fast to the *Glengaber*, and towed to the westward to take the strain off the *Indus*; she towed thus for twenty minutes, and then, at the request of the mate of the *Glengaber*, went to fetch the master of that vessel from Rock Ferry. In the meantime the *Black Prince* came up and made fast to the *Glengaber* and checked their drifting. The *Sir George Grey* then came up and offered her services to the master of the *Glengaber*, but according to the defendants' evidence they were refused; by the plaintiffs' account, however, they were accepted—whether by the *Black Prince* or by the *Glengaber* was uncertain—and she made fast ahead of the *Black Prince*, and towed ahead. They stopped the drifting, and held her steady for a short time. The weather was then blowing a moderate gale. The *Bee* meanwhile had returned, and was made fast along the port side of the *Glengaber* and went ahead full speed to hold her against the tide, and continued to do so until high water, about midnight. The hawser of the *Sir George Grey* was then cut, and the *Black Prince* went alongside, her hawser also being cut. The *Black Prince* was made fast to the starboard side, and the *Sir George Grey* to the port side of the *Glengaber*; the *Bee* being lashed to the stern to cant her head to the eastward. At 1 a.m. of the 9th, the *Black Prince* again got her hawser cut ahead; the *Sir George Grey* let go and went away; the *Bee* was again lashed alongside, and with the ebb tide the *Glengaber* was got clear of the *Indus*. The *Glengaber* was then towed down the river to the entrance of the Alfred Dock. The *Warrior* then came up and offered her services, and she was lashed alongside

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the *Glengaber* and assisted in bolding her up. The *Bee* ran short of coal about 9 a.m., and went away. The wreck was then cleared away with the assistance of some shipwrights and another tug. The *Black Prince* then let go, and the *Warrior* and the other tug towed the *Glengaber* into the Alfred basin, and after some delay into the Alfred Dock, where she was moored in safety at about 2 p.m. It was admitted that Edward and William Griffiths were registered owners of thirty and sixteen sixty-fourth shares respectively in the *Black Prince*, and also of thirty-two and twenty-six sixty-fourth shares in the *Warrior*. A cause of collision was instituted against the *Black Prince*, by the owners of the *Glengaber*, in respect of this collision, and another cause by the same persons against the owners of the *Strathmore*. The first cause came on for hearing before the present salvage suit, and the *Black Prince* was held to have failed in her defence, although the question of the extent to which she was to blame, was reserved until after the cause against the *Strathmore* was heard. The present salvage suit came on for hearing after the cause against the *Black Prince*, and before the cause against the *Strathmore*.

Aspinall, Q.C. and *Gully*, for the plaintiffs, owners, masters, and crew of the *Black Prince*, the *Warrior*, and the *Sir George Grey*.

Pickering, Q.C. and *Potter*, for the plaintiffs, owners, master, and crew of the *Bee*.

Milward, Q.C. and *Myburgh*, for the defendants, submitted that the *Black Prince* was not entitled to salvage reward, on the ground that she was a wrongdoer, having been found to blame for the collision; that the *Warrior* came under the same rule as her owners were also owners of the *Black Prince*, and could not therefore benefit by their own wrong; that the *Sir George Grey* having been employed by a wrongdoer could not recover. The services of the *Sir George Grey* and the *Warrior* were small.

Aspinall, Q.C. in reply.

JUNE 14th.—*Sir B. PHILLIMORE*.—The inconvenience which arose in the preceding collision case (against the *Black Prince*) from the absence of the evidence in the *Strathmore*, follows to a certain extent these cases of salvage, which were the consequences of that act of collision, and it is very much to be regretted, though it cannot be helped, owing to the exigencies of the case, that the court has not before it the evidence with regard to the *Strathmore*, so as to be enabled to deal with the whole of the question; for, although it is divided into a variety of suits, in reality it is impossible to make a fair decision with respect to the case now before me without remembering the previous history of the case. There are some points of law upon which the court must express an opinion before it proceeds to assess the quantum of award which it thinks due to the salvors in this case. I have already decided that the *Black Prince* failed in her defence as defendant in the suit of collision brought by the *Glengaber* against her, and I must now decide that the *Black Prince*, which was towing the vessel which ran into the *Glengaber*, and which, to some extent at least—to what extent may depend hereafter when the case of the *Strathmore* is fully examined—must be considered with the *Strathmore* as one vessel, and, as the cause of the collision, cannot recover in this court, as a ship rendering salvage service, the necessity of which her own misconduct has occasioned. I must,

however, remember that although the *Black Prince* is not in my judgment entitled, for the reason that I have stated, to be considered as a salvor, I must carefully bear in mind her power in rendering the services which were performed subsequently to the collision, because that power which she possessed must very much affect the judgment of the court with respect to the other salvors. I shall dismiss the claim of the *Black Prince* with costs. With regard to the *Warrior*, it has been contended in *limine* that that vessel is not entitled to be considered as a salvor because upon cross-examination it appeared that some of her owners were also owners of the *Black Prince*. I am not inclined to allow that objection to prevail. I foresee very grave consequences which might result from it, and a very great deal of expense in the conduct of these suits. But, on principle, I do not think the objection can stand; certainly, it could only stand with regard to those owners themselves, and could not in any way affect the claim of those who were not joint owners of the *Black Prince*, and could not affect the crew who assisted as salvors; but I know of no precedent for saying that because a vessel belongs to the same owner as the vessel which has done the mischief (being wholly unconnected with the act of mischief itself, and their being no suggestion of any conspiracy—which, of course, would create a totally different state of circumstances—no suggestion of any conspiracy between the two vessels, the one to cause the mischief and the other to assist in remedying it), such a vessel cannot recover salvage reward. I know of no case in which such a suggestion has been put forward, and therefore know of no instance in which it has been sustained, therefore I do not uphold it in the present case; and I think the *Warrior*, if entitled to salvage, is not disentitled to it because some of her owners are also owners of the *Black Prince*. I must also say a word with regard to the *Sir George Grey*, which is said to be disentitled to be a salvor, because she was employed by the *Black Prince*, an objection I must also decline to uphold. The *Black Prince's* misconduct cannot extend beyond herself. The *Sir George Grey* appears to me to have reasonably supposed in these circumstances, though the communication was more directly with the *Black Prince*, that she was in fact employed on behalf of the *Glengaber*. And then I must say a word with respect to the *Bee*. Now the *Bee*, it is admitted, and very properly admitted, has conducted herself from first to last in a manner which entitles her to a considerable salvage remuneration in proportion to her efforts, and also to the value of the property which she saved. That value appears to amount to 22,000*l*. It is quite true, as has been observed, that there was no risk of life or property in any of these services, not even in the services of the *Bee*, which seem to have extended over eleven hours, during half of which time, without entering into the details of the petition, which has been read by Mr. Pickering, and which is assented to with a trifling alteration by the defendants, her services in the opinion of the court supported by that of the Elder Brethren of the Trinity House, are to be considered as of great value in the preservation of the property. I shall award the *Bee* 300*l*. I think, as I have already said, that the *Warrior* or the *Sir George Grey* were both salvors, but I quite assent that their services were com-

ADM.]

THE RAJAH.

[ADM.]

paratively of a trifling character. I shall award to the *Sir George Grey*, which I think is entitled to a somewhat larger amount of remuneration than the *Warrior*, as she seems to have been of more service in keeping the *Black Prince* in position at the time the *Black Prince* was rendering assistance, I shall award to the *Sir George Grey* 60*l.*, and to the *Warrior* 50*l.*; and with regard to their costs I think they are entitled to their costs, because I think the case has been properly brought in this court, for various reasons; amongst others, the principal cause itself being here, it was more convenient to the suitors, and probably a great saving of expense, that all the other suits connected with that case should also be dealt with by this court, and that is the award I now make.

Solicitors for the plaintiffs, the owners, &c., of the steam tug, *Wright, Stockley and Beckett*.

Solicitors for the owners, &c., of the *Bee, Simpson and North*.

Solicitors for the defendants, *Duncan, Hill and Parkinson*.

Tuesday, July 16, 1872.

THE RAJAH.

Limitation of liability—Collision—Two vessels damaged—Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), s. 54.

A shipowner, whose vessel injures two other vessels in a collision on one occasion and by one act of improper navigation, does not incur in respect of each of those vessels a separate liability beyond the limitation of liability provided for by the Merchant Shipping Act Amendment Act 1862, s. 54, and is entitled to have his liability limited as for one collision.

THIS was a case of limitation of liability instituted on behalf of George Elliot, the owner of the steamship *Rajah*, against the owner of the tug *Admiral* and her master and crew, and the owner of the ship *William Davis*, and all other persons having any interest in the said tug and ship, or in the cargo, &c., on board of them, with reference to a collision between the *Rajah*, the *Admiral*, and the *William Davis*, on the 11th Feb. 1872. On that date, according to the plaintiff's position, the *Rajah*, at one and the same time, came into collision with the *Admiral* and the *William Davis*, and the *Admiral* sank and the *William Davis* was much injured. The cargo of the latter vessel was not injured. The owners of the *William Davis* and the owners of the *Admiral* respectively instituted suits of collision against the *Rajah* in this court, and the owner intervened as defendant, and bail was given. The owner of the *Rajah* admitted his liability, and by his petition prayed the court, there being no loss of life, to limit his liability to an aggregate amount not exceeding 8*l.* per ton on the gross tonnage of the *Rajah*, and to stay proceedings in the collision suits on payment into court of that aggregate amount. The defendants filed separate answers alleging that the *Admiral* was in the mouth of the river Thames, about to take hold of and tow the *William Davis*, which was then lying at anchor; that the *Admiral* was a short distance off the starboard bow of the *William Davis*, and, with her engines working a head, was being kept in position to enable those on board her to obtain the tow rope of the *William Davis*; that "under these circumstances the *Rajah*, which was

coming down the river under steam, ran into and damaged the *William Davis*, and then ran into and sank the *Admiral*." This allegation, which was intended to raise the point that there were two separate collisions, was admitted by the plaintiffs to be true.

Butt, Q. C. (Pritchard with him) for the plaintiffs.—The defendants are going to contend that these were separate collisions, and that the plaintiffs are, therefore, liable for 8*l.* per ton twice over. I submit that, although the blows doing damage were, perhaps, at different moments, it was substantially on one occasion and one collision. Their contention arises on the wording of the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), sect. 54, (a) which only deals with damage to "any other ship or boat" in the singular number. The real test is, whether this is to be considered as two distinct collisions, or, as being on the same occasion, only one collision. If the latter, then the plaintiff is entitled to his limitation. The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), sect. 506, (b) shows that collisions must be on distinct occasions to create a separate liability.

Clarkson for the defendants.—Sect. 506 of the Merchant Shipping Act 1854 was not enacted for the benefit of the shipowner but for the benefit of those injured by collision, and in order to prevent this defence being set up by shipowners where their vessels had injured several other vessels on the same voyage. The *Admiral* and the *William Davis* were separate, and the injury done was to two vessels by improper navigation under sect. 54 of the Merchant Shipping Act Amendment Act 1862. The plaintiffs are, therefore, not entitled to the limitation prayed.

Sir R. PHILLIMORE.—I take a different view of the construction put upon this section from that put forward by Mr. Clarkson. I think that the true construction to be put upon the statute is that the liability there limited has reference to one and the same accident, if it may be so called, and that it is not intended that where a vessel and a tug lying close to each other are struck almost at the same time, and as a result of the same act of improper navigation, that there should be a double liability. I am of opinion that this claim for limitation of liability is founded upon a just conception of the meaning of the statute, and I shall grant the prayer of the petition.

(a) The section, as far as material, is as follows:—The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,

4. Where any loss or damage is by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other thing whatsoever on board any other ship or boat;

Be answerable in damages . . . in respect of loss or damage to ships, goods, &c., to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage, &c.

(b) That section is as follows:—The owner of every seagoing ship, or share therein, shall be liable in respect of every such loss of life, personal injury, loss of, or damage to, goods as aforesaid, arising on distinct occasions to the same extent as if no other loss, injury, or damage, had arisen.

Sect. 54 of 25 & 26 Vict. c. 18, is substituted by that Act for sect. 504 of the Merchant Shipping Act 1854.

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THE SCHOONER MARQUETTE.

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Proctors for the plaintiffs, Pritchard and Sons.

Sollicitor for the Admiral, Thomas Cooper.

Proctor for the William Davis, Cyrus Waddilove.

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(Collected by F. O. CUMPT, Esq., Barrister-at-Law.)

UNITED STATES DISTRICT COURT OF MICHIGAN.—IN ADMIRALTY.

Tuesday, Feb. 13, 1872.

THE SCHOONER MARQUETTE.

Salvage—Agreed compensation—Proceedings in rem and in personam.

A salvor by contract is not an agent of the owners, and has no claim against the property saved beyond the contract price.

A contract by salvors with owners for an agreed amount to be paid in any event, creates only a personal obligation on the part of the owners.

A wrecking company which had agreed to raise a sunken schooner for a certain proportion of her value, hired of the libellant a diver and certain apparatus.

Held, that the libellant, having knowledge of the contract, could not maintain a libel in rem.

LONGYEAR, J., delivered the opinion of the court.—The *Marquette* was sunk in the Straits of Mackinaw, by a collision, and abandoned by her owners to the underwriters, and there lay then sunken in about fifteen fathoms of water. The underwriters contracted with the North-Western Wrecking Company, a corporation organized under the laws of Ohio for the raising of sunken vessels, to raise the *Marquette* and place her in Clark's dry dock in the city of Detroit, for six-tenths of the vessel. The North-Western Wrecking Company entered upon the performance of their contract, under the charge and supervision of Milo Osborne, and after working at the wreck for several days found that on account of the great depth of water in which the wreck lay, the services of a diver were necessary. The libellant, who was also in the wrecking business, was then engaged in raising a wreck in Beaver Harbor, near Beaver Island, a few miles distant from the wreck of the *Marquette*. He had divers in his employ, and owned and had in use the necessary diving armour and apparatus, a hand pump, a steam pump, etc., adapted to the purposes of wrecking. He was also the patentee of a new invention for raising sunken vessels, which consisted mainly in sinking casks filled with water, and then, after being fastened to the vessel, inflating them with air by the use of a steam pump and connecting tubes or pipes, and thus expelling the water and giving the casks a lifting power. Osborne, who was in charge of the work for the North-Western Wrecking Company, applied to and obtained of the libellant a diver and the necessary armour and apparatus, including a hand pump. After working a short time it was found that the hand pump was not sufficient for the divers to operate with safety in so great depth of water, and Osborne returned the hand pump and obtained libellant's steam pump. After working a few days longer, and not making much progress, Osborne returned to libellant the diver, apparatus and pump, and had a settlement with him up to that time, and paid

libellant what was then found to be his due at the rate of 50dols. per day with the hand pump, and 75dols. per day with the steam pump, less a small deduction made by libellant at the request of Osborne. Osborne desired the use of the diver, etc., longer, but complained that they could not afford it at the price charged by libellant. A new arrangement was then entered into, and Osborne returned to the *Marquette* with two divers who were in the employ of the libellant, the necessary armour and apparatus, and the steam pump, and taking with him also some of libellant's casks to be used on his patented plan, and had the same for use in raising the wreck thirty-four consecutive days, and until the vessel was finally raised. The divers, &c., were actually used twenty-eight, and were idle six days out of the thirty-four days. It is for this use, under the new arrangement, that the libellant brings this suit against the vessel. During this time the libellant came along where the company were at work, on his way to Cleveland, with the vessel he had been raising, and left a small vessel, called the *Barbour*, and his chains, anchors, additional casks, &c., and the same were used by the company to some extent, but no additional claim is made for such use. On the *Marquette* being raised she was taken to Detroit by the North-Western Wrecking Company, and placed in Clark's dry dock, in complete fulfilment of their contract with the underwriters, and its interest of six-tenths in the vessel, her boats, &c., thereupon accrued to them, and the company has intervened and put in its claim and answer for the protection of that interest. The libellant and Osborne, both of whom were sworn as witnesses and testified in the case, agree that the divers were in the employ of the libellant, and that he was to be paid for their services, as well as for the use of the armour, apparatus, pump, &c. They also agree that libellant's compensation was not dependent upon success, but that he was to be paid at all events, whether the vessel was raised or not. It is true they do not say this in so many words, but the version which each gives of what the contract was under the new arrangement admits of no other construction. They are also agreed as to the time, viz., thirty-four days, and that twenty-eight of those were working days, and six of them they were idle. The main facts upon which there is any disagreement, are, as to whether there was a fixed rate of compensation agreed upon, or whether it was left to a quantum meruit, and as to whether the libellant knew, or was informed of the character or capacity in which the company was operating, that is, that they were operating as contractors, and not as owners. The libellant claims that the rate of compensation agreed upon was 75dols. per day when working, and half-price, or 37.50dols. per day, when idle. On this basis, he claims as follows:

28 working days at 75 dols.	2100
6 idle days at 37.50 dols.	225
Total	2325
Less payment conceded	310
Balance	2015
Total	2325
Payments claimed and conceded	310
Leaving a balance of	2015
for which, with interest from 1st Oct. 1870, libel-	

[AMERICAN REPS.]

THE SCHOONER MARQUETTE.

[AMERICAN REPS.]

lant claims a decree in his favour against the vessel. On the other hand, the company claims that no fixed rate of compensation was agreed upon; but on the contrary, that when Osborne complained that they could not afford to pay 75 cents per day, that libellant told him to take the drivers, &c., and use them, and he would be reasonable with them, or words to that effect, and that that was the agreement as to compensation. But without pursuing this disputed point further now, I will proceed to the other disputed fact. And here I must hold that libellant had notice of the character or capacity in which the company was operating. Libellant, in his testimony, says: "I understood the North-Western Wrecking Company had taken the job to raise the vessel, and had failed. I did not know how much they had taken the job for." He understood, then, that the company was not operating as owner, but had undertaken the raising of the vessel as a "job," and the only point as to which he professes not to have been informed, was, how much they were to receive for the service. This is sufficient alone to settle this point. But there is further testimony, which I think places it beyond all doubt that libellant knew, not only that the company was operating as contractor, but also the terms of the contract. Osborne, after producing in evidence the contract (which was in writing), between the North-Western Wrecking Company and the underwriters, testifies positively and explicitly, as follows: "I made known to Captain Falcon that we had such a contract; that I deemed it a good one, and that I wished him to go in with me and share in the results," &c. That was at the time we were at Beaver Harbour. He replied that he wanted nothing to do with the wreck—that he wanted the money. He said they were slow things to realise from. I told him that we were to have six-tenths, and that they ought to be raised in a very short time—we deemed it a good contract." In this Osborne is not contradicted. On the libellant being recalled to the witness stand, and asked if any such conversation took place, says, "none that I recollect;" and this is all the denial he makes, which in fact is no denial. But it is contended on behalf of libellant, that the North-Western Wrecking Company were in fact part owners of the vessel to the extent of the six-tenths which they were to have under their contract with the underwriters in case of success, and which finally accrued to it. I cannot agree to this. The company was operating precisely the same as any salvors under contract, and the agreement as to the six-tenths was simply fixing the quantum of compensation in lieu of leaving it for after consideration between the parties, or to be determined by the court. Besides that, it was wholly conditional upon success, and it accrued to it only from the time the contract was fully performed. By no known principle of law or in reason, can it be held to relate back to any previous period, so as to affect the interests of those who were owners of the vessel at the time the contract was entered into. The company most, therefore, be held to have sustained the relation of contract merely, at the time the agreement between libellant and Osborne was entered into. The case, then, is that of a person having rendered a service to salvors for a compensation to be paid at all events, who were themselves operating under a contract with the owners known to such person claiming and seeking to enforce

a lien upon the vessel saved, independently and irrespectively of such latter contract, and of the compensation as fixed by it. The learned advocate for the libellant has referred the court to no adjudicated case in which this was allowed to be done, and to no authority or even dictum to that effect; and after a most careful and searching investigation, the court has been able to find none. On the contrary, the authorities are all the other way. The case of *The Whittaker* (Sprague's decision, 229, and same case at p. 242), and that of one hundred tons of iron (2 Benedict's D. C. Reps. 21), are quite analogous to the present case. Both cases were, in fact, more favourable to the libellant than the present. In the case of *The Whittaker*, Holbrook, the original contractor, after vain efforts to get the vessel off, gave the job over entirely to one Otis, at an expense largely beyond the contract price, succeeded in getting the vessel off, and then libelled her for his pay. Judge Sprague dismissed the libel, for the reason that Holbrook, the original contractor, was not made a party. Afterwards, upon a new libel, in which Holbrook was joined, the court granted a decree to Holbrook and Otis, jointly, limiting them to the original contract price, although it was less than half what Otis had expended. In that case, also, Otis' compensation was dependent upon success, while, in the present case, as we have seen, libellant was to be compensated at all events. In the case of one hundred tons of iron, libellant had hired to the owners seven large blocks, to be used by them in endeavouring to get their vessel off the beach, at 5 cents per day, with an express stipulation that the vessel should be responsible for hire and damage, and for the return of the blocks. The hire not having been paid, and the blocks having been lost, libellant brought his suit, in rem, against one hundred tons of iron which was of the cargo and had been recovered from the vessel. Judge Blatchford dismissed the libel, not only on the ground that a pledging of the vessel was not a pledging of the cargo, but mainly on the broad ground that the libellant had no claim whatever as a salvor, giving as a reason that the hire of the blocks was for a fixed compensation which was to be paid at all events whether the vessel was saved or not, which is exactly the present case according to the libellant's own theory. In that case also, it is to be observed, the contract was made with the master of the vessel, and it purported to pledge the vessel for its fulfilment, and yet the court held that the libellant could not recover in the Admiralty, either in rem or in personam. In this case, not only was the contract not made with master or owner, but the libellant expressly refused to have anything to do with the wreck. I think both of these cases are sustained by authority as well as on principle. The case of *The Whittaker* was decided on the principle that a salvor by contract, like the North-Western Wrecking company in this case, is not an agent for the owners, and cannot create against the owners, or the property saved, any obligation or liability beyond the contract price, or it may be added as applicable to this case, a different mode of payment than that expressed in the contract; and I think there can be no dispute as to the soundness of that doctrine. The most that the court could do in any event, would be to let the libellant in to share the contract price with the original contractor. But the court cannot do that in this case

AMERICAN REPS.] HALL *et al.* v. NASHVILLE AND CHATTANOOGA RAILROAD COMPANY. [AMERICAN REPS.]

without making a new contract for the parties, because, as we have seen, libellant expressly refused to share the contract price or have anything to do with the wreck at the time the agreement between him and the company was made. The case of one hundred tons of iron was decided on the principle that the hiring, as in the present case, was for a compensation to be paid at all events, whether the vessel was saved or not. The same principle was also stated and acted on by Judge Sprague, in the case of the *Whittaker*, in deciding another branch of the case than that above alluded to. See also the *Independence* (2 Curtis Circuit Court Reps. 350, 355), where the same doctrine is enunciated by Judge Curtis in the following language: "In my judgment, a contract to be paid at all events, either a sum certain, or a reasonable sum, for work, labour, and the hire of a steamer or other vessel attempting to relieve a vessel in distress, without regard to the success or failure of the efforts thus procured, is inconsistent with a claim for salvage, and when such a contract has been fairly made, it must be held binding by a court of admiralty, and any claim for salvage disallowed." It must be understood that the nature of the claim as a salvage claim is not changed simply because the service was rendered by contract. It is well settled that the nature of the service as a salvage service is not changed for reason alone. It is because that by the contract the compensation is to be paid at all events, whether the property is saved or not, that a claim for salvage cannot be maintained; such a contract creates a mere personal obligation, and no lien attaches on account of it. I hold, therefore, that the libellant in this case cannot maintain a suit *in rem* in this court, for the reasons, first, that the services having been so rendered under an agreement with a contract, itself operating for a specific compensation, and not with the owner or master of the vessel, he cannot, in any event, maintain a suit against the vessel except by joining with such original contractor and sharing with him the compensation so agreed upon between him and the owners; secondly, that he could not maintain such suit in this case, because by the very terms of his agreement he was not to share; thirdly, that he was to be paid at all events, whether the vessel was saved or not. The libellant undoubtedly has a remedy against the North Western Wrecking Company, in some form of action, but not in this. Having arrived at these conclusions, it is unnecessary to determine the specific compensation the libellant was to receive, whether a *per diem*, or a *quantum meruit*, or how much. The libel must be dismissed with costs; but, inasmuch as the merits of the case as between the libellant and the North-Western Wrecking Company are not decided, it must be without prejudice as between them.

UNITED STATES SUPREME COURT.

December Term, 1871.

HALL *et al.* v. THE NASHVILLE AND CHATTANOOGA RAILROAD COMPANY.*Marine and fire insurance—Carrier and underwriter—Respective liabilities—Subrogation.*

Where goods upon which an insurance has been effected are delivered to a common carrier, he is primarily liable for any loss which may occur,

but is entitled to be subrogated to the rights of the assured as against the insurer.

The principle of subrogation applies equally in the case of fire and marine insurance.

Where a loss arises by the fault of the carrier, the insurer who pays the amount of it to the assured is entitled to use his name in a suit to recover damages against the carrier.

STRONG, J. delivered the opinion of the court.—It is too well settled by the authorities to admit of question that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has often been ruled that an insurer who has paid a loss, may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss. It is conceded that this doctrine prevails in cases of marine insurance, but it is denied that it is applicable to cases of fire insurance upon land, and the reason for the supposed difference is said to be that the insurer in a marine policy becomes the owner of the lost or injured property by abandonment of the assured, while in land policies there can be no abandonment. But it is a mistake to assert that the right of insurers in marine policies to proceed against a carrier of the goods after they have paid a total loss, grows wholly, or even principally, out of any abandonment. There can be no abandonment where there has been total destruction. There is nothing upon which it can operate, and an insured may recover for a total loss without it. It is laid down in *Phillips on Insurance* (sect. 1725), that "a mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may afterwards be recovered from other parties on account of the loss," and that "the effect of a payment of a loss is equivalent in this respect to that of abandonment." There is then no reason for the subrogation of insurers by marine policies to the rights of the assured against a carrier by sea which does not exist in support of a like subrogation in case of an insurance against fire on land. Nor do the authorities make any distinction between the cases, though a carrier may, by stipulation with the owner of the goods, obtain the benefit of insurance. In *Gales v. Hailman* (11 Penn. 81, 515), it was ruled that a shipper who had received from his insurer the part of the loss insured against, might sue the carrier on the contract of bailment in his own right, not only for the unpaid balance due to himself, but as trustee for

what had been paid by the insurer in aid of the carrier, and that the court would restrain the carrier from setting up the insurer's payment of his part of the loss as partial satisfaction. So in *Hart et al. v. The Western Railroad Company* (13 Met., Mass.), it was held that where underwriters had paid a loss by fire caused by a locomotive of a railroad corporation, the owner might recover also from the corporation for the use of the underwriters, and that he could not release the action brought by them in his name. There is also a large class of cases in which attempts have been made by insurers who had paid a loss to recover from the party in fault for it, by suit in their own right, and not in the right of the assured. Such attempts have failed, but in all the cases it has been conceded that suits might have been maintained in the name of the insured party for the use of the insurers: (*Rockingham Mutual Fire Insurance Company v. Boshier*, 39 Maine, 253; *Peoria Ins. Co. v. Frost*, 37 Ill. 333; *Conn. Mu. Life Ins. Co. v. New York and New Haven B. R. Co.* 25 Conn. 265.) And such is the English doctrine settled at an early period: (*Mason v. Lainsburg*, 3 Dougl. 60; *Yates v. Whyte*, 4 Bing. N. C. 272; *Clark v. Blything*, 2 B. & C. 254; *Randall v. Cochran*, 1 Ves. sen. 98.) It has been argued however, that these decisions rest upon the doctrine that a wrongdoer is to be punished; that the defendants against whom such actions have been maintained were wrongdoers; but that, in the present case, the fire by which the insured goods were destroyed was accidental, without fault of the defendants, and therefore that they stood, in relation to the owner at most in the position of double insurers. The argument will not bear examination. A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to a cession of the remains of the property, or to have the loss adjusted on principles peculiar to the contract of insurance; and when a loss occurs, unless caused by the act of God, or of a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent, in fact, he has consented by his contract to be dealt with as if it were not so. He does not stand, therefore, on the same footing with that of an insurer, who may have entered into his contract of indemnity, relying upon the carrier's vigilance and responsibility. In all cases, when liable at all, it is because he is proved, or presumed to be, the author of the loss. There is nothing, then, to take the case in hand out of the general rule that an underwriter who has paid a loss is entitled to recover what he has paid by a suit in the name of the assured against a carrier who caused the loss. The judgment is reversed, and the cause is remanded for further proceedings.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

March 22 and May 10, 1872.

(Present: The Right Hons. Sir JAMES W. COLVILLE, Lord Justice JAMES, Sir MONTAGUE E. SMITH, and Sir R. F. COLLIER.)

THE AUSTRALASIAN STEAM NAVIGATION COMPANY v. MORSE.

Ship—Authority of master to sell cargo—Necessity for sale—Communication with owner—Telegraph—General cargo.

The authority of the master of a ship to sell the goods of the absent owner is derived from the necessity of the situation in which he is placed; and, consequently, to justify his thus dealing with the goods he must establish (1) a necessity for the sale; and (2) inability to communicate with the owner and obtain his directions.

Under these conditions, and by force of them, the master becomes the agent of the owner, not only with the power but under the obligation (within certain limits) of acting for him; but he is not entitled to substitute his own judgment for the will of the owner in selling the goods if it is possible to communicate with the owner and ascertain his will.

There is a "necessity" for the sale, if, under the circumstances of the case, a sale is the best and most prudent thing to be done for the interest of the owner.

The possibility of communicating with the owner depends on the circumstances of each case, involving a consideration of the facts which create the urgency for an early sale; the distance of the port from the owners, the means of communication which exist, and the general position of the master in the particular emergency.

Such communication only needs to be made where an answer can be obtained, or there is a reasonable expectation that it can be obtained, before sale; where, however, there is ground for such an expectation, every endeavour, so far as the position in which he is placed will allow, should be made by the master to obtain the owner's instructions.

The master is bound to employ the telegraph as a means of communication, where it can usefully be done; but the state of the particular telegraph, the way in which it is managed, and the possibility of transmitting explanatory messages, are proper subjects to be considered in determining the question of the practicability of communication.

The fact that the master cannot communicate with all the owners of a general cargo, does not of itself justify him in selling without communication with any of the owners; but this fact, increasing the embarrassment of the master, is to be considered when an estimate of his conduct has to be formed.

This was an appeal from a judgment of the Supreme Court of New South Wales, bearing date 7th March, 1870, whereby a rule nisi to set aside the verdict for the defendants obtained in this case, and to grant a new trial, was made absolute, with a direction that the costs of the first trial and of making the said rule absolute should abide the event.

The action was commenced by the respondents against the appellants. The declaration alleged, in

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the first count, the conversion by the appellants of certain bales of wool, the property of the respondents, and in the residue of the declaration sued for money had and received, and for money due on accounts stated.

The appellants pleaded to the first count that the wool was shipped on board of a vessel of the appellants, called the *Boomerang*, to be carried from Rockhampton, in the colony of Queensland, to Sydney, and there (excepting certain perils and casualties of the sea and navigation) delivered to the plaintiffs; that the ship in the course of her voyage stranded, and the wool became saturated with sea water, and that the appellants were compelled to take it back to Rockhampton, and then, after survey, sold it, as the only proper course to pursue in its then state, for the benefit of the plaintiffs.

To the residue of the declaration the appellants pleaded payment into court of 124*l.* 1*s.* 6*d.*

The plaintiffs replied to the first plea.—First, joinder of issue; secondly, that the wool might, at small expense, have been dried and re-packed, and forwarded to Sydney; and thirdly, as to the second plea, that the money paid into court was not sufficient.

Issue was joined on these replications.

Five other similar actions were about the same time commenced in the said Supreme Court against the appellants by other parties, owners of wool shipped on board the *Boomerang*.

The case was tried in the said Supreme Court before Sir Alfred Stephen, Chief Justice of the said court, on the 1st, 2nd, and 3rd March 1869, when evidence (part of which had been obtained on commissions to examine witnesses in England, and in Queensland, in one of the said other actions, and was, by consent of the parties, read as evidence in this action), was given to the following effect:—

The plaintiff was a wool producer in Queensland, at a station 120 miles inland from Port Mackay, and in the month of December 1865, nineteen bales of wool were sent by him to Rockhampton, a distance southward of about 250 miles, and at the latter port were transhipped by his agent on board the steam vessel *Boomerang*, belonging to the appellants, for conveyance from Rockhampton to Sydney, in the colony of New South Wales, a further distance of about 900 miles. The bales were consigned to Messrs. Willis, Merry, and Lloyd, merchants in Sydney, for the purpose of shipment to England.

The said nineteen bales formed portion of a cargo comprising 260 bales of wool, or thereabouts, consigned to nineteen separate consignees in Sydney aforesaid (including the plaintiffs in the said other five actions), and four parcels deliverable to order.

The *Boomerang* on her voyage, about forty-five miles from Rockhampton, struck upon a rock and filled, and the whole of her cargo became submerged and more or less damaged by sea water. The cargo was thereupon with great labour taken out of the *Boomerang*, transhipped in a steam vessel, the *Yaamba*, sent from Rockhampton for the purpose, and brought back to Rockhampton. In the course of transshipment from the *Boomerang* many of the bales of wool unavoidably burst open, and the wool belonging to different consignees became mixed, and the wool on its return to Rockhampton, to which place it was conveyed with reasonable despatch, was dirty and stank and was heated and in danger of ignition. The weather

was rainy, and there were no stores in the town of Rockhampton in which the wool could have been unpacked and dried, and the wool was in immediate peril of increased and serious damage. Under these circumstances, at the instance of the appellants' agent at Rockhampton, the wool brought back there was surveyed by Charles Haynes Morgan, Lloyd's agent there, together with Capt. Robert Millar Hunter, of the same place, merchant, who reported to the appellants' agent that the wool was becoming rapidly heated, and was in such a condition that it could not be re-shipped with safety, and recommended that it should be sold immediately; whereupon and owing to the urgency of the case, the cargo, with the exception of two or three parcels, was, with the approval of the captain of the *Boomerang*, sold at public auction by the appellants' agent.

At the said trial the Judge proposed the following questions for the determination of the jury:

First, Was the wool in such a state that it could safely be conveyed to Sydney? Secondly, Could the defendants, with the means obtainable by them, have dried, repacked, and forwarded the wool to the port of its destination? Thirdly, If they could have done this at all, could they have done it without incurring an expense considerably exceeding the amount of freight? Fourthly, Did the defendants, time and circumstances considered, act for the best and as wise and prudent men for the interest of the plaintiffs? Fifthly, Had the defendants, considering all the circumstances of the case, time and opportunity to obtain instructions from the owners? Sixthly, Was the master of the vessel a participator in the proceedings thus taken, or a consenting party to such proceedings?

The jury answered the first, second, third, and fifth of the above questions in the negative, and the fourth and sixth in the affirmative, and thereupon a verdict was entered for the appellants.

On the 11th March 1869, the respondents obtained a rule nisi to set aside the verdict and for a new trial, which was made absolute on the 7th March 1870, Sir Alfred Stephen, the Chief Justice of the said court who tried the case, dissenting from the opinion of Hargrave and Cheeke, JJ., who formed the majority of the court.

The appellants then presented a petition to the Supreme Court, praying for leave to appeal to the Queen in Council; but the petition was refused with costs, on the ground that the rule did not involve directly or indirectly any claim respecting property of the value of 500*l.* sterling. The total amount, however, which the respondents sought to recover as damages from the appellants was for the value of 103 bales of wool, estimated at 1750*l.* and upwards.

The appellants subsequently obtained special leave to appeal, on the ground that, though under the appealable value, the case involved an important point of mercantile law.

March 22.—Sir R. Palmer, Q.C. and Archibald for the appellants.—The jury were properly directed by the Chief Justice, and their findings upon the several questions put to them are conclusive as to the matters of fact involved. The findings of the jury were in accordance with the evidence. Having regard to the state of the cargo, and the means at the appellants' disposal, and all the circumstances of the case, the appellants were justified in selling

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the cargo of the *Boomerang* without communicating with the consignees.

The Gratitude, 3 Rob. 240.

The Karnack, 3 Mar. Law Cas. O. S. 103; 21 L. T. Rep. N. S. 159; L. Rep. 2 Priv. Co. 105;

The Bonaparte, 8 Moo. Priv. Co. 459;

The Hamburg, 1 Mar. Law Cas. O. S. 327; 2 Mar. Law Cas. O. S. 1; 8 L. T. Rep. N. S. 175; 10 Jb. 206; 2 Moo. Priv. Co. N. S. 299; Br. & Lush. 253.

Sir J. Karslake, Q.C. and *Thesiger* for the respondents.—The verdict was against evidence and against law. The questions submitted to the jury, as the sole questions of fact for their determination, were calculated to mislead; especially the fourth of those questions, which omitted all reference to "urgent necessity," or "necessity" as the sole ground for any sale of the wool by the appellants; thus putting it to the jury as merely a question of expediency. The attention of the jury was not directed to the state of the specific bales of wool belonging to the respondents, as distinguished from those belonging to other consignees. The cases cited for the appellants show that an absolute necessity for sale must be proved. The judge ought to have told the jury that the master of the *Boomerang* was bound to use reasonable exertions to dry the wool; and that the wool ought not to have been sold, unless nothing better could reasonably have been done to preserve it from destruction; whereas the questions submitted to the jury presented other and difficult considerations on this point. The owners or consignees of the cargo might have been communicated with, within a time not inconvenient under the circumstances of the case. The questions put to the jury tended to give them the impression that the appellants, or agents at Rockhampton, were not bound, if possible, to make such communication previously to sale.

The Lizzie, 3 Mar. Law Cas. O. S. 150; 19 L. T. Rep. N. S. 71; L. Rep. 2 Adm. & Ecol. 254;

Atkinson v. Stephens, 7 Ex. 567;

Escoback v. Nutting, 7 C. B. 797;

Freemans v. East India Company, 5 B. & A. 617.

May 10.—Judgment was delivered by Sir MONTAGUE SMITH.—This action was brought to recover the value of nineteen bales of wool shipped by the plaintiffs at a port in Queensland, on board the defendants' vessel, to be carried to Sydney, and which were sold by the master at an intermediate port. The defence is that the sale was justified by the necessity of the situation in which the master was placed with reference to the cargo. The plaintiffs, who were the owners of the wool, shipped it at Port Mackay in a general ship of the defendants, called the *Williams*, for Sydney, via Rockhampton, and consigned it to Messrs. Willis, Merry, and Co., who were their agents at Sydney. At Rockhampton the wool was transhipped in usual course into another steamship of the defendants the *Boomerang*. The cargo consisted in all of about 260 bales of wool, belonging to different owners, consigned to nineteen different consignees at Sydney; besides some parcels deliverable to order. On her voyage from Rockhampton, and about forty-five miles from that port, the *Boomerang* struck on a rock, and filled; the whole of the cargo was submerged and damaged. The ship stranded on Thursday, the 21st Dec., and the cargo was taken out of her and brought back to Rockhampton. The greater part of it was landed on the 22nd and 23rd. On the latter day the wool was examined by surveyors. After the survey, the

master determined to sell, and on Saturday, 23rd, advertised the sale for Tuesday, the 26th. These general facts do not seem to be disputed, and it is not alleged that the master did not use proper care and diligence in discharging the wool, and in having it examined and surveyed. The complaint is that he was not justified by any necessity in selling the wool, and in taking on himself to do so without communication with the owners. The case was tried at Sydney before the Chief Justice and a special jury, and the verdict passed for the defendants. There was conflicting evidence as to the trial to the extent and nature of the damage done to the wool, and its condition. It appeared from the evidence that many of the bales had burst, and the wool had become intermixed; that a great number of bales were heated; that in some fermentation had begun, which, if unchecked by speedy treatment, would destroy the staple of the wool in a few hours, or at most in two or three days. Evidence was also given that, to save wool in this condition from destruction, various processes were necessary—viz., unpacking, washing in fresh water, drying, pressing, and repacking in fresh packs, and that facilities could not be obtained by the master in the small town of Rockhampton for this treatment; and, in fact, that no person could be found to undertake the work, even if he had been disposed to pay the heavy expense of it. There was some opposing evidence on these points; but, after the verdict, it may be taken that the jury gave credit to the case of the defendants, which was, in substance, that the sea damage had brought the cargo into a state in which it could neither be carried on or stored, and that it would in two or three days have lost nearly all value, unless it could at once be treated in the way above described; that such treatment could not practically be obtained on a large scale, and that, consequently, there was no other course to be taken for the benefit of the owners, than to sell the wool in parcels to numerous purchasers, who might be able individually to apply the proper treatment to their small lots. The verdict having passed for the defendants, a rule nisi was granted to set it aside, and for a new trial on the ground of misdirection, and that the verdict was against the evidence. This rule was made absolute by two judges of the Supreme Court of New South Wales, the Chief Justice, who tried the cause, dissenting; and this judgment is the subject of the present appeal. The general principles of law are not in dispute, viz., that the authority of the master of a ship to sell the goods of the absent owner is derived from the necessity of the situation in which he is placed; and, consequently, that to justify his thus dealing with the goods he must establish (1) a necessity for the sale; and (2) inability to communicate with the owner and obtain his directions. Under these conditions, and by force of them, the master becomes the agent of the owner, not only with the power, but under the obligation (within certain limits), of acting for him; but he is not in any case entitled to substitute his own judgment for the will of the owner in the strong act of selling the goods, where it is possible to communicate with the owner and ascertain his will. The summing up of the Chief Justice was impugned on the ground that the learned judge did not bring these principles with sufficient distinctness to the attention of the jury; and it was alleged that they were misled by the way in

which the case was left to them. The first specific objection was to the Chief Justice's explanation of the word "necessity," and it is referred to in the judgment of Mr. Justice Hargrave, who says that he considered the jury to have been misled by two circumstances; first, by the explanation of "necessity" as being only equivalent to a "high degree of expediency," "highly expedient," &c.; and, secondly, by the fourth written question, viz., whether the defendants had acted "as wise and prudent men." It appears that the Chief Justice did use the expressions thus quoted: but to ascertain in what sense they were used the other parts of his summing up must be looked at. The Chief Justice, after stating the circumstances which would create a necessity for selling, goes on thus: "But it is only in cases of the most pressing necessity that the master can thus take upon himself to act for the owners of the cargo; and if he does this without such a pressing necessity, he and his owners will be responsible, even though he may have acted in a perfect good faith." Then follow the passages complained of: "This necessity is equivalent, for the purposes of the present inquiry, to a high degree of expediency; in other words, that course which was clearly highly expedient will be considered to have been pressingly necessary." And, at the conclusion of his summing up, he says, "the master cannot dispose of it in any way unless under such a necessity as that already mentioned, and where he can hold no correspondence with the owner." The learned judge, after these observations, left some specific questions on the facts, which the jury found for the defendants, and added the question (No. 4), to which objection is made. "Did the defendants, time and circumstances considered, act for the best, and as wise and prudent men, for the interest of the plaintiffs?" which the jury answered in the affirmative. The learned judges of the Supreme Court, who criticised the Chief Justice's explanation of "necessity," did not attempt themselves to define it. It has, undoubtedly, been employed in these cases to express the urgency of the occasion which must exist to justify the act of the master; but the word "necessity," when applied to mercantile affairs, where the judgment must, in the nature of things, be exercised, cannot of course mean an irresistible compelling power; what is meant by it in such cases is, the force of circumstances which determine the course a man ought to take. Thus, when by the force of circumstances a man has the duty cast upon him of taking some action for another, and, under that obligation, adopts the course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the person for whom he acts in a given emergency, it may properly be said of the course so taken that it was, in a mercantile sense, necessary to take it. The Chief Justice appears to have directed the jury substantially to this effect:—He repeatedly told them that they must be satisfied of the "necessity," "the pressing necessity," for the sale. In adding "which means that the course taken must be clearly highly expedient," it cannot be presumed that he intended the jury to understand that, if the sale was merely expedient, the master would have been right in resorting to it, nor can it be supposed the jury so understood the charge. It could not properly be predicated of the sale that it was "clearly highly expedient" if a better course could have been found. Considering, therefore, the

language of the charge as a whole, and the terms of the fourth question, their Lordships think the jury were led to consider the right question (so far as the point now under discussion is concerned) viz., whether there existed a necessity for the sale as the best and most prudent thing to be done for the interest of the owner of the goods. A sale of cargo by the master may obviously be necessary in the above sense of the word, although another course might have been taken in dealing with it; for instance, if in this case the wool, which had no value but as an article of commerce, could have been dried and repacked, and then stored or sent on, but at a cost to the owner clearly exceeding any possible value of it to him when so treated, it would plainly have been the duty of the master to sell, as a better course, for the interest of the owner of the property, than to save it by incurring on his behalf a wasteful expenditure. In other words, a commercial necessity for the sale would then arise justifying the master in resorting to it. It was further objected, on the argument at this bar, that the attention of the jury was not sufficiently directed to the condition of the specific bales of wool of the plaintiffs as distinguished from the rest: but it seems to their Lordships that their attention must have been directed to the plaintiff's wool, although, no doubt, from the circumstances of the case, the trial took very much the shape of an inquiry into the state of the entire cargo as a mass. Both sides appear to have gone into the whole matter, and the evidence of witnesses taken in another action with reference to another part of the cargo was by consent read on this trial. It is plain that the facts that the ship was a general ship; that the wool belonged to numerous owners; that all of it was more or less damaged, and some of it intermixed, rendering it difficult within the time at the master's disposal and the small resources of the port to deal with the bales separately, must, properly, have had great weight with the jury, when they came to consider what it was practicable for the master to do with such a cargo, and the different parcels of which it was composed. Their Lordships have now to consider the objections made to that part of the direction of the learned judge which related to the obligation of the master to communicate with the owners. It is not disputed that the Chief Justice pointedly called the attention of the jury to this obligation. He told them that the master could not sell the goods, "unless under such a necessity as that already mentioned, and where he could hold no communication with the owners." And after this explanation he puts as the fifth question to the jury, "Had the defendants, considering the circumstances of the case, time and opportunity to obtain instructions by the owners?" telling them their verdict must be for the plaintiffs, if they found that question in the affirmative, whatever their opinion on the other parts of the case might be. The possibility of communicating with the owners must, of course, depend on the circumstances of each case, involving the consideration of the facts which create the urgency for an early sale; the distance of the port from the owners; the means of communication which may exist; and the general position of the master in the particular emergency. Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it could be obtained before the sale. When, however, there is ground for such an

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expectation, every endeavour, so far as the position in which he is placed will allow, should be made by the master to obtain the owner's instructions. (See the judgment of this board by the Lord Justice Knight Bruce in the case of *The Bonaparte* (8 Moo. Priv. Co. 459); the corrected passage is given in the report of *The Hamburg* (R. & Lush. 273.) In the present case the sale if justifiable at all, must have taken place speedily, for the perishable condition of the wool, which alone justified the master in selling, made it necessary there should be an immediate disposition of it; and the jury, in affirming the necessity of the sale, must be taken so to have found. The plaintiffs themselves were the owners of the wool. They had shipped it on their own account for Sydney, where it was to be transhipped to England. They lived at an inland station, and no means existed for communicating with them before the sale; and upon these facts it was scarcely contended by the learned counsel at the bar that the owners themselves could have been communicated with. The master did apply to Messrs. Rea & Co., who acted for some purposes as the agents of the plaintiffs at Rockhampton, to take the wool on their behalf, but they declined to interfere with it, or with the master's discretion. The principal contention on this part of the case was, that the master ought to have communicated with Messrs. Willis and Co., the consignees at Sydney, or used some endeavours to do so. In the absence of evidence to the contrary, the presumption would properly arise that the consignees named in a bill of lading had an interest in the goods, and ought to be communicated with; but in the present case it is clear that Messrs. Willis and Co. had no interest in the wool, and were to act only as the agents of the plaintiffs at Sydney. The obligation, therefore, to communicate with them, appears to their Lordships to depend on two questions of fact: First, whether, from the nature of their agency, they were such agents as ought to have been communicated with; and, if so—secondly, whether there was time and opportunity, under the circumstances, to consult them before the sale. With regard to the first of these questions, it is certainly strange, if the obligation to consult Messrs. Willis and Co. was intended to be relied on, that although Mr. Morse (one of the plaintiffs), and Mr. Willis (the agent) were both examined *vide* voce at the trial, no information whatever was given by them of the nature and scope of this agency. The fair inference arising from this abstinence, and from the evidence afforded by the letters of Messrs. Willis, showing what they actually did in the subsequent part of the transaction, as well as from the general course of business with regard to wool consignments, seems to be, that Messrs. Willis and Co. were shipping agents, employed to forward the wool to England, and that they were not the general agents of the plaintiffs, nor clothed with any authority to act for them in dealing with the wool before its arrival at Sydney, and on an emergency of this kind; but at all events, the nature and character of the agency was, in their Lordships' view, a question of fact for the jury; and it may be assumed, that a special jury of merchants of Sydney were thoroughly competent to deal with it. On the second question, viz., whether communication with Messrs. Willis and Co. was practicable, some of the circumstances to be considered, were—that the wool was landed and

surveyed on Saturday, the 23rd Dec., and that, on its state being ascertained, an immediate sale was resolved upon, as being necessary, and fixed for Tuesday, the 26th (the intervening days being Sunday and Christmas Day), and at once advertised. The ship was a general ship; there were twenty-three consignees, most of them at Sydney, each having an equal right to the time and consideration of the master. Sydney is 900 miles from Rockhampton. No letter could have reached that place. There was, however, telegraphic communication between the two towns; and much conflicting evidence was given as to the possibility of corresponding by means of it, especially on Sunday and Christmas Day. There can be no doubt that the master is bound to employ the telegraph as a means of communication, where it can usefully be done; but in this case the state of the particular telegraph, the way it was managed, and how far explanatory messages could be transmitted by it, having regard to the time and the circumstances in which the master was placed, were proper subjects to be considered by the jury, together with the other facts, in determining the question of the practicability of communication. It was contended for the respondents that, although the above two questions of fact may have arisen on the evidence, yet that the attention of the jury was not sufficiently directed to them. Their Lordships have not had the advantage of seeing the whole of the summing up of the learned judge; but it is apparent from the course of the trial, the jury must have been led to consider them. A great deal of evidence was given, both as to the state of the telegraph, and the habits of business of the merchants of Sydney, with the sole object of showing the practicability of communication with Messrs. Willis and Co. It appears, also, from the record, that, at the very end of the case at the trial, the counsel for the defendants objected to the Chief Justice, that if the plaintiffs insisted that it was the master's duty to have consulted "the consignees or the plaintiffs," the facts out of which the duty arose should have been specially replied. The Chief Justice overruled the objection, holding that a special replication on the record was not necessary. This discussion clearly shows that the question as to communication with the consignees was an issue, not only raised, but regarded by the Chief Justice as one to be decided by the jury. In truth, they must have had the point present to their minds during most of the trial, and must have considered it as involved in the question submitted to them. Undoubtedly, if the Chief Justice ought to have told the jury that, in point of law, the master was bound to communicate with the consignees, his direction might be successfully assailed; for he did not so direct them; but their Lordships think that in this case the learned judge could not properly have taken upon himself so to rule, as a matter of law, and, on the contrary, that the questions of fact before referred to were within the proper province of the jury. A further objection is made to the judge's summing up, on the ground that he told the jury "in effect" that, if the master could not communicate with all the owners of the cargo, he might sell without communicating with any. If the learned judge had really so directed the jury as a matter of law, their Lordships would have considered that his direction was erroneous; because, undoubtedly, each owner has a right to the con-

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sideration of the master, and, acting as his agent, he should do his best to communicate with him. In the case of an owner who might be near, and easily got at, it certainly would not, alone, be a sufficient excuse for not communicating with him, that others at a greater distance could not be consulted. But it has not been shown to their Lordships that the Chief Justice did lay down any such proposition of law. He, certainly, directed the attention of the jury to the facts that the cargo was a general one, belonging to numerous owners, and the difficulty of communicating with all, as circumstances which would, in fact, increase the embarrassment in which the master was placed. Their Lordships consider that the learned judge was justified in so doing. A merchant knows when he embarks his goods in a general ship that they cannot have the undivided care and attention of the master. It is obvious that, when such a ship is in distress at a distant port, from whence communication with all the owners is impossible, and with any of them difficult—the task of selecting (where all are entitled to consideration) those with whom he can and should communicate must add greatly to the master's labours, and might, in some cases, require an amount of time and attention which he could not give, unless he neglected more pressing duties connected with saving and dealing with the goods. Such a state of things, when it exists, is clearly within the range of the circumstances which the jury may properly be directed to consider in estimating the conduct of the master. On the whole, therefore, their Lordships have come to the conclusion that the misdirections imputed to the Chief Justice have not been established, and that the rule for setting aside the verdict ought not to have been made absolute on that ground. The Chief Justice who tried the cause reports that he is satisfied with the verdict, and therefore with regard to that part of the rule which seeks to set aside the verdict on the ground that it is against the weight of evidence, their Lordships, in accordance with the ordinary rule, would not be disposed to disturb the verdict on that ground unless it appeared to them to be clearly wrong. Their Lordships need only say that they have not been led by the discussion of the case to this conclusion; and, in the result, they will humbly advise Her Majesty to allow this appeal, and to order that the rule making absolute the rule nisi for a new trial be set aside, and the original rule be discharged, with costs. The appellants will have the costs of this appeal, and the deposit made by them as security for costs will be returned to them.

Judgment reversed.

Attorneys for the appellants, *Hill and Sons.*

Attorneys for the respondents, *Wilde, Wilde, Berger, and Moore.*

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Reported by J. F. ASHTON, Esq., Barrister-at-Law.

Tuesday, June 18, 1872.

(Present: Right Hon. Sir J. W. COLVILLE, Sir M. SMITH, and Sir R. P. COLLIER.)

THE MARMION.

Collision—Vessel close hauled—Luffing—Deviation from course.

A close hauled vessel is justified in luffing so as to bring her, after she has sighted another vessel,

as close to the wind as she can get so as to remain under command, and such luffing is not a deviation from her course that will relieve the other vessel, having the wind free, from the duty of getting out of her way.

This was an appeal from a decree of the High Court of Admiralty of England in a suit instituted by the owners of the barque *Oceola* against the ship *Marmion*. The *Oceola* was a barque of 898 tons register, and on the 25th Nov. 1871 was, whilst on a voyage from Quebec to Liverpool, on the 25th Nov. 1871, at 4 A.M., about thirty-five miles S.W. by W. of the Tuskar Light in the Irish Channel. The wind was E.S.E., and the *Oceola* was close hauled on the starboard tack, heading about N.E. The *Marmion* was a ship of 783 tons register, bound from Liverpool to Calcutta, and at the time in question was heading S.W. by W., with the wind free. Both vessels had their regulation lights burning brightly. The *Marmion* was sighted by the look-out of the *Oceola* a little on the starboard bow, and by him reported to the master who was in charge of the deck. The master of the *Oceola* thereupon gave an order to the helmsman to luff, and immediately after saw the *Marmion's* red light over the port bow. The master of the *Oceola* gave a second order to the helmsman to keep his luff, and about two minutes after the green light of the *Marmion* was sighted, and the red light shut in. The *Oceola's* sails were then lifting; the *Oceola's* helm was thereupon put hard aport to deaden the blow.

The *Oceola* was sighted from the *Marmion* two or three points over the port bow, and about two miles off, and soon after her green light was seen. Upon the green light being seen the helm of the *Marmion* was starboarded until the green light of the *Oceola* was brought a couple of points on the starboard bow of the *Marmion*, when her helm was ordered to be steadied. According to the statement on behalf of the *Marmion*, "shortly afterwards the red light of the *Oceola* opened on the starboard bow of the *Marmion*, whereupon the *Marmion's* helm was put hard aport, notwithstanding which the two vessels came into collision, the *Marmion* with her stem striking the *Oceola* amidship on her port side." The *Oceola* was sunk.

The master of the *Oceola*, in his statement before the receiver of wreck, stated, that after the *Marmion* was sighted, he gave the man at the wheel the three following orders, viz.:—"To keep her luff;" "To keep a close luff;" and "to luff;" and in cross-examination stated that before the collision the *Oceola's* helm was put hard down. It was submitted in the appellant's case, that these orders brought the *Oceola* closer to the wind than she was when first sighted by the *Marmion*, and that this was a deviation from her original course, and therefore that she was not keeping her course as required by law.

The learned judge of the Admiralty Court pronounced the *Marmion* solely to blame, holding that the *Marmion* should have continued her course, and not have starboarded, and that the *Oceola* was justified in keeping as close to the wind as possible. From this judgment the owners of the *Marmion* appealed, mainly on the grounds that the *Oceola* did not keep her course, as she was bound to do, and that she improperly ported.

Mileard, Q.C. and Myburgh (Philimore with them), submitted that the luffing of the *Oceola* was a deviation from her original course, and that a

vessel has no right to come so much into the wind that her sails are lifting.

Dr. Deane, Q.C., and *Clarkson* for the respondents were not called upon.

The judgment of the court was delivered by Sir J. W. COLVILLE.—This is an appeal against the decision of the Court of Admiralty, which has found the ship *Marmion* solely to blame for a collision which took place between her and the barque *Oceola* in the Irish Channel on the 25th Nov. 1871. There is, for a nautical case, unusually little difference or dispute as to the circumstances under which the collision took place. The parties, by their preliminary acts and their evidence, are all agreed, or very nearly agreed, as to the time and place of the collision; as to the direction of the wind, and as to the state of the weather and the tide. Nor is there any very great difference between them—in fact it has been contended by the appellants that they are pretty well agreed as to the position of the two vessels when they sighted each other. There seems to have been a question raised on the part of the *Oceola* as to whether those on board the *Marmion* should really, when the vessels sighted each other, have seen the green light of the *Oceola*; but their Lordships are disposed to assume that such was the case, and it seems to be consistent with what both parties state in their preliminary acts. It is, however, to be observed that, according to the *Marmion*, at the time when she sighted the green light she was two miles distant, and two to three points on the portbow and assuming that the position of the other vessel was then such that she might have sighted the green light, their Lordships have come to the conclusion, assisted as they are by the nautical assessors, that the *Marmion* was still correctly found to be to blame. The *Oceola* being close hauled upon the starboard tack, and the other vessel going free, it would of course be the duty of the *Marmion* to keep out of the way of the *Oceola*. That was her *prima facie* duty under the twelfth Article of the Regulations for preventing Collisions at Sea. The contention of the appellants is, that she took the proper measures for the purpose, but that those measures were defeated by those on board the *Oceola*, who by tacking in the way she is admitted to have done, failed to keep her course within the meaning of the eighteenth Article. The case was, no doubt, made in the court below, and the parties there failed to convince the learned judge that such was the case. They have equally failed to convince their Lordships here that there was the improper tacking on board the *Oceola* which can be said to have amounted to a deviation from her course, or to have been one of the causes contributing to the accident. It appears to them, as they are advised by the nautical assessors, that it was the duty of a vessel in that position to keep close to windward, and that she does not appear to have failed in her duty or to have done anything which can be said to throw her out of her proper course until the final porting, which the learned judge in the court below found—and it seems to their Lordships properly found—was a justifiable thing, in order to weaken the blow and to diminish the consequences of the collision then imminent. That being the state of the case, the grounds that have been taken by the appeal must fail. Their Lordships certainly, as has often been ruled here, are not in the habit of disturbing the judgment of the court below in

cases of collision, unless it is clearly shown to their satisfaction that the decision under the appeal is wrong. It appears to their Lordships, assisted as they have been, that the *Marmion* really was in fault; that admitting that the original position was as stated in the preliminary act, she may have mistaken the precise heading of the other vessel, a supposition which is rather confirmed by the cross-examination of the mate, who was in charge of the deck when the two vessels came in sight of each other, and also by what is said of its being the intention of the *Marmion* in starboarding her helm to pass astern of the other vessel, an expression which is not very easy to explain upon any other hypothesis than that of supposing that the *Oceola* was heading rather more to the west than is described. However that may be, it seems to their Lordships, assisted as they have been by their nautical assessors, that it was not right, in the circumstances in which the *Marmion* found herself placed, to execute the manoeuvre of starboarding, the effect of which was to pass to the windward of the *Oceola*; that she ought rather, if there was any doubt on the subject, to have given way to the vessel, and that at any rate she should have become clearly satisfied, before she took the step, that the other vessel was not keeping close to the wind, or she might have been satisfied if she had waited until she had seen the red light. On these grounds their Lordships think that no sufficient ground has been shown for disturbing the decision of the court below, and they must therefore advise her Majesty to dismiss this appeal, with costs.

Appeal dismissed.

Solicitors for the appellants, *Gregory, Rowcliffe, and Basile*, agents for *Duncan, Hill, and Parkinson*, Liverpool.

Solicitors for the respondents, *Stocker and Jupp*, agents for *Radcliffe and Layton*, Liverpool.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART BOOTH and H. PRAT, Esqrs., Barristers-at-Law.

Saturday, July 20, 1872.

(Before the LORDS JUSTICES.)

ROBEY AND COMPANY'S PERSEVERANCE IRONWORKS (LIMITED) v. OLLIER.

Consignor and consignee—Bills of exchange drawn against cargo—Lien on cargo—Appropriation of proceeds of sale.

B. consigned a cargo to the defendants for sale at the joint risk and profit of himself and them, and sent them the bill of lading, with a letter, advising them that he had drawn upon them on account against the cargo six bills of exchange for sums amounting to 1500*l.*, which he requested them to protect on presentation. In reply, they wrote saying that the drafts should be duly honoured. *B.* afterwards indorsed three of the bills to the plaintiffs. The bills were in due course presented to the defendants, who refused to honour them; Held (affirming the decision of the Master of the Rolls), that there was no appropriation of the proceeds of the cargo to meet the bills, and that the plaintiffs had no lien on the cargo in priority to the claim of the defendants in respect of their general lien as consignees.

Frith v. Forbes (1 Mar. Law Cas. O. S. 253; 4

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De G. F. & J., 409; 7 L. T. Rep. N. S. 271 distinguished.

This was an appeal from a decision of the Master of the Rolls.

The plaintiffs were a joint-stock company carrying on the business of engineers in the City of Lincoln.

In the year 1869, Mr. Frederic Calder Brown was employed by the plaintiffs as their agent at Ibrahim, in the Dannbrian Principalities, for the sale of engines and machines forwarded to him by the plaintiffs, and he from time to time received moneys on account of the plaintiffs. In November 1869, an account was stated between the plaintiffs and Brown, and a sum of £300. and upwards was found to be due from Brown to the plaintiffs upon the balance of the account.

In the same month, Brown purchased with his own money at Ibrahim a cargo of maize at the price of 1553L 7s. 10d. and consigned it to the defendant Messrs. Ollier and Co., of London, by the ship *Acacia* for sale at the joint risk and profit of himself and them.

On the 9th Nov. 1869, Brown wrote to Ollier and Co. informing them that the *Acacia* had not sail with the cargo, and after stating that he enclosed the bill of lading, he proceeded thus:

Against this cargo I beg to advise having drawn to account on your good selves as follows under this day's date:

No. 779.....	£200	} 3 months date, order myself.
780.....	230	
781.....	240	
782.....	250	
783.....	280	
784.....	300	
	£1500	

Which please protect on presentation. This includes 1500. cash advanced to master on account of freight.

This letter did not really contain the bill of lading, Brown having accidentally omitted to inclose it. On receiving the letter, Messrs. Ollier and Co. wrote, on the 15th Nov. 1869: "Your next will doubtless hand us bill of lading for the maize Your drafts on account of this cargo shall have due protection."

On the 19th Nov. 1869, Messrs. Ollier and Co. received a subsequent letter from Brown inclosing the bill of lading, and on the same day they wrote acknowledging the receipt, and saying, "Your six drafts against this cargo (1500l. total) shall be duly honoured."

On the 23rd Nov. 1869, Brown endorsed and sent the three bills of exchange, numbered respectively, 782, 783, and 784, for sums amounting to £300., to the plaintiffs, in payment of the amount due to them on the balance of the account, with a letter in these words:

I beg to enclose herewith three drafts for:

£250 } Order myself on Messrs. Ollier
280 } and Co., of London, at 3m.
300 } date from 9th inst.

£830 sterling, which, at maturity, please pass to my credit.

The following is a copy of one of these bills:

First.—Ibrahim, 9th Nov. 1869.—Exchange for £250 sterling. At three months date of this first of exchange, second and third not paid, pay to the order of myself the sum of two hundred and fifty pounds sterling, value which place to account, cargo per A. (i.e., *Acacia*) as advised by this day's post.

(Signed)

FRED. C. BROWN.

To Messrs. Ollier and Co., 9, East India Chambers, Leadenhall-street, London.
No. 782.

The other two bills sent by Brown to the plaintiffs were in the same form, and each of the three bills was endorsed by Brown as follows: "Pay to the order of Messrs. Robey and Co. (Limited), value received. Ibrahim, November 23, 1869. (Signed), Fred. C. Brown."

On the 6th Dec. 1869, these three bills were received by the plaintiffs, who, on the same day forwarded them by letter to Messrs. Ollier and Co. for acceptance. On the following day Messrs. Ollier and Co. returned the three bills unaccepted, stating that they were sorry to have to do so in consequence of telegraphic communication they had had from Brown since the date on which he sent two bills to the plaintiffs.

Messrs. Ollier and Co. subsequently received the cargo of maize and sold it for upwards of 1258L.

The plaintiffs claimed to be entitled to a charge on the proceeds of sale for the amount of the three bills and interest thereon, while Messrs. Ollier and Co. claimed to be entitled to retain the whole of the proceeds of sale in part payment of a larger sum due to them from Brown upon a general account current.

The plaintiffs instituted the present suit against Messrs. Ollier and Co. to enforce the charge which they claimed upon the proceeds of sale of the cargo.

The Master of the Rolls dismissed the bill with costs.

After stating the facts of the case his Lordship, in delivering judgment, said:—"Upon a full review of the circumstances of this case, I am of opinion that the ordinary rule which establishes that where a consignee only obtains a cargo on the faith of accepting bills drawn against it he must either give up the cargo or apply the proceeds to honour the bills, and where in consequence the bills are a charge on the proceeds of the cargo in his hands, does not apply to this case. On the facts I have detailed the cargo of maize was clearly a part of the joint adventure between Brown and Ollier and Co., and no party to the adventure has a right to anything until the proceeds are realised and ascertained. It is clear also that the plaintiffs cannot stand in any better position in relation to the bills than Mr. Calder Brown himself. In ordinary cases, where a shipper consigns a cargo to his agents, he may impose on the consignees the terms that they shall not accept the consignment without also accepting the bills drawn against it, and he may require the cargo or the proceeds to be applied to meet those bills drawn against it if he please, but in that case, as it was well observed in argument, the cargo belongs to the shipper, who might consign it to any other house or any different agent; but this is not so where the transaction forms part of a joint adventure. There the cargo must be consigned to the person agreed on for the purpose, by the persons who are the partners in the joint adventure, and when the affairs are all wound-up no party to this joint adventure is bound to pay more than the balance of profit or loss due from him on taking the account of it, and assuming that there is the sum of 138L, as the defendants allege, that is all that the other party, namely, Calder Brown, is entitled to receive. In addition to which, by being a joint adventure, the whole character of the transaction is altered, and Calder Brown has no power to pledge the cargo to pay a separate debt of his

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own. This is obvious if simply stated in this form: Two persons, A. and B., agree to buy abroad a cargo of corn or cotton to be consigned to C. in England. C. receives and realises the cargo, and finds a profit of 100*l.* each to be due to A. and B. With this share of profit each may do what he pleases, but he cannot charge the cargo of C. for a debt of 300*l.* or any other sum due by him to another person, for instance, to E. If he could he would be throwing the payment of his own debt on his partner. This is exactly the case which arises here. It does not in the slightest degree alter the case that the consignee, instead of being a stranger, is one of the partners to the joint adventure. His duties and functions in such a case are distinct from his right as a partner in the joint adventure. He must realise the cargo in the best way he can, and he then must divide the proceeds fairly among the joint adventurers, including himself, however numerous or few they may be, but he is not to bear the loss sustained by any of the other joint adventurers in any other transaction, nor is anything forming part of the adventure to be dealt with by any of them, but his own share of the surplus or loss whichever it may be. No doubt if the bills drawn against the cargo are part of the joint adventure they must be paid either out of the proceeds of the cargo or by contributions from the other co-adventurers, but that is merely matter of account, and the defendants admit their liability to account, and allege they have done so fairly, and that the money in court is the result of that account, and the amount due from them in taking it. If that is correct, the money in court is due to Calder Brown or the persons entitled to the amount coming to him out of the joint adventure. If his letter to the plaintiffs gave them the lien on the amount, it ought to be paid to them, but that is a matter between them and the other creditors of Calder Brown not represented here. All that arises here is the right of the plaintiffs to claim against the cargo of maize in the hand of the defendants, and as to that I am clearly of opinion that the bill fails, and that it must be dismissed with costs."

From this decision the plaintiffs appealed.

Sir Richard Bagallay, Q.C., and Speed, for the appellants.—On sending the bill of lading to the defendants, the consignor informed them that he had drawn the bills against the cargo. They accepted the cargo, subject to the charge for the amount of the bills, and they promised that the bills should be duly honoured. They are therefore bound to pay us, out of the proceeds of the cargo, the amount of the bills indorsed to us. That is the effect of the decision in *Frith v. Forbes* (1 Mar. Law Cas. O. S. 253: 2 L. T. Rep. N. S. 271; 4 De G. F. & J. 409), where it was held that the general lien of a consignee cannot be set up against the express direction of the consignor given to him at the time when the cargo is accepted, and, accordingly, the holder of bills drawn against a cargo was held to have a lien on it in priority to the consignee.

Miller, Q.C. (with him Southgate, Q.C.).—This case is quite distinguishable from *Frith v. Forbes*. There the bills were drawn against the cargo in favour of Frith and Co., and the consignor advised the consignees of that on sending them the bill of lading of the cargo. Moreover, there the cargo was not, as in this case, consigned on a joint

speculation between the consignor and the consignees.

Without calling for a reply.

Lord Justice JAMES said: It is quite clear that this case is distinguishable from *Frith v. Forbes* (sup.). I do not think that that case is to be extended beyond its own particular circumstances, and I am not prepared to say that every bill of exchange purporting to be drawn against a cargo carries with it in the hands of every person a special equitable right against the cargo in favour of the holder of the bill. In this case the cargo appears to have been nothing but the consideration for the drawing of the bills. In *Frith v. Forbes*, the letters mentioned that the cargo which was consigned was the property of the consignor; the bills were drawn against it in favour of a certain firm, and it was held that that firm had an interest in the cargo. In this particular case the cargo was not the cargo of Brown alone. The defendants had no doubt written to Brown, saying that they would meet his drafts, but those letters were not communicated to the plaintiffs, and the plaintiffs cannot make a case upon private communications which passed between Ollier and Brown, and about which the plaintiff knew nothing. Therefore the case stands as if no such letters had been written. A man says, I send you a cargo against which I draw bills, and those bills are in the hands of a man who says, I have a special right on the cargo. This case is distinguishable from *Frith v. Forbes*, the decision in which case can only be applied to its own particular circumstances.

Lord Justice MELLISH.—I am of the same opinion. It is clear that the simple indorsement of a bill of exchange only gives a right to the bill of exchange itself, and I cannot see that anything took place between Brown and the plaintiffs except this, that Brown, being indebted to the plaintiffs, indorsed to them certain bills of exchange. I certainly cannot agree that the mere fact of a bill of exchange stating, "Please to account cargo per A., as advised by this day's post."—I cannot think that any mercantile man receiving a bill of exchange worded like that would suppose that because those words were in it he had an equitable assignment of the cargo or any security upon it. The mercantile usage is perfectly plain. If you intend to get the security on the cargo, you expect the bill of lading to accompany the bill of exchange, and to get them both together; and if you get the bill of exchange simply, and take the bill of exchange simply in payment of a debt, all you would expect to get would be the security of the bill of exchange. Then, as to the case of *Frith v. Forbes*, the Lords Justices seem to have come to the conclusion that all the letters taken together amounted to an equitable assignment of the cargo, that there was such a communication between the parties as amounted to an equitable assignment. In the present case I quite agree that Brown had no right to make an equitable assignment of the cargo, and did not purport to do so. All that he did was to endorse the bills of exchange to his creditors, who got the ordinary right of any indorsee. I am of opinion that the decision of the Master of the Rolls was quite right and that the appeal must be dismissed.

Lord Justice JAMES.—Dismissed with costs.

Solicitors: Taylor, Hoare, and Taylor, agents for Burton and Son, Lincoln; Stocken and Jupp.

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JONES AND ANOTHER v. THE NEPTUNE MARINE INSURANCE COMPANY.

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COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Monday, June 10, 1872.

JONES AND ANOTHER v. THE NEPTUNE MARINE
INSURANCE COMPANY.

Marine insurance—Policy on freight—Construction of policy—Inception of risk—"From B. to port of discharge"—Goods not on board—"Insurance beginning from loading"—Meaning of "loading."

*Plaintiffs having underwritten a policy on chartered freight on a cargo of guano, effected a re-insurance with the defendants, "lost or not lost, in the sum of 800*l.*, upon the freight, payable to them in respect to this present voyage, to be performed between as below, by the vessel Napier, &c., from Baker's Island to port of discharge in the United Kingdom, the insurance on the said freight beginning from the loading of the said vessel." The vessel arrived at Baker's Island and proceeded to load, but before taking in the whole of the cargo was driven on a reef and became a complete wreck. The plaintiffs having brought an action to recover from the defendants for a total loss:*

Held, that the defendants were not liable, the policy not having attached:

Per Blackburn, J., because the liability of the underwriters was not intended to begin until the vessel had departed from Baker's Island, the words "the insurance on the said freight beginning from the loading of the said vessel," not extending the insurance beyond the previous words "from Baker's Island."

Per Mellor and Lush, JJ., because, though the words "the insurance on the said freight beginning from the loading of the said vessel," do extend the insurance beyond the words "from Baker's Island," the words "from the loading," mean from the completion of the loading, and as the loading was not completed the risk had not attached,

DECLARATION stated that the plaintiffs, on the 21st Feb. 1871, caused to be effected with the defendants, by Messrs. T. Patton, jun., and Co., the plaintiffs' agents in that behalf, a policy of insurance, with certain memoranda written in the margin thereof, which said policy was signed and subscribed by two of the directors of the said company, on behalf of the said company, and was in the words and figures following, that is to say:—
Freight Policy.

W. H., No. 263. Neptune Marine Insurance Company,
Limited.

Capital £12,500.

This policy witnesseth that Messrs. J. Patton, jun., and Co., as well in his own name, as and for in the name or names of all and every other person or persons to whom the same doth or shall appertain, in part or in all, doth make insurance, and cause him and them, and every of them, to be insured by the Neptune Marine Insurance Company, Limited, lost or not lost, in the sum of 500*l.*, upon the freight payable to him or them in respect of this present voyage, to be performed between, as below, by the vessel Napier, whereof — is master, or whoever else may go as master in the said ship from Baker's Island to a port of call and discharge in the United Kingdom, the insurance on the said freight beginning from the loading of the said vessel, and terminating when

the said vessel shall be moored as above at a safe anchorage. And it shall be lawful for the said vessel in this voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever for refuge or any necessary purpose, without prejudice to this insurance. The said freight for the purposes of this insurance is hereby declared to be valued at the actual amount payable to the insured by the charterer of this vessel for the above voyage. Touching the adventures and perils, &c. And the plaintiffs say that the said memoranda, written in the margin of the said policy, were and are in the words following, that is to say, "Warranted free from risk of explosion by coal gas whilst in the harbour. Being a re-insurance, and to pay as may be paid on original policy." And the plaintiffs say that the defendants, in consideration of the premises, and that the plaintiffs paid to the defendants the said sum or premium of nine guineas per cent. upon the said sum of 500*l.*, became and were insurers to the plaintiffs of the said sum of 500*l.* upon the said freight in the said policy mentioned, according to the tenor and effect thereof, and of the said memoranda. And the plaintiffs say that certain goods at Baker's Island aforesaid were shipped and loaded in and on board of the said ship to be carried therein, for freight upon the said voyage, and other goods were then there ready to be and about to be shipped and loaded in and on board of the said ship, to be carried therein for freight upon the said voyage; and if it had not been for such a loss of the said ship as hereinafter mentioned, would have been shipped and loaded in and on board of the said ship, to be carried therein for freight upon the said voyage. And the plaintiffs say that they were then and thence until and at the time of the loss hereinafter mentioned, interested in the said premises insured in and by the said policy herein declared on to the value and amount of all the moneys by them ever insured thereon. And the plaintiffs say that afterwards and during the continuance of the said risk, the said ship, by perils so insured against as aforesaid, became and was damaged and lost, and was rendered incapable of carrying the said goods upon the said voyage, whereby the said freight became and was wholly lost, and by means and in consequence thereof the plaintiffs were obliged to pay and paid a large sum, to wit the sum of 500*l.* on the said original policy, and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to be paid by the defendants the said sum so insured by the plaintiffs as aforesaid in and by the said policy herein declared on, &c.

Please: First, that the plaintiffs did not cause such policy to be effected, nor did the defendants become such insurers as alleged; secondly, that at the time of the alleged loss of the said ship, the said ship had not been loaded within the meaning of the said policy, nor had the insurance on the said freight begun as alleged.

The defendants also demurred to the declaration, alleging, as a matter of law to be argued, that the partial loading of the vessel was not a total loading within the meaning of the policy.

The amended declaration contained a count for money payable by the defendants to the plaintiffs, for money received by the defendants for the use of the plaintiffs, and for money found to be due from the defendants to the plaintiffs, on accounts stated between them. Under this count the plain-

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tiffs claimed to recover 47l. 5s., the premium paid upon the policy declared on in the first count, in the event of the plaintiffs not recovering on such policy.

To the amended declaration the defendants pleaded the three former pleas. And as to the residue of the declaration the defendants brought into court the sum of 47l. 5s., and said that the said sum was enough to satisfy the claim of the plaintiffs in respect of the matter therein pleaded to.

Replication—first, taking issue on the defendants' first and second pleas respectively; secondly, demurring to the second plea, a matter of law intended to be argued being that under the circumstances stated in the declaration the risk had commenced, and the loss was a loss within the terms of the policy; thirdly, joining in demurrer to the first count; fourthly, accepting the sum paid into court in full satisfaction and discharge of the cause of action in respect of which it had been paid in.

Rejoinder that the second plea is good in substance.

At the trial, which took place before Blackburn, J. and a special jury, at the Winter Assizes 1872, holden at Liverpool, for the West Derby Division of the County of Lancaster, the following facts were agreed upon by the parties:

Messrs. William Henry Jones and Edw. Stewart Jones are underwriters and insurance brokers, carrying on business at Liverpool. The defendants carry on business at West Hartlepool. The *Napier*, a vessel of 1400 tons burthen, was chartered by Messrs. De Wolf and Co. of Liverpool, on the 20th and 22nd Aug. 1870, to proceed to Melbourne, and thence to Baker's Island, in the Pacific Ocean, where she was to load a full cargo of guano and take it to Liverpool or Birkenhead. The vessel arrived at Baker's Island on the 1st April 1871, in order to take in her cargo. The policy of insurance was effected on the 21st Feb. 1871, a premium of £9 9s. per cent. being paid.

Baker's Island is a small place, only visited by ships for the purpose of loading guano. There is no harbour, and ships have to stand off the Island and anchor to buoys, the guano being brought to the ships in lighters.

The *Napier* began loading the guano on the 4th April, and loaded several tons a day up to the 16th April. The weather then got so bad that the vessel was obliged to slip anchor and stand out to sea. She got back to the island on the 19th April and recommenced loading, the loading continuing to the 24th April, when the weather again got very bad, and notwithstanding the exertions, the vessel ran on a reef and became a total wreck, after having loaded 1130 tons of guano.

The plaintiffs claimed from the defendants for a total loss of freight. The defendants refused payment on the ground that the vessel was lost before the risk commenced.

The policy sued on was a re-insurance, and the plaintiffs settled as for a total loss. The original policy and the charter-party were put in evidence.

A verdict was directed to be entered for the plaintiff for 452l. 15s., leave being given to the defendants to move to enter the verdict for them. A rule nisi having been obtained to enter the verdict for the defendants on the ground that the risk had not attached, or to reduce the verdict to 250l. 7s. 8d., or such other sum as the court should

think fit, on the ground that the defendants were only liable to a loss in proportion to the freight on cargo actually loaded.

Butt, Q.C., and Trevelyan now showed cause against this rule.—There are two points in this case: First, did the risk attach before the vessel sailed from Baker's Island? secondly, what is the meaning of the word "loading?" The risk attached at the commencement of the loading. The words of the policy are used merely to describe the voyage, not to state the time at which the risk was to attach. Because the words are "from Baker's Island," instead of the ordinary words "at and from Baker's Island," it cannot be held that the policy did not attach until the vessel sailed from Baker's Island, when we find in the margin of the policy these words: "the insurance on the said freight beginning from the loading of the said vessel." It is contended by the other side that the word "loading" here means "complete loading," but it is submitted that it has not necessarily that meaning. *Mellish v. Allnutt* (2 M. & S. 106) was referred to. [BLACKBURN, J.—Is there any reported case in which the words "at and" are left out?] In *Richards v. The Marine Insurance Company* (3 Johns. N. Y. Rep. 307) goods were insured from Nevitas in the island of Cuba, "beginning the adventure, &c., from and immediately following the loading thereof on board of the vessel at Nevitas, in Cuba." The vessel sailed with a cargo of goods from New York, and arrived at Nevitas, but not being allowed to land the goods there, except a few trifling articles, she sailed again from Nevitas with the outward cargo on board for Jamaica; and while proceeding to that place was wholly lost by perils of the sea. It was held that the policy did not attach to the outward cargo which continued on board at Nevitas and until the vessel was lost, and that the insured could only recover back the premium paid. This case, however, touches only the question whether the words "on the loading of goods" are mere description or amount to a warranty that the goods shall be loaded at the port named. Actual sailing of the vessel cannot be held to have been intended in the present case, unless we strike out altogether the words "from the loading." "As a contract of indemnity to the assured," says Duer (On Marine Insurance, vol. i., p. 161) "the policy is to be liberally construed in his favour, not only because this mode of construction is most conducive to the interests of commerce, but because, for the reasons that have been stated, it is probably most consonant to the intentions of the parties. It is certain that the assured desires as ample an indemnity as he can obtain, and it is probable that the insurer means that he shall understand the indemnity given, to be as extensive as its terms, upon any fair interpretation, import. For the same reasons, and not in obedience to a mere technical rule, an exception from the risks of the policy is to be construed, strictly against the insurer. Such an exception is a modification of the promise of indemnity, and as that promise is to be liberally construed, it is a necessary consequence that the exception cannot be permitted to abridge its operation to a greater extent than the terms need plainly require." There is the further question whether the words "from the loading" mean from the completion of the loading, as contended by the defendants, the vessel being only partially loaded in the present case. [LUSH, J.—The meaning

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must be either at the commencement of the loading or at its completion. His Lordship referred to *Montgomery v. Egginton* (3 T. R. 382), where it was held, where the freight was valued at 1500*l.* and goods had been put on board, of which the freight would have been 500*l.*, the rest of the cargo being ready to be shipped, when the vessel was driven from her moorings and lost, that the insurable interest in the whole freight had accrued, and that the assured was entitled to the whole sum insured.] In *Foley v. The United Fire and Marine Insurance Company of Sydney* (3 Mar. Law Cas. O. S. 352; L. Rep. 5 C. P. 155; 39 L. J. 206, C. P.; 23 L. T. Rep. N. S. 108), by a policy of insurance, chartered freight on board a certain vessel was insured "at and from Mauritius to rice ports," and thence to a port in the United Kingdom. The vessel was chartered to proceed on her voyage from Calcutta to Mauritius, and having discharged her cargo there, to proceed to Akyah, to load there or at Rangoon a cargo of rice for a port in the United Kingdom. She safely arrived at Mauritius, but whilst she was there, and before she had finished discharging her cargo, she was driven ashore and totally lost. It was held, nevertheless, that the risk on the policy had attached at the time of the loss. In *Gordon v. American Insurance Company of New York* (4 Den. N. Y. 360), cited Phillips, s. 944, under a policy on freight, "beginning the adventure on said freight from and immediately following the loading thereof on board said vessel," the risk was held not to commence until the vessel had begun to load. So it is submitted the risk attached in the present case at the beginning of the loading. It is further submitted that it attached step by step, *pro rata*, as the cargo was put on board. "If the word 'loading,' " said Lord Ellenborough, C.J., in *Mellish v. Allnutt* (*ubi. sup.*), "is to be understood in a grammatical sense as descriptive of an act to be done, and not of the goods being in a loaded state, it can only be applied to one specific place, viz., where the cargo is to be taken on board, whereas, if it is to be understood as being loaded, it will be descriptive of a loading at every place. The former is the more obvious and strictly grammatical construction." That is the meaning which the plaintiff desires to put on it here.

Bell v. Hobson, 16 East. 240;

Hunter v. Leathley, 10 B. & C. 858;

Hastie v. Depeyster, 3 Calcutt N. Y. Rep. 190;

Beckett v. The West of England Marine Insurance Company (Limited), ante, p. 185;

were also referred to.

Maniary, Q.C. and *Aspinall, Q.C.*, in support of the rule.—The defendants are not liable, for the risk never attached. The risk is expressly made to commence "from the loading" of the vessel. And the insurance is effected not as in ordinary cases, "at and from," but simply "from" Baker's Island. In *Beckett v. The West of England Marine Insurance Company (Limited)* (*ubi. sup.*) a ship was chartered to carry a cargo from Liverpool to Lagos on the west coast of Africa, there discharge and reload another cargo for the United Kingdom, in consideration of a lump sum by way of freight, payable half before sailing from Liverpool, half on delivery of the homeward cargo. The plaintiff, the shipowner, effected an insurance on freight "at and from Lagos," and the policy contained a clause whereby the defendants, the insurance company, agreed that the insurance should "com-

mence upon freight and goods or merchandise aforesaid from the loading of the said goods or merchandise on board the said ship or vessel at as above." The ship being lost before she had shipped any of her homeward cargo, it was held that this clause precluded the plaintiff from recovering against the underwriters, although the freight was chartered freight. "What the words really mean," said Mellor, J., "is, the commencement of the risk shall be when the goods and merchandise are on board at Lagos, and not when the ship merely arrives there. Once let that construction be put to the policy, and the case is perfectly clear." Hannen, J., said, "we cannot reject operative words in a sentence merely because there may be a reason for a suggestion that one of the parties may not have contemplated the effect they would have. It must be remembered that they are the words of the underwriters as well as those of the assured." And Cockburn, C.J., refers to a reason, which is equally applicable to the circumstances of the present case, why the risk was made to commence "from the loading." "I think," said his lordship, "that Mr. Williams has given a second very good reason for the insertion of the words by the underwriters, viz., the peculiar difficulty of loading vessels on the West Coast of Africa, where they are exposed to dangers of tempests and other perils during the process of loading. That being so, one can quite understand the underwriters saying, 'we do not take upon ourselves, without requiring extra premium, the risk of the vessel loading at the coast under these circumstances. Though it may be,' they said, 'when the loading is completed, and the vessel is over the bar with a full cargo on board, we will undertake it.' But even independently of that, I cannot see any possible means of getting over the precise language used in the policy. I think, therefore, that this vessel having been lost before the loading was completed, the risk under the policy never attached, and that the defendants are entitled to judgment."

BLACKBURN, J.—In this case we are all agreed upon the result. We think the rule must be made absolute to enter the verdict for the defendants, but I believe we are not perfectly agreed upon our reasons. I will, therefore, proceed to state the reasons which influence me in coming to the conclusion I do. This is a reinsurance on chartered freight, the original voyage of the ship being from Melbourne to Baker's Island, and from Baker's Island to the port of discharge in the United Kingdom. There was of course the ordinary covenant to furnish a full cargo, and the freight was to be paid for according to what was the quantity of cargo delivered at the end of the voyage, more or less, according to the goods delivered; any residue arising from not shipping a full cargo to be a separate matter of damage. The ship then sailed on this voyage, and she was insured from Melbourne to Baker's Island, and it was during her stay at Baker's Island that this disaster occurred. The underwriters, under the policy, executed a reinsurance, on which reinsurance it is that the present question arises. The object was—as they had insured during the voyage, as I have said, from Melbourne to Baker's Island, and during her stay there and on her voyage home—to cover themselves during a portion of the risk, and the question is, what portion of that risk have they undertaken herein in the present form of policy? The

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policy is a peculiar policy. It is not one of those ordinary Lombard-street policies—ordinary Lloyd's policies, which have been modified of late, but it is an entirely new one from beginning to end, and applicable to freight only. That being so, we must consider what the ordinary policy of insurance is. In every case where there is an insurance against a marine loss the undertaking by the underwriter is this: "I will be responsible for such accidents as happen to the subject matter of the insurance during some particular voyage," which is there described. The question then is. What is that voyage? If the perils happen during that time he may be responsible for those consequences so far as they affect the subject-matter of the insurance. An ordinary Lombard-street form of policy is a very artificial one, which is very old and long-established, and which has acquired a meaning which it is very difficult to put on it at first, but which has now been long-established; and the way that is done is by making it applicable to everything; and when they mention the voyage there is a blank for the freight, and then come these further words, "the beginning of the adventure on the said goods and merchandise to be from the loading thereof on board the said ship," &c.; and then there is left a blank which is generally filled up with the words, "this being a voyage from Baker's Island to England," or as the case may be, and "shall continue and endure," and so on. In that form of policy there is nothing whatever said, but it is always understood to refer to the time when the risk is to commence on the freight; and the consequence of that construction of the policy is this, that the underwriters are to be responsible for damage in the particular thing, the subject matter of the insurance being goods, &c., during the voyage, but it is not to be applicable to anything further than the particular goods, until the goods are loaded on board the ship. As to the freight there is nothing specified, and where that is so, as I understand the construction of it, it is this, if the freight be in existence, and thereby a peril may happen which destroys the ship during the specific period of the voyage over which the policy is intended to apply—if the freight be in existence and the ship is lost, then the underwriters are responsible for it, although the goods are not put on board. It is enough to prove the freight to be in mere expectancy and possibility. Taking that to be the correct view of the matter, the question we have to decide on this policy is, in the first place, what voyage was it during which the underwriters said "we will be responsible for any damage arising to this freight from perils occurring during the voyage"? and secondly, during what period of it the freight was to be in such a state and condition that if the peril happened during the voyage the freight was capable of sustaining damage from it. As to that the policy is worded in a peculiar way. It begins thus: "shall cause themselves to be insured in the sum of 500*l*. on the freight payable to him or them in respect of the present voyage." That being printed, then come in writing the words "on the vessel *Napier*, whereof ——— is master, or whoever else may go as master in the said ship from Baker's Island to any port of call and discharge in the United Kingdom." Then come the words, which are again printed, "the insurance on the said freight

beginning from the loading of the said vessel, and terminating when the said vessel shall be moored at a safe anchorage." Construing that as best I can, I think it amounts to this: "We the underwriters, say we will be responsible for any perils in consequence of anything that may happen during this period—during the voyage from Baker's Island to a port of call or discharge." But I look in vain for words in that part of it that say "or during her stay at Baker's Island." These words, if the parties had intended to expose themselves to that risk under the insurance during her stay at Baker's Island, could easily have been inserted; but I look and look in vain for those words, and they are not there. The argument that struck me as the great argument for the plaintiff was that the printed words that follow—and the printed words are intended to apply to all cases—are "the insurance on the said freight beginning from the loading of the said vessel and terminating when the said vessel shall be moored at a safe anchorage," and so, of course, the goods were intended to be loaded before the voyage began, because they could not be loaded during the period of the voyage from Baker's Island to the United Kingdom. If I understand Mr. Butt's argument, it comes to this: that the risk was to commence earlier—that it was to commence during the stay at Baker's Island as soon as the goods were loaded. That raises the other question of the amount whether it was to be whole or partial. That seemed to me to be the argument for the plaintiff, and I pause to see whether any effect can be given to it; and I come to the conclusion that the matter is not as so put. What was meant to be said is, "We will be responsible for any peril that happens during the voyage described, but whether it happen then or not, we will not be responsible for the freight and insurance on it until the goods are actually on board." I take it that the printed words do not amount to an extension of the former words, that they will be responsible for the risk and peril during the voyage. They really say, "We limit it to the perils which may happen during the voyage, that is from Baker's Island forwards; yet nevertheless, we say, as a general rule for freight we shall not be responsible, unless the goods be on board." Taking that view—and that is the ground on which I go—the meaning is that "We will be responsible for damage to the freight after the goods shall be put on board, and during the voyage from Baker's Island to any port of the United Kingdom." This loss happened before the voyage from Baker's Island to the United Kingdom had commenced; and in that view of the matter I consider the loss is not covered by the policy, and consequently, that the defendants are entitled to the verdict. Now, a good deal of argument has been addressed to us upon the supposition that if you could imply words to say that during her stay at Baker's Island the ship should be covered, that then it was not necessary that the ship should be completely loaded before the risk attached. It is unnecessary to decide that at all, but I will say that my present impression, without going further than that, is, that inasmuch as the freight would depend on the quantity of goods ultimately delivered, if a portion of the cargo had been shipped, there would have been a portion of freight at risk, and the other portion would not be covered, and consequently it would be apportionable. But

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it is unnecessary to decide that in the view I take of the case; and I do not mean to decide it, but only to say that such is the impression on my mind, *velut quantum*. The ground I decide the case upon is, that I think the words of this policy express the intention of the underwriters not to be liable for the perils that happened before the ship had gone from Baker's Island, but only on the voyage from Baker's Island, and that voyage had not commenced.

MELLOR, J.—I come to the same result as my brother Blackburn, although I differ from him as to one portion of his judgment, doing so with the utmost possible hesitation; still I cannot quite yield to the reasons which he has alleged for his judgment. This is a reinsurance for a part of a risk, and the words are not "at and from Baker's Island," but "from Baker's Island to a port of call or discharge in the United Kingdom; the insurance on the said freight beginning from the loading of the said vessel, and terminating when the said vessel shall be moored and safely anchored." I cannot but think that the written words (there being no word "at") if they stood alone, would certainly have the meaning which my brother Blackburn ascribed to them. They would only cover the risk from the time of the sailing of the vessel from Baker's Island to some port of the United Kingdom; but then, follow words which I cannot give any real or satisfactory meaning to unless I say that they extend the risk further than my brother Blackburn supposes; because the words are, "insurance on the said freight beginning from the loading of the said vessel." I think these words would not be satisfied by holding them to apply merely to the state in which the loading was, so as to make the matter apply to freight where there had been a partial loading of the vessel; I cannot help thinking that they do extend the risk of the loading of the vessel, and this is not inconsistent, as it appears to me, with the words "from Baker's Island to a port of discharge in the United Kingdom." Therefore, they must be read, "from the loading of the vessel at Baker's Island to a port of call and discharge in the United Kingdom." Then there are certain other words, such as "until the ship sails," which seem to give full effect to those words. I say I differ in this view, from my brother Blackburn, with the greatest possible respect. I may have made a mistake, but I cannot help expressing the conviction at which I arrive, namely, that, according to the meaning of the policy, it does extend the risk from the time of the loading of the vessel at Baker's Island to the arrival at a port of call or discharge in the United Kingdom.

LUSH, J.—I am of the same opinion, that our judgment ought to be for the defendants; but I arrive at that conclusion for reasons different from those which my brother Blackburn has expressed, and which, although not material in this case, may be material in other proceedings on the same form of policy. Now, in my view, the words in writing here, descriptive of the voyage, were intended, in this policy, to define the risk. The words are, "Lost or not lost, the sum of 500*l*. upon the freight payable to him or them in respect to the present voyage, to be performed as below," referring to the words "to be performed from Baker's Island to a port of call and discharge in the United Kingdom." Now those words, in my

view, are descriptive of the subject of insurance, namely, the freight which is to be earned on that voyage, and are not intended to define when the risk was to commence. Nevertheless, if there had been no other words defining the period when the risk was to commence, the risk, by implication, would only commence when this voyage commenced; and until the ship had sailed on that voyage the policy would not have attached. Then come the words that are expressly put in to define the commencement of the risk that had not, in my view, been defined before, and they are these namely, "the insurance on the said freight beginning from the loading of the said vessel." I could only read those words as qualifying and rebutting the inference which would have been drawn from the previous description of the voyage, and making the underwriters liable from the time when the vessel was loaded; meaning, that is, that they would be liable although the voyage had not commenced, if the vessel had been loaded. Then what does that loading mean? Does it mean the commencement or the completion of the loading? In this particular case the loading had been partially finished, not completed. The vessel had perished before the cargo was all put on board. Now if those words mean "the insurance being from the beginning of the loading," then, in my view, the plaintiff would be entitled to the whole amount, because there would have been a total loss; for although all the cargo was not on board, all the cargo necessary to complete the loading was ready to be put on board, and would have been put on board had not the vessel been unable to receive it by one of the perils insured against. If the words had been "from the beginning of the loading," then the plaintiff would have been entitled to our judgment. I am of opinion they do not mean that. I take into account that the underwriters do not intend to be responsible for the vessel during the time she lay at Baker's Island, because the ordinary words are omitted. It is not "at and from Baker's Island," but "from Baker's Island." Therefore the underwriters intended not to incur that liability which is ordinarily incurred in policies of this description; "at and from," but only to insure the voyage; and these words, in my view, must be read so as to give them their fullest sense as qualifying the previous description of the risk. Then, to what extent are they to be qualified? According to my view, the only reasonable construction is, that the underwriters, in insuring that voyage, in effect say, "We are willing to become responsible from the time the vessel has taken in her loading cargo, and is ready to commence the voyage, although it has not, in fact, actually commenced." That reading appears to me to make the whole of the policy consistent, and inasmuch as in this case the loading was not complete, the policy had not attached, and the plaintiff can recover nothing. This reading seems to dispose of the second branch of the rule. The second branch of the rule asks for what is called *pro rata* sum, namely, such proportion of the policy as would cover the amount of the cargo actually put on board. That seems to be disposed of by the same reasoning. If the policy had not attached, then the underwriters are not liable at all. If I am right in my view of it, that this loading means the complete loading of the vessel, the policy had not attached. If I could read

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it, on the other hand, as saying that the insurance was to begin at the time when the loading began, then, for the reasons which I have already given, I should have thought the plaintiff entitled to the whole. It seems to me that in this case the plaintiff is entitled to all or nothing; but, for the reasons given, I think the plaintiff entitled to nothing, on the ground that the policy had not attached.

Rule absolute.

Attorney for plaintiff, Wynne, for Forshaw and Hawkins, Liverpool.

Attorneys for defendant, Cunliffe and Beaumont, for Woodburn and Pemberton, Liverpool.

Wednesday, May 22, 1872.

FRASER AND OTHERS v. THE TELEGRAPH CONSTRUCTION AND MAINTENANCE COMPANY.

"Steamship"—"Auxiliary screw"—Bill of lading—Sailing voyage.

When a vessel by which goods are forwarded is described as a "steamship," simpliciter, in the bill of lading forming the agreement between the freighter and the owner of the vessel, the contract is that the goods shall be transported in a ship whereof the primary and principal propelling power is steam, and the terms will not be satisfied by an auxiliary screw steamship making a sailing voyage with the occasional aid of her steam power.

DECLARATION that in consideration that the plaintiffs would at the defendants' request cause to be shipped on board a certain steamship of the defendants called the *Hibernia*, which was then possessed of such motive and propelling powers as steamships of the class of the *Hibernia* ordinarily are possessed of, certain goods, to wit, black pepper and coffee, for reward to the defendants, the defendants promised that they would carry the said goods in the said steamship from Singapore to London, and would during the voyage use and employ the motive and propelling powers belonging to the said steamship; that the plaintiffs accordingly shipped the goods. Breach, that the defendants did not use and employ the motive and propelling powers of the steamship in the manner in which such powers are employed by steamships in the usual course of navigation, whereby the goods were delayed on the voyage, and the plaintiffs lost their market.

Second count: That the plaintiffs delivered to be carried in the *Hibernia* the goods as in the first count mentioned, and it became the duty of the defendants to use the motive powers as in the first count mentioned. Breach, that they did not do so.

Third count: That in consideration that the plaintiffs would ship goods on board the steamship *Hibernia*, to be carried in the said steamship as in the first count, the defendants promised that they would carry within a reasonable time. Breach, that they did not carry within such time.

In a fourth count, a duty on the part of the defendant to carry within a reasonable time was alleged; and a fifth count stated that the goods were delivered to the defendants as carriers, to be carried within a reasonable time, but were not so carried.

Plena (inter alia): traverses of the promise, the duty alleged, and breaches.

Issue thereon.

The cause was tried before Mellor, J., and a special jury in the sittings after last Michaelmas term, at Guildhall, when it was proved that the plaintiffs, merchants of Singapore, had shipped a quantity of pepper and coffee on the defendant's auxiliary screw steamship *Hibernia*, under bills of lading dated Nov. 1870, as follows: "Shipped in good order and condition in the steamship *Hibernia*, laying off the port of Singapore, and bound for London, having liberty to call at any port or ports in or out of the customary route in any order to receive and discharge coals, cargo, and passengers, and for any other purpose, or to tow and assist vessels, and to tranship the goods by any other steamer, 1796 bags black pepper, to be delivered in like good order and condition at the port of London, *inter alia*, damage from machinery, boilers, or steam, however caused, or from explosions, heat or fire on board, default of engineer excepted, at 2l. per ton of 16 cwt." This freight was not much above the then ordinary freight for a sailing vessel. Five hundred tons of coal were on board when the ship left Singapore, but this quantity would not have sufficed if the homeward voyage had been made under steam. Acting, however, by the directions of the owners, the captain made the passage by means of sails, and used the steam power only in the China sea, at St. Helena, when coming up the English channel, and during occasional calms. No more coals were taken in, and the whole stock was not exhausted. Thus the voyage, which a ship propelled constantly by steam usually completes in 65 days, lasted 135 days, being longer than the ordinary voyage of a sailing ship.

The plaintiffs virtually abandoned their first two counts, and relied on the contention that as the vessel was only an auxiliary screw steamer, she was not bound to steam the whole distance.

The learned judge asked the jury to take into consideration the kind of vessel and the nature of the voyage, and to say whether the duration of the voyage was or was not reasonable.

Verdict for the defendants.

A rule having been obtained to set this verdict aside, and for a new trial on the ground that the learned judge had misdirected the jury in not telling them that the contract was for carriage in an ordinary steamship; and that the verdict was against the evidence.

Pollock, Q.C. and Cohen showed cause.—The *Hibernia* came no doubt within the category of steamers, and so was fairly described in the bill of lading. But she belonged to a perfectly well-known class of vessels which are designed to use steam as an auxiliary motive power only; and the plaintiffs inspected her and were aware of her character. There was no warranty that she should steam during the whole voyage. [BLACKBURN, J.—It is not a warranty, but part of the contract. LUSH, J.—A description of a ship as "A 1" has been held to be a warranty that she is so classed.] A certain quantity of coals are taken on board an auxiliary steamer, as in the present case, and it becomes the duty of a prudent master to economise them. Nor is any unfavourable inference to be drawn from the fact of a little coal being unused at the close of the voyage. The captain was not bound to do more than was usual, nor to go into intermediate ports to coal.

Sir John Karslake, Q.C. (A. L. Smith with him) was not required to argue.

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COCKBURN, C.J.—I think this rule should be made absolute. The miscarriage at the trial, I think, has arisen from the abandonment of the first two counts in the declaration, although it is undoubtedly, a fact when the matter is looked into a little more closely, that the same questions are involved in the third count, which alleges an absence of navigating the vessel with reasonable expedition. But the present point is whether it was necessary that this vessel should be a steamship. It is expressly so called in the bill of lading, and that instrument also contains a provision not at all unimportant, viz., that "the vessel shall be at liberty to call at any port or ports in or out of the customary route in any order to receive and discharge coals, cargo, and passengers, and for any other purpose, . . . to tow and assist vessels, and to tranship the goods by any other steamer." Now the effect of the whole of that is, I think, to make it incumbent on the shipowner to see that the vessel by which these goods are to be shipped, and on the shipping of which a bill of lading is given, shall be a vessel propelled by steam. I am, however, far from saying that when it would be convenient for a steamship to use sails she should nevertheless at all times steam, but I mean that her principal means of propulsion shall be steam and not sails. Such, in my opinion, is the true meaning of the contract here, and it should have been left to the jury to say whether the vessel satisfied that condition, and I must adhere to what I have already said in the case that, even supposing the true construction of this agreement to be that an auxiliary steamship would satisfy the terms of it, still I consider that would involve the condition that the auxiliary power should be as far as possible employed, not of course if the ship were driven out to sea far away from a coaling station, but under ordinary circumstances. But I think the contract appears to be different by the bill of lading, for notwithstanding a case referred to by Mr. Cohen, decided in the Court of Common Pleas, I must hold that the bill of lading is itself the contract under which the goods were carried and is conclusive, and that the master would not be able to say, "I, in the interests of the owners, make this a sailing voyage." If a new trial takes place, it will, I think, be expedient to go into that question and make the evidence on the subject more complete. But it is enough now to say that, according to the right construction of the contract, it means that the ship shall be a vessel, the primary and principal propelling power of which is steam.

BLACKBURN, J.—I also think there should be a new trial. The first two counts which have been abandoned laid down the duty alleged much more strongly than the two before us, and averred a promise that the goods should be delivered in reasonable time, and that the defendants did not deliver within such time. These counts also stated that the goods were put on board the steamship *Hibernia*. Now, on that I understand the plaintiff to say that the reason why defendants are liable is because they did not use reasonable exertions on the voyage. If the delay had been caused by storms, or other incidents of navigation, I think the plaintiff would not go so far as to say the goods had been delayed for want of reasonable exertions, and, when we once reach that point, the kind of ship becomes most important

in ascertaining the sort of contract really made, because the reasonableness of the expedition would vary according to the kind of ship. If the contract was, "We will carry these goods on board a vessel having an auxiliary screw, and using it when necessary to do so," then the exertions would be reasonable; if the contract was to carry by steamer, although when with favouring winds she might go as a sailing vessel only, yet the vessel in the latter case would use much more steam than that in the former. Now, the view my brother Mellor took of the matter was that the contract was to carry by an auxiliary screw, and that only, and in that view his direction to the jury would have been right, viz., "Say if they were using coal in such quantities as was proper during the voyage," but unfortunately, on looking into the bill of lading, the contract, I think, appears to be different. Notwithstanding the case referred to by Mr. Cohen, decided in the Court of Common Pleas, I must hold that the bill of lading is itself the contract under which the goods were carried, and is conclusive; and the bill of lading is as follows: [His Lordship read the material parts.] Now, I can in no way construe that clause, allowing transshipment, &c., as meaning anything else but this, viz., "The goods shall be shipped on another such steamer," viz., a vessel whose motive power is principally steam power, although not requiring that during every moment of the voyage she should be worked by it. Then if we take that to be the contract, there can be no doubt in the matter, if the defendant avowedly only used the steam as auxiliary to canvas, and the vessel in reality sailed. On that view the plaintiff is right and the defendant wrong, but taking my brother Mellor's reading of the contract, I cannot say whether the jury were right or wrong in their finding; at all events the evidence on the new trial will be more ample than before, and at present we can and need only say that the proper direction was not given, and that the plaintiff was, under the agreement, entitled to have reasonable exertion made by the ship, a steamer, worked as a steamer.

LUSH, J.—I am of the same opinion. I think the proper construction was not put on the bill of lading at the trial, and that it is not a contract that steam shall be used merely to supplement sails, but as a primary motive power, so as to keep the ship going at the rate of speed at which she would go if she were a mere steamer.

MELLOR, J.—I am of the same opinion, for I do not think that I put the true construction on the contract which has now been put on it by the court. And on the other point I should not be prepared to say decisively that I was dissatisfied with the verdict if my first interpretation of the agreement had been correct. But it is not necessary to give my opinion upon that question now, although I may state my own impression to be that I myself should have been disposed to have found the verdict the other way.

Rule absolute.

Attorneys for plaintiffs, Shum and Croseman.

Attorneys for defendants, Bircham and Co.

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COURT OF COMMON PLEAS.

Reported by H. H. HOCKING, H. F. POOLY, and R. A. KINOLAKI, Esqrs., Barristers-at-Law.

June 1 and 3, 1872.

SEYMOUR S. LONDON AND PROVINCIAL MARINE INSURANCE COMPANY.*Marine Insurance—War risks—Warranted no contraband of war—Real destination.*

During the continuance of the war between the United States of America and the Confederate States, and while the coasts of the territory of the latter States were strictly blockaded, certain persons in this country shipped a cargo of goods on board a ship which was to proceed to Matamoras, a Mexican town on the Rio Grande, which river separates it from Texas, one of the Confederate States. The shippers reserved to themselves the option of disposing of their goods as they saw fit on arriving at Matamoras, but the real intention of all parties was that at Matamoras the goods should be transhipped into lighters and proceed thence to a point in Texas, there to be delivered to the Confederate Government in pursuance of a contract made between that Government and one M. The goods were insured on their voyage to Matamoras by a policy which contained a warranty against contraband of war. While on its way to Matamoras the ship was seized by a United States cruiser and condemned. In an action on the policy by the insurance agent on behalf of the shippers,

Held, that the goods being from the time they left this country really bound to Texas, were contraband of war, so that the warranty was broken and plaintiff could not recover.

SPECIAL CASE.

This was an action brought to recover 3000*l.* and interest upon a marine policy of insurance, subscribed by the defendants. In the policy the insurance was declared to be "upon goods warranted no contraband of war," and the policy was declared "to cover the risks excepted by the clause," warranted free from capture, seizure, and detention, "and all the consequences thereof or attempts thereof," only part of an interest of 7500*l.* in the ship *Peterhoff*, at and from London and Matamoras, including risk of craft to and from the ship.

The principal pleas relied upon were the seventh and ninth. The seventh plea alleged that the defendants were induced to make the said insurance by the misrepresentation of the plaintiff and his agents, and the wrongful and improper concealment by the plaintiff and his agents from the defendants of certain material facts then known to the plaintiff and his agents, and unknown to the defendants, and which ought to have been communicated by the plaintiff and his agents to the defendants.

The ninth plea alleged that the said warranty against contraband of war was not complied with.

The case came on for trial before Bovill, C.J., at the London sittings after Michaelmas Term 1866, when a verdict was taken by consent for the plaintiff for 3000*l.* and interest, subject to the opinion of the court upon a special case.

The facts may be briefly stated (so far as they were material) as follows:

During the war between the United States of America and the Confederate States, and when the ports of the latter were strictly blockaded by

the cruisers of the former, an agreement was made between the Confederate Government, and one Bellot des Minières by which the States agreed to take all military stores and supplies, which Bellot des Minières might furnish to them, and pay for them (in cotton if desired) to the value of 100 per cent. on the invoice prices. The goods were to be inspected and approved previous to shipment by the agents of the Confederate Government. Bellot des Minières accordingly appointed Gustavus Harding his agent to procure persons to ship goods in pursuance of this contract. It was arranged between all parties concerned, that it would be safer not to try and run the blockade, but to send the goods to the Rio Grande, a river which divides Mexico from Texas, one of the Confederate States. There is a bar at the mouth of this river, and it was accordingly arranged that the goods should be unshipped at the mouth of the river into lighters and taken in them to Matamoras, a town in Mexico, and thence forwarded across the river into Texas. A ship, the *Peterhoff*, was accordingly chartered by Gustavus Harding to go to the Rio Grande. Gustavus Harding then issued a circular, in which he set forth the contract that had been made between Bellot des Minières and the Confederate Government, and the arrangements that had been made for sending goods, in fulfilment of that contract, by way of Matamoras into Texas, and invited the persons addressed to ship goods on their own responsibility in fulfilment of the contract. The shippers were to have 50 per cent. out of the 100 per cent. which, by the contract, Bellot des Minières was to receive from the Confederate Government, and the rest was to be divided between Bellot des Minières and Harding. Various persons were induced by this circular to ship goods on board the *Peterhoff*. The goods were of the description mentioned in the agreement between Bellot des Minières and the Confederate Government, viz. cloth, flannel, and other material for clothing; and also, *inter alia*, artillery harness. None of these persons entered into any agreement by which they became bound to dispose of their goods, either to Bellot des Minières or the Confederate Government, but they were all of them induced to ship their goods on board the *Peterhoff* by the hope of realising the stipulated share in the profits of the contract between Bellot des Minières and the Confederate Government, and they shipped them with the intention and in the expectation that they would be disposed of in fulfilment of that contract. The goods were inspected and passed, previous to shipment, by an agent of the Confederate Government. A cotton press was taken on board the ship for the purpose of pressing the cotton, which was expected to be received from the Confederate Government in payment of the goods. In order to retain the goods in their control, the shippers made out the bills of lading to one Bowden, who sailed in the ship as supercargo, and who had power, in case he deemed it advisable in his sole discretion to do so, to sell the goods to the agent of Bellot des Minières at Matamoras, in which case Bellot des Minières was to be bound to take them upon the terms of the above-mentioned circular. But Bowden was not bound to sell to Bellot des Minières' agent, but was to be at liberty on arriving at Matamoras, to sell to anyone and at any price he thought fit. Nevertheless, it was

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found in the case as a fact, that it was intended by all parties that the goods should be disposed of to the agent of Bellot des Minières at Matamoras, in pursuance of the above arrangement. The above-mentioned agreement was *bona fide*, and the *Peterhoff* was regularly cleared for Matamoras, which was her true destination. Plaintiff, an insurance broker, insured the goods shipped with the defendants to the extent of 3000*l.*, against war risks only, and warranted them "no contraband of war." The *Peterhoff* was seized on her way to Matamoras by the United States cruisers, and with her cargo condemned in the American Prize Court.

Chief Justice Chase, the judge in the American Prize Court, in dealing with the case divided all goods seized on the seas into three classes, the first class comprising such articles as were manufactured and primarily and ordinarily used for military purposes in time of war; the second, such as were used for purposes of war or peace, according to circumstances; and the third, such as were exclusively used for pacific purposes. Merchandise of the first class destined to a belligerent country, or places occupied by the army or navy of a belligerent was, he said, always contraband. Merchandise of the second class was contraband only when actually destined to the military or naval use of a belligerent; merchandise of the third class was not contraband at all. The artillery harness in this case he considered as belonging to the first class, and condemned it accordingly.

Field, Q.C. (Murphy with him) for the plaintiff. The goods, even if rightly decided to fall under what Chief Justice Chase calls the first class, were really intended for sale at Matamoras. That was their destination, and therefore they were not liable to seizure. They cannot be said to have been destined for Texas in such a way as to make them contraband of war. He cited

Hobb v. Henning, 2 Mar. Law Cas. O. S. 183; 17 C. B., N. S., 791; 12 L. T. Rep. N. S. 205; 34 L. J. 117, C. P.

Carter v. Boehme, 1 Sm. L. C. 460.

Sir George Honyman, Q.C. (J. C. Mathew with him) for the defendants.—The goods were from the beginning destined for Texas, so as to make the cargo contraband of war. [BRETT, J.—The voyage to Matamoras was in reality the commencement of a transit, which, unless something new intervened, was to terminate in the Confederate States.] Yes. Moreover, the sentence of the prize court was conclusive on the plaintiff. He cited:

Powell v. Hyde, 5 E. & B. 607;

1 *Duer on Insurance*, 624;

Sea Light and Coke Company v. Turner, 5 Bing.

N. C. 686;

McKinnell v. Robinson, 3 M. & W. 434;

Lightfoot v. Tennant, 1 B. & P. 551.

He also contended that the policy was avoided by the wrongful concealment of material facts.

Field, Q.C. in reply.

WILLES, J.—This was an action on a policy of insurance on goods from this country to Matamoras, a Mexican town on the Rio Grande. The goods were described in the policy as warranted no contraband of war. The goods were to proceed by ship to the Rio Grande, where there is a bar, thence by lighters to Matamoras. The Rio Grande divides Mexico from Texas, one of the States then known as the Confederate States. The river at Matamoras is some sixty yards wide. The war was at the time of the making of the policy raging

between the United States and the Confederate States. Whether the war which subsequently broke out between France and Mexico had then commenced does not clearly appear. The date of the policy is the 10th Dec. 1862. In the agreement of the 17th Dec. 1862 between Bellot des Minières, Harding, and the shippers, there is a remarkable provision that one party was to be bound to get the leave of the French for the importation of the goods to Matamoras in the event of the Mexican ports being blockaded by France. If war existed between France and Mexico at the time the policy was made, the task of putting a construction on the policy would be easy. But the only war judicially under our notice is the American war, and the argument on the part of the underwriters is that the warranty "no contraband of war" must include goods of the first class, viz., goods of a distinctively warlike character, even though it appeared that the goods in question were not going to a part of the country at war, so that an enemy might legally seize them on the way. It is, however, unnecessary to enter into that question. It may well be argued as between the underwriters and the assured that the warranty "no contraband of war," being expressed generally, must include goods which, there being a war between any two countries, would from their nature be specially liable to be seized by either of them; i.e., that the warranty would include goods of an undoubtedly warlike character, even though such goods, not being intended for one of the countries at war, might not be legally seizable. The policy was against war risks only. It therefore extended to any seizure by any country at war made in a hostile manner, even though such seizure might subsequently, in a prize court, be declared contrary to the laws of war, and even though the prize court might direct restoration of the goods with costs and damages. An insurance against war risks is an insurance against all seizures made in a hostile manner, and assuming that the goods were unquestionably intended for Mexico on a contract binding between the parties who shipped them and persons in Mexico, and had been seized by a United States cruiser, that would have been a seizure within the policy. The seizure would have been mistaken, and it might have been made perversely, or even capriciously; but it would still have been within the policy, if it had been made in a hostile manner. It might, therefore, be fairly, if not conclusively, open to argument, that the warranty was to be read in like fashion, i.e., as including goods which in their character are contraband of war, and consequently likely to be seized by any country whose interest it might be to watch for ships carrying contraband of war, and whose interest it might be to seize a cargo of that description on suspicion that it might be intended for the country with which it was at war. Looking at the matter from that point of view, the warranty would exclude goods of a doubtful character (I will refer only to the artillery harness)—goods whose character could only be determined by their destination—as such goods, no matter what their destination, would be specially liable to be seized on suspicion, even though it might afterwards turn out that the suspicion was unfounded. That is the first question raised, but it is unnecessary to express an opinion upon it. Passing that by, then, I take

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it as undoubted that the warranty applies to the case of any goods going to such a place as would render them liable to be seized. The question, therefore, arises, whether the goods in question had such a destination, that they were legally seizable as contraband of war. It appeared that the intended course of the goods (I am thinking especially of the artillery harness) was, unless some obstacle interposed, or some change of purpose altered the destination, to go to Matamoras (whether they were to be landed there or not seems doubtful); but, assuming that it was intended that the goods should be landed at Matamoras from the lighters, they were then to be re-shipped on other lighters and taken to some place in Texas. The course which the goods were taking by the desire and according to the intention of all parties, was to go to Texas, there to be delivered to the agents of the Confederate Government. A great many steps were to be taken before the goods were to reach Texas; but it appears to me that, from the time they left this country, the place they were bound to was Texas. If that is so, it appears clear that the goods were legally seizable on the sea at the time they were seized by the United States cruisers. The main question that has been argued has been whether the goods were in point of fact so bound to Texas that they were legally seizable on the sea by the United States, and we ought, therefore, in order to show what our view of the case is, to consider the facts more closely. It appears that one Beehie was employed by the Confederate States to procure a cargo for them, and through his agency an agreement was made between the Confederate Government and Bellot des Minières, by which the former agreed to receive certain military stores and supplies, and it was arranged that these goods should be delivered at some safe place within the Confederate territory. They were to be inspected previous to shipment and not afterwards. The Confederate Government agreed to pay for the goods at 100 per cent. on the invoice price, payable in cotton, if desired. This cotton was to come from the Confederate states. That was the first step in the transaction. The cargo that was ultimately sent out was to enable Des Minières to fulfil this contract. Des Minières appointed Gustavus Harding to get a shipment of the goods, and Harding introduced the matter to Messrs. Bennett and Wake, shipbrokers in London. Thereupon it was agreed that the safest way was not to try and run the blockade which applied only to the seaports, but to send the goods to Matamoras, a Mexican town, whence, without fear of interruption, the goods might be transported across the river to the Confederate territory. It was open, therefore, to Des Minières to ship the goods directly to some Confederate port; but instead of doing so it was thought the safest way to ship them to Matamoras. The next step was to procure a ship, which was done by a charter-party between Beehie and Harding of the one part, and the owners of the other. The next thing to be done was to get shippers, and to do that it was arranged between Des Minières and G. Harding that the goods which should be shipped by the latter and his friends for the execution of a portion of the contract should be to the amount of 150,000*l.*, and that the 100 per cent. profit should be distributed between the parties in certain proportions then mentioned. It was also arranged that Robert Harding, the brother of Gustavus, should

be the agent of Des Minières to dispose of cotton which should be received in payment, and to hold the proceeds and distribute them in accordance with the terms of the agreement. The terms, therefore, on which anybody was to ship any of the goods were to be found in this agreement, and persons were to receive their share of 50 per cent. profit, part of which was to be delivered to them through the hands of Des Minières, who was to receive the return made by the Confederates for the goods which were to go out. In furtherance of this design, Beehie and Bennett and Wake proceeded to distribute information as to the adventure. The substance of this was that Beehie was to deliver, in pursuance of his contract, in the Confederate States, through the agency of persons who were to have the conduct of the matter. The goods were to be sent to some person in Mexico, and by him to be put in course to arrive in Texas. It was further provided (and this is the option that has been spoken of) that "if the goods can meet with a better market, shippers by our vessel may avail themselves of the said contract or not." It was thus arranged, that any person sending out goods to Matamoras, where it does not appear that there was any market for goods of the description sent out, should have the option of giving up his share of the 100 per cent. profit, which had been promised by the Confederate Government, and of trusting to a chance market elsewhere. It is now contended that the option thus reserved is sufficient to change the character of the transaction, and to prevent it from being said that the goods were bound for Texas. The notice of Messrs. Bennett and Wake which I have just quoted goes on to provide for the contingency of peace. It is impossible to believe that the option I have just alluded to was anything more than colourable to make the goods possibly exempt from seizure as going to Mexico, so that a prize court might hold that the voyage to Texas was not continuous with the voyage to Matamoras, and that the goods were not bound to go to Texas, but that it was intended that they should go to a neutral port, to be sent on to Texas if it was thought, on arrival at Matamoras, expedient that they should go there—in other words, that, as far as the prize court might be concerned, the goods should be regarded as bound for a neutral port, and that there was only a possibility of their being sent thence to Texas. I think that the option thus reserved was a mere colour or blind, through which it was thought the real character of the transaction might possibly be concealed. I have thought it necessary to dwell on the terms of the contract, because, when we come to look at the contract between the parties it will be found that it is merely an expansion of the notice. I look then at the option reserved to the shippers as a simple blind. It is to be regarded just as if a man shipped goods for Charleston with a suggestion that the goods were to stop at St. Thomas's, where possibly there might be a better market for the goods, and that he reserved to himself the option of disposing of the goods at St. Thomas's if he chose to do so, and of not going to Charleston at all. Induced by the notice just referred to, various persons shipped goods on board the *Peterhoff*, and all the goods that started on that voyage were goods shipped under this contract with the Confederate Government. Other goods were shipped by Harding on the chance

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that the Confederate Government might accept them. Lastly, a cotton mill was put on board, to press the cotton when received. Having given that account of the transaction, let me proceed to deal with the shipment. The goods were shipped on the strength of the information received as to the profit. The shippers were not to be bound to sell to the Confederates when they got out there, but they were all induced to ship in order to share in the profit promised by the Confederate Government. It was intended to sell the goods to the Confederate Government through Bellot des Minières. The parties had taken care to ascertain that the contract with the Confederates was genuine, and they also assured themselves that the Confederate Government had made proper provision for the transit of the goods and the return of the cotton. It is impossible to construe the warranty in the charter-party as merely limiting the liability of the underwriters to such goods as were not contraband of war; the warranty was introduced to save the underwriters in the event of a vessel of war seizing the ship, and, on finding some contraband on board her, taking her into port to a prize court. The effect of the presence of contraband of war on board a ship is, not that the contraband alone is forfeited, but to make the contraband itself, and all the goods of the same owner on board the ship, forfeitable to the captor, and the result would be that the cargo would be taken to a prize court to determine whether the actual contraband only should be forfeited, or whether any and how much of the rest of the cargo should be forfeited. That is the law as it was frequently laid down by Lord Stowell. To proceed with the facts of the case. It appears that a supercargo was sent out to protect the interests of the shippers—one Robert Bowden—who was appointed by Gustave Harding to assist in bringing the adventure to a successful conclusion. He was the person to whom the bills of lading were to be made out. Certain of the shippers entered into the agreement which has been relied on—which is an agreement between Des Minières of the first part, Robert Harding of the second, and the shippers enumerated in the schedule of the third. After reciting the agreement with the Confederate States, it goes on to recite an agreement with the parties of the third part, that in any case they shall send out goods to the port of Matamoras, Brown, Fleming, and Co. as the agents of Bellot des Minières will purchase the same. That is not true; 100 per cent. was to accrue to Des Minières on the goods that might arrive in the Confederate States, and, by the agreement with Harding, the latter was to receive that and divide it into three parts. To speak of the option reserved to the shippers is idle. The 4th article of the agreement is that the ship shall not carry contraband of war; that is a mere hind. There was to be contraband on board the ship, and that that was contemplated from the beginning is certain. We must take this agreement, so far as we can, to be *bond fide* between the parties; but no amount of *bond fides* can alter the facts. The 6th paragraph gives power to Bowden to sell the goods at Matamoras, and provides what he is to do in the event of his not selling them to Brown, Fleming and Co. Then comes the 7th paragraph, by which if Bowden, in his sole discretion, chooses to sell to Brown, Fleming and Co., he is to be at liberty to do so, and Brown, Fleming and Co. are

to be bound to accept the goods, and, by the 8th paragraph, to pay at the rate of 100 per cent. over and above the invoice price. Thus all the persons who shipped goods put them in the hands of a person who was in direct communication with the Confederate Government, and payment for the goods, together with the expected profit—all was to come from the Confederate Government. The next finding in the case is that the agreement was made *bond fide*; but it is added, that "the parties thereto intended by means of the stipulations in the agreement relating to the alleged sales to Brown, Fleming and Co., or their nominees, that the goods should be disposed of and delivered to the agents of the Confederate Government." Thus the design from beginning to end (unless an anticipated obstacle intervened) was that the goods should go to the Confederates. That being so, before I proceed to refer to the case of *Hobbs v. Henning (sup.)*, I think it right to show how prize courts have from time to time dealt with the case of cargoes sent to be landed in neutral ports, with the intention that they shall ultimately reach a hostile port. The question in such cases arises as to the continuity of the voyage. In such cases great stress has been laid by prize courts on the question, whether the goods, sent in the first instance to the neutral port, have been sent with the real intention of being landed at that port, so as to become part of the common property of the neutral country, or whether they have been sent there only as a blind, so as to alter the character of the subsequent voyage. The law has been decided, that a mere transshipment at the neutral port, or a sale there without landing the goods, or a putting of the goods ashore and reshipment of them in the same or in a different vessel—all circumstances of that kind are insufficient to break the continuity of the voyage, and to prevent it from being illegal from the beginning. The court is to look at the real intention of the parties, and not to give them credit for what I may term the operose manner in which they may have tried to conceal the true design. If, then, the court disregards the masks, and look at the real design of the parties; if they find the real design to be, by doing such acts as I have described, only to mask the original and continuous design, the court will strip off the mask and view the matter in its true light. It is unnecessary to refer at length to the cases that have been cited. The case of *The Thomryis* (1 Edw. Adm. Rep. 17) may be summed up by saying, in the words of Lord Stowell, "that the mere transshipment of a cargo at an intermediate port will not break the continuity of the voyage, which can only be effected by a previous actual importation into the common stock of the country where the transshipment takes place." In that case, Lord Stowell had to consider whether certain goods originally shipped at a port in Spain had been since that shipment on their way to a hostile country. If they had, then they might be seized on the high seas by any nation who had an interest in seizing them. A sale effected on the way was not held sufficient to change the character of the voyage. The suggested importation to Lisbon was held to be no importation at all. Some stress was laid on the question, whether they were actually put on shore at Lisbon; and there are some passages in the judgment which seem to say that if they had been actually landed there it might have made a difference. In the case before

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as there is nothing to show that the cargo was to be actually landed at Matamoras. Even if it was to be put on shore there, if such landing were only colourable, it will be seen that Lord Stowell did not think that sufficient, unless they became part of the common stock of the country. At any rate, a mere transshipment is not sufficient to break the continuity of the voyage, which can only be broken by a landing into the country, so as actually to become part of its common stock. Another case that has been referred to is *The William* (5 C. Rob. Adm. Rep. 385). It is obvious from that case that what a judge has to do is to look at the real character of the transaction. In the case before us he must satisfy his mind that there was a real intention to import these goods into Matamoras; and applying my mind to the question, with every charity towards the shippers, I find it impossible to arrive at a conclusion that it was intended to import this cargo into Matamoras, so as to make it part of the common stock of Mexico. I must guard myself against being supposed to express any opinion upon the controverted point whether neutrals can sell arms to belligerents; whether, in short, what is *prima facie* contraband can be sold to them. I do not wish to throw any doubt upon the power to sell. I call it a controverted point, because though the weight of authority allows such sales by neutrals, the learned judge of the Admiralty has, in a recent work on international law (3 Phillimore's International Law), adverted to principles of justice as showing that neutrals ought not to be allowed to sell to belligerents under any circumstances. If it were necessary to express an opinion on the point, this court might arrive at a different conclusion. For myself, I have no doubt upon the point, but I think it would be wrong to pronounce a distinct judgment on the point, as the question does not arise. I only wish to say that I take the part of the minority in that controversy. The present case was one in which the entire adventure was to be completed in the country where the goods were to go and the profits, in which the sellers were to share, were to arise only on the entry of the goods into the belligerent country. A neutral may no more lawfully import arms into a hostile country without rendering them liable to seizure on the way, than a neutral government can do so without giving rise to a *casus belli*. It is a case of private war by the individual; an act of a hostile character. The mere act of selling to a belligerent has not that character. I now come to consider the case of *Hobbs v. Henning* (*sup.*), which was much relied on by the plaintiff. It is true that in that case the plea did not allege that there was in the policy there, as there is here, a warranty that the goods insured were not contraband of war; but it was founded on the allegation that the goods were contraband, and that they had been shipped to Matamoras for the purpose of being sent on to Texas. The plea was held bad, because it not being alleged that any warranty had been given, it became necessary to show that the goods were contraband, and liable to be seized as such; and it was further held that the averment that it was the intention of the sellers that the goods should go to the Confederate States, did not indicate that the goods were bound to go there; and on that ground it was decided that the state of things which we have now decided to have existed in the present

case not having been averred in the plea, the plea was not sustainable. That appears from the judgment. The case of *Lightfoot v. Tennant* (1 Bos. & P. 551), was there distinguished at p. 819 in the Common Bench Report N. 8, and that part of the judgment accords with the law that we lay down to-day. "If goods," says Erie, C.J., "fit for immediate use in war, and therefore of the quality denoted by the term 'contraband of war,' are passing between neutrals, it seems that they are not liable to seizure by a belligerent. The right of capture, according to Sir W. Scott's opinion, expressed in the case of *The Twins* (30 Rob. Adm. Rep. 167), attaches only where they are passing on the high seas to an enemy's port. They must be taken *in delicto*, that is, in the actual prosecution of a voyage to an enemy's port." It is right to mention that by the word "voyage" is meant the real destination of the goods; and, as is pointed out by Lord Stowell, the character of the voyage is not altered by a mere transshipment. The word "voyage" is simply equivalent to the old English word "bound." Thus, Erie, C.J., in *Hobbs v. Henning*, at p. 818, says: "The allegation that the goods were shipped for the purpose of being sent to an enemy's port is not an allegation of a mental process only." I will not stop to criticize this passage. I will bow to the authority of the late Chief Justice of the court; but I take that passage in connection with what follows, viz.: "We are not to assume, therefore, either that the plaintiff had made any contract, or provided any means for the further transmission of the goods into the enemy's state, or that the shipment to Matamoras was an unreal pretence. If the goods were in a course of transmission, not to Matamoras, but to an enemy's port, the voyage would not be covered by the policy, and that defence is raised in direct terms by the third plea. Here the allegation does not deny the destination to the neutral port to which the insurance relates, but introduces a purpose existing in the mind of the assured after the termination of the voyage insured for, as to the ulterior disposition of the cargo and ship. It is consistent with that purpose as here alleged, that the plaintiff made the consignment for mercantile profit as the end to be attained by him; in other words, that he knew of an effective demand for warlike stores at Matamoras, and was induced to send a supply by the expectation of a high price, and that he expected that the purchase would probably be made on behalf of the Confederate States, and in this sense had the purpose that the goods should pass into those states. In this sense price was the ultimate end which he purposed to attain, and Federal and Confederate were alike indifferent as means, provided he attained that end, and in a neutral territory he might lawfully sell to either." In the present case, the plaintiff may be said not to have made any contract. I exclude the notion of any contract having been made by the shippers. But there was a certain contract existing on the one hand between Bellot des Minieres and the shippers. The latter was just the same sort of contract as is entered into by a person who offers a reward. It was binding on the promisor. It was a contract of which the shippers might avail themselves, if they liked. In *Hobbs v. Henning* the plea was held insufficient, as it showed that there was to be a sale by a neutral in a neutral port. Here we find as a fact that the goods were shipped with the intention that there should be only

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a temporary stoppage at the neutral port, and that the goods, in the course of the same transaction, should go on to Texas, and that the shippers should be paid by a share of the profits to be obtained on the delivery in the Confederate States. The case of *Hobbs v. Henning*, is, therefore, an authority for the defendants. Erle, C.J., in his judgment, goes on to say, "The distinction between a mere mental process that an unlawful act should be done and a participation in the unlawful act itself, is made more clear by referring to the cases of *Holman v. Johnson* (Cowp. 341) and *Lightfoot v. Tennant* (1 Bos. & P. 551). In the first, the plaintiff, in a foreign country, sold goods to the defendant, knowing that he purposed to smuggle them into England, and in one sense the plaintiff there sold them with the purpose that they should be so smuggled; but as he did not participate in any way in the unlawful transaction, the mere mental process did not avoid the contract of sale. In the second case, *Lightfoot v. Tennant*, the plaintiff sold goods to the defendant, to be delivered abroad, in order that they should be sent unlawfully to the East Indies. After a verdict for the defendant on a plea alleging this fact, on motion for judgment *non obstante veredicto*, the objection was raised that the mere mental purpose of the vendor did not avoid the contract of sale; but the objection was answered by suggestion of the fact that the plaintiff's participation in the unlawful transaction went beyond the mere mental purpose; that he was to be taken to be a party to the whole project, and to be acting in the execution thereof in the sale which was the cause of action; and upon those facts the contract was held void." In a work which has been of the greatest advantage to the law, "Benjamin on Sale," at p. 380, all the cases on this point are collected. Those cases prove that it is sufficient to show that goods have been delivered with a knowledge that they are being bought with an illegal purpose, and for the purpose of being so used. I think that is all I need say upon the case. Other points have been argued, but it is unnecessary that I should advert to them. I think our judgment should be for the defendants.

KEATING, J., concurred.

BRETT, J., had left the court, and delivered no judgment.

Judgment for defendants.

Attorneys for plaintiff, Phelps and Sidgwick.

Attorneys for defendants, Waltons, Bubb, and Walton.

EXCHEQUER CHAMBER.

Reported by H. LEIGH and T. W. SAUNDERS, Esqrs.,
Barristers-at-Law.

AFFAIRS FROM THE COURT OF EXCHEQUER.

Saturday, June 22, 1872.

JAMES V. THE SOUTH-WESTERN RAILWAY COMPANY.

Admiralty Court Act 1861 (24 Vict. c. 10, s. 13)—*Merchant Shipping Act 1854* (17 & 18 Vict. c. 104), s. 514—*Jurisdiction of Admiralty Court*—*Prohibition*.

The plaintiff, a passenger by the steamer *N.*, which, after negligently colliding with another ship, had been utterly lost at sea, brought an action in the Court of Exchequer against the defendants, owners of the *N.*, for personal injuries and loss of baggage occasioned to him thereby. Cross causes

of damage were also instituted by the owners of both vessels in the Court of Admiralty, and 5000*l.* paid in by the defendants in lieu of bail. The latter then began a suit under 24 Vict. c. 10, s. 13, for limitation of their liability to the plaintiff and similar claimants. The Admiralty judge held that he had jurisdiction, entertained the suit, and ordered that the sum of 6376*l.*, the amount of possible liability calculated at 15*l.* per ton of the *N.*, should be paid into court.

The defendants, having accordingly paid in that sum, and admitted their liability, prayed for an injunction restraining the action of the plaintiff, who thereupon declared in prohibition:

Held (affirming the judgment of the Court of Exchequer), that as the Admiralty Court, although in some respects a Superior Court, is one of limited jurisdiction, and, as it had not jurisdiction, because neither the ship nor "the proceeds thereof," were "under arrest," within the terms of 24 Vict. c. 10, s. 13, prohibition would lie, and might issue.

ERROR from the Court of Exchequer.

The pleadings and points of argument are fully set out in the report of the case below (*ante*, p. 226), where judgment was given for the plaintiff on demurrer to a declaration in prohibition to the Court of Admiralty.

Sir J. B. Karlake, Q.C. (C. W. Wood, Q.C. and Cohen with him) for the defendants.—24 Vict. c. 10, s. 13 enacts that "Whenever any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty, the said court shall have the same powers as are conferred upon the High Court of Chancery in England by the ninth part of the Merchant Shipping Act 1854." By sect. 514 of the last-mentioned Act power is given to the Court of Chancery to entertain proceedings at the suit of any shipowner who has incurred liability in respect of loss of life or goods, for the purpose of determining the amount of such liability and for the distribution of such amount, with power for such court to stop all actions and suits pending in any other court in relation to the same subject-matter. The present question, as to the jurisdiction depends upon the construction of the section first cited. Here the vessel, being lost, could not be "under arrest." She was, however, represented, as it were, by a sum paid into court instead of bail. In *The Northumbria* (3 Mar. Law Cas. O. S. 316; 21 L. T. Rep. N. S. 681; L. Rep. 3 Ad. & Ecc. 24), it was held that, where proceedings in rem have been instituted in the Court of Admiralty against a vessel, and bail has been given for the vessel, the court has jurisdiction to entertain a suit instituted by the owners of the vessel for limitation of liability, although the vessel may not actually have been under arrest of the Court of Admiralty. Moreover the maximum amount of the owner's liability was paid into court previously to the injunction, and that is surely enough to give jurisdiction to stay the action. Under such circumstances, an order to stay all actions was granted by the Court of Admiralty in *The Normandy* (3 Mar. Law Cas. O. S. 519; 23 L. T. Rep. N. S. 631; L. Rep. 3 Ad. & Ecc. 152.) [WILLIS, J.—I have had to consider this matter at chambers, and there the plaintiff's counsel contended that the Admiralty Court had no jurisdiction, summing up his argument thus: "The ship is gone. She is lost, and for all practical purposes, is *nil*; but 'proceeds' must mean proceeds of something, and *ex nihilo*

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will fit." The assumed value of the vessel may be regarded as the "proceeds" within the spirit of sect. 13, although, as the ship has perished, no "proceeds" strictly speaking can issue from her. [BARRT, J.—The payment into court in the collision suit cannot in any possible way be regarded as proceeds of the ship. The money was brought into court under the Admiralty Court Act 1861, sect. 34, as security in a cross cause where the defendant's ship could not be arrested within the meaning of that section, and not to prevent the arrest of the vessel, as in those cases where a *procipe* for a *caveat* warrant is filed, and the defendant or his proctor undertakes to give bail in any suit that may be instituted against the ship; (Williams and Bruce's Admiralty Court Practice, pp. 189, 197.) The money paid in to procure the release of a ship represents the ship; so also money paid in to prevent her arrest. Sect. 34 of the Admiralty Court Act shows that the legislature intended to give jurisdiction in all cases, even where the ship could not be arrested, and that the security given under that section is substituted for the money paid into court or bail given to prevent the arrest of the ship. Although there must be an admission of liability, as stated by Wood, V.C. in *Hill v. Audus* (1 Kay & J. 267), it is "not indisputably requisite that the owner of a ship preferring a claim in the Court of Admiralty under this statute, to limited liability should begin by acknowledging that his vessel is to blame;" (per Dr. Lushington in *The Amalia* (Bro & L. 156; 1 Mar. Law Cas. O. S. 359). The Court of Admiralty is a Superior Court, and therefore prohibition will not lie: (*Place v. Potts*, 5 H. L. Cas. 583). A distinction is drawn in *The Mayor of London v. Cow* (L. Rep. 2 H. L. Cas. at p. 259) by Willes, J., between the statutes affecting the Mayor's Court and the Admiralty Court, he says, "In this local Act (the Mayor's Court) there are neither express words nor necessary implication to produce the prerogative effect of creating a Superior Court. . . . Far different was the language used in the public Act of 20 Vict. c. 65, to put the Admiralty Court on the footing of the Superior Court." [WILLES, J.—That point cannot be maintained. Some spiritual courts are superior, and yet prohibition lies to them if they exceed their jurisdiction. *Ricketts v. Bodenham*, 4 A. & E. 433.]

W. G. Harrison for the plaintiff.—There could be no proceeds of the ship, which, for all practical purposes, had ceased to exist. Money deposited in court instead of bail cannot be considered as proceeds. The purpose for which it was paid in, was to enable the defendants under the Admiralty Court Act 1861, s. 34, to further litigate their cause of damage, and had no reference to the suit for limitation of liability. [Stopped by the Court.]

Sir J. B. Karslake replied.

WILLES, J.—Speaking for myself, and apart from judicial duty, I am sorry the cause has arrived at its present stage, and that the plaintiff has not been persuaded to allow the sum which has been paid by the defendants into the Court of Admiralty to be distributed there. However, a judge is bound not to follow his own view as to what is a convenient course. He must measure the rights of the plaintiff not by "the crooked cord of private discretion, but by the golden meadow of the law;" and the question is whether

the plaintiff, against his will, is to be compelled to submit to the jurisdiction of the court of Admiralty. In considering it we must remember that it is for the defendants to make out that there is some law which authorises the Court of Admiralty in preventing the plaintiff from pursuing his ordinary remedy. Unless such a law exists, then, as the Admiralty is acting beyond its jurisdiction, prohibition will go, for the court is one of a limited jurisdiction. I do not call it an inferior court, but, treating it as a superior Court with a limited jurisdiction, it is subject to prohibition though superior in name; like many other courts, nominally superior but still liable to prohibition, their jurisdiction being limited. The defendants rely upon 24 Vict. c. 10, s. 13, giving to the Court of Admiralty, under certain conditions, the same jurisdiction as to limitation suits as is possessed by the Court of Chancery under sect. 514 of the Merchant Shipping Act 1854. This power of limiting liability dates from 53 Geo. 3, c. 159, by which, following a rule which is very general abroad, a shipowner can abandon his vessel, and only be answerable to the extent of the interest which he embarked in the voyage. The law of France upon this point is stated in *Lloyd v. Guibert* (2 Mar. Law Cas. O. S. 283; 13 L. T. Rep. N. S. 602; L. Rep. 1. Q. B. 119). And the rule has been embodied in the various Merchant Shipping Acts. With regard to the mode in which the Court of Chancery exercises its jurisdiction, I may note that in *Hill v. Audus* (1 K. & J. 263) the hill does not seem to have been actually dismissed, though the Vice-Chancellor seems to have been ready to dismiss it, because there was no admission of liability. The decision of the court, however, simply was, that no injunction ought to be granted to restrain the trial of a particular action which had been brought against the plaintiff, and which he sought to restrain. And that is intelligible, because the Court of Chancery would have had no ordinary jurisdiction to try the subject matter of that action. But this is not equivalent to dismissing the hill, because it contained no general admission of liability. Serious consequences might ensue if such a hill were dismissed, simply because, in the first instance, there was no admission of liability as to all the persons who might be interested in the matter; seeing that, except through the intervention of the Court of Chancery, there is no mode of arriving at the amount to which liability is to be limited, and no mode of distribution provided. But whatever may be the jurisdiction of the Court of Chancery is really not material here, because the defendants are bound to show that jurisdiction existed in the Court of Admiralty. Now it seems that in a collision which occurred between the defendants' vessel *Normandy* and the *Mary*, the *Normandy* went to the bottom, and for all useful purposes ceased to exist. These proceedings were taken against the defendants, which we must assume to be *in personam* as well as *in rem* (a) True, the de-

(a) Some confusion seems to have existed in the learned judge's mind as to the distinction between proceedings *in rem* and proceedings *in personam*. Proceedings *in rem* can only be instituted against property in respect of which a claim has arisen, or the proceeds of such property when in court, and when such property or proceeds can be made available to answer the claim. In fact the property must be capable of arrest by the officers of the Admiralty Court: (See Williams and Bruce's Admiralty Court Practice, p. 186). In the pre-

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defendants are a corporation, but I do not stop to consider whether the Court of Admiralty, any more than a court of quarter sessions, has jurisdiction *in personam* in the case of a corporation; for the plaintiffs in error submitted, and paid into court a sum representing the sum they would, if guilty of negligence, be bound to pay to all persons who might have claims against them. The sum did not at first represent the entire amount of pecuniary responsibility; but, assuming that it did, were the conditions of jurisdiction prescribed by 24 Vict. c. 10, s. 13, fulfilled? Was "the ship or the proceeds thereof" under arrest? The ship was certainly not arrested. She was a nonentity, and as much lost as if she had been destroyed by fire, because she was so deeply hurried in the sea that human art could not extricate her, or, at all events, not without an expense not worth incurring. There was no actual arrest, therefore, of the ship, nor was there any constructive arrest, as in the case of *The Northumbria* (sup.), where bail was put in, not, as I understand, to answer a particular claim, but to represent the whole value of the ship to the extent of the shipowner's liability. If bail was of the first kind, I do not think it could be said that the ship or her proceeds were under arrest. But with regard to the second kind of bail, the judge might not improperly say that the ship—not the proceeds, but the ship itself—was under arrest; just as a person who is out on bail is under arrest, because he is delivered to his bail, as constables, who can render him whenever they are tired of the obligation of being his sureties. The analogy is not quite perfect, because the bail here is given, not to give up the ship, but for the whole sum to which the shipowners can, by any possibility be, by any means, liable. However, I do not quarrel with the decision in *The Northumbria* (sup.); but it does not govern the present case. The vessel cannot be taken, and the money paid into court is certainly not "under arrest," as her proceeds. The money does not represent the ship, nor was it paid in to save the ship from arrest. Then can it in any way be considered as the "proceeds thereof"? The passages referred to by my brother Brett from Williams and Bruce's Admiralty Court Practice, pp. 189, 197, throw much light on this word "proceeds," which is a technical expression, and *prima facie*, means the proceeds of the sale of the ship when it becomes necessary to resort to sale, in which case the Admiralty Court holds the proceeds as representing the ship; and that *prima facie* meaning is strongly confirmed by the argument in *The Neptune* (3 Knapp, 97), which case decided that "materialmen have no lien for supplies furnished in England on the proceeds remaining in the registry of the Court of Admiralty,

sent case the defendant's ship was at the bottom of the sea, and there could, therefore, be no arrest and no proceeding *in rem*. The proceedings against the defendants was a proceeding *in personam* only, and it was such a case as the present, for which the Admiralty Court Act 1861 provided when it enacted (sect. 35) that the proceedings might be either *in rem* or *in personam*, and (sect. 34) that in case, in a principal cause, the ship of the defendant has been arrested, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment, the court may suspend judgment in the principal cause till such security has been given. Here the *Normandy* was lost and the *Mary* was arrested, and security was given in the cross cause against the former.—*Ex.*

of a ship sold under a decree of that court, for the payment of seamen's wages." In the course of that case the expression "proceeds" was used as meaning proceeds arising from the sale of the ship under the order of the court. In the reply this construction was insisted on by counsel, who referred to *Burton v. Sess* (1 Ves. 154), where Lord Hardwicke held that there was no lien for repairs (except for those done during the voyage) upon the body of the ship, and "if," he says "the body of the ship is not liable, or hypothecated, how can the money arising from the sale be effected or followed, the one being consequential on the other?" And there was no difference, the counsel argued, as to conversion, between the Courts of Admiralty and Chancery, both holding that the proceeds of a thing sold must be subject to the same equities as the thing itself previous to the sale. It will be seen, therefore, that the question of conversion was dealt with. The same line was followed in the delivery of the judgment of the Judicial Committee where (at p. 114) the Admiralty judge is stated to have rested his opinion upon the principle that when a ship has been arrested and sold under process from the Court of Admiralty, that court, after satisfying the immediate object of the sale, holds the balance of the proceeds *in usum jus habentium*; that the *ius habentes* are to be ascertained according to the law of the court in which the fund is administered; that the law of the Court of Admiralty is the civil and maritime law—a strange confusion, I may observe, as the civil and maritime law are notoriously diverse and often opposed to each other—and that by that law the material men had a lien on the ship and proceeds. The Judicial Committee reversed this decision, and established the principle already stated. From this case, therefore, and the books, we find that the expression "ship, or proceeds thereof" was one already perfectly understood, and not introduced for the first time into 24 Vict. c. 10, s. 13. It means the ship, or the money proceeding from her sale; and if there were any doubt about the meaning, when we find these words joined with the words "under arrest," no room is left for doubt. Here the arrest was impossible, both in law and fact; and the circumstances which have happened were not contemplated by the section. Several other points were raised, but they do not require consideration. To one or two I have referred as bearing, by way of illustration, on the point before us. I express the conclusion I have arrived at with hesitation, because it is to some extent inconsistent with the reasons of the court below. But, after fully considering the matter, I think that the judgment ought to be affirmed on the ground I have mentioned. I think the Court of Admiralty had no jurisdiction, because there was no arrest of the vessel, and because the money paid into court was in no sense the proceeds of the vessel.

BATES, J.—I am of the same opinion. The first question is whether prohibition now lies to the Court of Admiralty. I find it laid down in Bacon's Abr. tit. Prohibition, that it formerly lay, and I do not see that there is anything in the modern statutes, which have enlarged the jurisdiction of the court, to prevent it still lying. The Admiralty may be, and probably is, entitled to the designation of a "superior" court, but still its jurisdiction is limited; and the question is, whether on the present occasion that jurisdiction has been ex-

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ceeded. Now its exercise depends upon whether the "ship or the proceeds thereof," were under arrest. Here the ship was not under arrest. She was at the bottom of the sea. And the "proceeds thereof" mean the proceeds of the sale thereof, or the sum realised thereby. A sale is impossible. Upon these grounds I concur with my brother Willes, that the judgment of the Court of Exchequer ought to be affirmed.

BLACKBURN, J.—I am of the same opinion. On the first point I have nothing to add; I can see nothing in the recent statutes as to the Court of Admiralty to take away our power of issuing a prohibition. But upon the main question I will say a few words. The jurisdiction claimed here is a particular one, and depends upon the conditions precedent to its exercise enacted by sect. 13 of 24 Vict. c. 10. The intention of the Legislature was probably to obviate the hardship of a person whose ship, or the proceeds thereof, was under arrest in the Admiralty Court being obliged to go to the Court of Chancery to get protection from suits which had been or might be instituted against him. No doubt the Court of Chancery could, if they thought fit, relieve him and entertain his suit for limitation without insisting upon his paying money into court or giving security. But the course of practice was the contrary, and therefore the result was that a shipowner might find himself with his ship arrested in one court, and under the necessity of paying a sum equal to its value into another. To obviate this inconvenience the jurisdiction of the Court of Chancery was conferred on the Court of Admiralty, when the ship, or proceeds thereof, are under arrest; by direct implication there is no jurisdiction, except when those conditions are fulfilled. Here I am of opinion that in no sense could the ship or the proceeds thereof, be considered under arrest. The defendants, it appears, had instituted a principal damage suit against the *Mary*, and the owners of the *Mary* instituted a cross-damage suit against them, and by sect. 34 of 24 Vict. c. 10, the court has power to say that where the ship cannot be arrested the principal suit shall be suspended until security is given to insure the judgment in the cross-suit. The court exercised this power in the present case, and the defendant did give security by paying 5000*l.* into court. This sum, however, is not the proceeds of the ship, but a collateral sum brought into court, not instead of, or as representing the vessel, but as security so as to enable the defendants to continue to prosecute the principal suit. With regard to *The Northumbria* (*sup.*) I at first thought it rightly decided, but I feel bound to say that Mr. Harrison's argument has shaken my opinion, and I have considerable doubt now whether the learned judge arrived at a correct conclusion. I had thought that when a suit was commenced money paid into court in lieu of bail might well be regarded as "proceeds." But, as Mr. Harrison pointed out, the money is simply paid in by way of security to pay the sum claimed in the particular suit. The difference is very material. Because if the ship were under arrest, or the proceeds of the ship, another claimant might attach them, but he could not attach a sum paid in lieu of bail to answer a particular claim. I therefore feel much doubt about that case, but I do not decide the question, because it is not necessary to do so. As to the case of *Hill v. Audus* (*sup.*), I feel a difficulty in concurring with what the Vice-

Chancellor is reported to have said in the course of his judgment. But I concur with my brother Willes that the Vice-Chancellor did right. The bill was not, as was supposed, dismissed; but the injunction applied for, which was to restrain an action which could not have been brought in the Court of Chancery, was properly refused.

KEATING, J.—I am of the same opinion. Neither the ship nor the proceeds thereof were under arrest. I remark that the learned judge of the Admiralty Court himself had doubts as to his jurisdiction, but eventually, looking to the language of the 13th and 34th sections of 24 Vict. c. 10, he decided that he had jurisdiction. Now, where it is sought to give jurisdiction to a court of limited jurisdiction, which the Admiralty Court—even though it be, as it probably is in some senses, a "superior" court—undoubtedly is, the words conferring jurisdiction should be clear and unambiguous; and the words of the 13th section make jurisdiction depend upon the ship, or the proceeds thereof, being under arrest. Here the ship was certainly not under arrest, and I incline to think that the word "proceeds" means proceeds of the sale of the ship. But I am not prepared to say that where a sale is possible, if the full value of the ship is paid into the registry in order to prevent the sale, that that sum would not be proceeds. But no sum was so paid in here. What was done was the voluntary payment by the defendants of 5000*l.* into court for the purpose of enabling them to continue their suit against *The Mary*. That amount is not in any sense proceeds of the ship. I therefore think the prohibition should go.

LEES, J.—I am of the same opinion. To give the Court of Admiralty jurisdiction the vessel must be under arrest, either in specie or by its representative; and I agree that in the present case the court was not in possession of either. The words "proceeds thereof," in sect. 10 of 24 Vict. c. 10, clearly mean, in my judgment, "proceeds of the sale," or money resulting from a sale. Here the money was in no sense "proceeds," because it was paid in under sect. 34 voluntarily, to enable the defendants to continue their damage suit against *The Mary*. And it was because the ship *Normandy* could not be arrested that the order was made under sect. 34 to bring the money into court to answer the judgment in the cross suit against her owners.

BARR, J.—The question in this case—assuming as I do that prohibition still lies to the Court of Admiralty—is whether, under the circumstances alleged on this record, the Court of Admiralty had jurisdiction under 24 Vict. c. 10, s. 13, to entertain a suit for limitation of the defendant's liability, a suit such as the Court of Chancery may entertain under the 514th section of the Merchant Shipping Act 1854. Now the Court of Admiralty has no such original jurisdiction; it has it only by virtue of sect. 13 of the first-named Act, which enacts that "Whenever the ship or vessel, or the proceeds thereof are under arrest of the High Court of Admiralty," that court shall have jurisdiction, and I am of opinion that this condition must exist at the commencement of the suit. "The ship, or the proceeds thereof," are to be "under arrest," and the real point to be decided is what is the right meaning to put upon the words "proceeds thereof." The phrase, it must be remembered, is used in an Admiralty Court Act, and that being so, we must

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ask whether in Admiralty proceedings any technical signification belongs to it. And it does appear to have a definite and well-understood meaning. In a suit *in rem* the jurisdiction of the court depends on the possession of the *res*, or of the proceeds of the *res*. Either the *res* or the proceeds must be under arrest" that is the proceeds must be paid into the registry of the court; and they are the proceeds of the sale of the *res*, or else a sum of money paid in to represent the proceeds and to prevent the sale. Such is the statement of the practice in Williams and Bruce's Admiralty Court Practice, p. 197. The owner may enter a caveat against the warrant to arrest the ship, and for this purpose must file a praecipe undertaking to enter an appearance in any cause which may be instituted against the property to give bail or to pay money into court; and the rules of practice (Williams and Bruce's Admiralty Court Practice, pp. 189, 197n) give the form of praecipe, which in describing the property contains the words, "Proceeds arising from the sale of, &c." though, in fact, there was no sale, and the money is paid in to prevent a sale. It would seem, therefore, that in the word "proceeds" something more may be included than the proceeds of an actual sale, and it may be that where the *res* on which the maritime lien attaches is of greater value than 15*l.* a ton, which is now the maximum of the shipowner's liability, the 15*l.* a ton might be regarded as "proceeds" if the ship was where she could be seized. But it is impossible to say that this sum can be the proceeds of the sale, where the ship could not be seized, or where as here, she had ceased to exist. Still less can the ordinary bail paid in in a damage cause be regarded as "proceeds," because that is paid in after suits instituted *i.e.*, after the court has had possession of the *res*. Nor can the bail given under sect. 34 of 24 Vict. c. 10, be "proceeds" in any sense. It is money paid in, not instead of the *res*, but "to answer judgment" in the cross cause. With regard to the decision in *The Northumbria* (*sup.*) if the construction placed upon it by my brother Willes be correct, I think it a sound decision. But if the money paid in there was only in lien of ordinary bail, then with great deference to the learned judge of the Admiralty Court, I must express great doubt whether his ruling can be supported.

Judgment affirmed.

Attorneys for plaintiff, Brooksbank and Galland.
Attorneys for defendants, Clarkson, Son, and Greenicell, for Crombie.

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Reported by F. O. CAWSE, Esq., Barrister-at-Law.

COURT OF QUEEN'S BENCH, GUILDHALL.

Thursday, July 4, 1872.

(Before HANNEN, J., and a Special Jury.)

IONIDES v. PENDER.

Barratry—Over valuation—Concealment of material fact—Expected profits—Connivance of shipowner in fraud of the captain—Innocence of owner of goods—Evidence.

V. the owner of the ship, and *D.*, shipped goods on a voyage from Hamburg to a port in Asiatic Russia. The adventure was expected to be enormously profitable. The whole cargo shipped was

valued at 8000*l.*, but the total insurance effected amounted to 20,000*l.*, the profits being variously estimated at from 80 to 125 per cent. To secure these profits, it was admitted that the goods had been overvalued to the extent of 25 to 30 per cent., and there were heavy insurances of commissions. Amongst the cargo was a shipment of spirits costing 1000*l.*, but valued at 2800*l.* The ship went down in fine weather in mid-ocean without any known cause.

D. brought an action to recover commission, profits on charter, and 1800*l.* of the 2800*l.* insured on spirits. It was pleaded that the loss was not the consequence of perils of the sea; that the concealment of the over insurance was concealment of a material fact, and that the goods were shipped with the fraudulent design of sinking the ship.

Held, that an insurance on profits must be taken to mean possible profits.

Held, further, that scuttling a ship with the knowledge of *V.*, the shipowner, but without the knowledge of *D.*, the freighter was barratry, in respect of which *D.* might recover against the underwriters.

Excessive valuation is almost conclusive evidence of a fraudulent intent.

The ships mentioned that profits were to be insured "however high they might be." No further notice of the over insurance was given to the underwriters.

The jury found that the over valuations were excessive and material, and were concealed from the underwriters.

An action on policies to recover commission, profits, and value of goods insured on a voyage from Hamburg to a port on the coast of Asiatic Russia.

The real plaintiffs (the nominal plaintiffs being their brokers) were some German merchants at Hamburg, who professed to have discovered a new and extensive market for European commodities in the ports of Eastern Siberia, and had for some years carried on commerce there. This commerce until lately had been carried on at a port called Nicolaiiefek, at the mouth of the Amoor, and it was represented that enormous profits had been realised there, especially upon spirits and tobacco, but also to a great extent upon European manufactures, woollen goods, and other articles. It was represented that upon tobacco a profit of 1000 per cent. and on spirits 500 per cent. had been realised, and on general goods 25 or 30 per cent. Particular instances were adduced in evidence. In 1886 240 cases of spirits, the cost price of which was 400*l.*, had realised a net profit of 2000*l.* In 1888 some cases of goods which cost 480*l.* realised 1338*l.* and in 1870 150 cases of goods which cost 365*l.* realised net 1339*l.* It was also stated by a witness that he had sold cases of cigars in that region at a profit of 1000*l.* per cent. On the other hand, there was evidence that these instances were exceptional, and that the average rate of profit was 25 per cent.; and while one of the adventurers in this case estimated the profits on spirits at 150 per cent. another of them was content with less than 80 per cent. It appears, however, that the Russian Government had discovered this commerce, and desired to share in the profits of it, and with this view imposed excise and customs duties at Nicolaiiefek. Partly in order to avoid these duties, and partly to obtain a better harbour, the trade had of late years drifted to another port some 700 miles to the south in a

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bay called Victoria Bay, opposite the centre of Japan. At this place there is a splendid harbour, and a town has sprung up called Wladivostok, and the trade there has been gradually increasing. As early as 1871 the German merchants alluded to, who had already been engaged in trade at Nicolaiefek, Messrs. Diekmann being the principal, proposed an adventure to the new port of Wladivostok, and a ship belonging to one of them (M. Vernicke) was chartered for the purpose, and loaded with a mixed cargo, composed largely of spirits and tobacco, but comprising also a variety of woollen and other manufactured goods. Both Diekmann and Vernicke shipped goods in the adventure, the former chiefly spirits, the other spirits and other goods. In their correspondence they spoke of 25 per cent. profit, but in their insurance they valued it at 80 per cent. and 150 per cent. Insurances were effected upon ship, cargo, freight, profits, commission, and everything else that was insurable, to the total amount of 20,000*l*. Some of these insurances were effected at Hamburg, and some through brokers in London, including those now sued upon. The ship was insured for 4000*l*. at Hamburg; the goods were insured for nearly 13,000*l*. in several policies, some in Hamburg and some in London. Freight was insured to the amount of 11,000*l*. commission was insured for 1500*l*. in more than one policy, one of which was now sued upon; and, in addition, there was a policy for 1000*l*. on safe arrival of the vessel. The English policies were not all effected in the same office. Instructions were given to insure 2000*l*. in the London and Provincial, 1000*l*. in the Globe, 4000*l*. in the North China, and 1000*l*. at Lloyd's. This latter was one of those now sued upon. Out of the 4000*l*. directed to be insured in the North China, 3000*l*. upon spirits had been transferred to Lloyd's, and was one of those now sued upon, leaving 1000*l*. still insured in the North China. The insurances which were questioned were those upon the goods and commission. It was alleged that the goods were enormously over-insured; and that as most of them belonged to the adventurers, the commission was for the most part either fictitious, or included in the profits, which were added to and included in the value of the goods insured. It was admitted on the part of the plaintiffs that there had been a considerable addition to the cost price of the goods on account of the profits, the object being, they said, to secure the large profits they expected to realise. This addition, however, on the whole did not exceed 25 or 30 per cent. and though it was admitted that there was a larger addition to the value of the spirits and tobacco, this, it was said, was partly on account of the higher profits and partly on account of duties which it was expected would be imposed, but which would not apply to goods previously shipped. This duty, it was said, would, at four rubles on sixteen quarts, amount upon the quantity of spirits shipped to 2000*l*., the whole of which would be bonus to the adventurers. In this way it was that they valued spirits which cost 1000*l*. at 2800*l*.; but on the other goods generally the addition was said to be only 25 per cent. The parties did not differ greatly as to the cost value of the goods shipped, which one side made a little under, and the other a little over 8000*l*. Adding 25 per cent. for profit, this would come to 10,000*l*. The freight would bring it to 11,000*l*. and the addition for

anticipated duties, reckoned as bonus, would bring up the amount to 12,000*l*. above the amount of the insurance on goods. The captain himself had a small venture of cigars not over-insured. This was the plaintiff's case.

The defendants pleaded that the goods insured were not lost by perils of the sea; that they were excessively over-valued; that there was concealment of the over-insurance; and that the goods were shipped with a fraudulent design that the vessel should be sunk and lost.

To negative the alleged over-insurance, evidence was given that the merchants sent through their brokers their valuations (in German), and the "slip" or proposal, stated that the insurance was to be on profits, however high they might be. All the policies on goods were valued. According to the defendants, the alleged additions to value on account of anticipated profits were grossly excessive, the profits being really imaginary, and the case as to the supposed bonus arising from remission of anticipated duties was visionary and illusory. It was insisted that there was an addition, not of 25 per cent., but of nearly 80 per cent. to the real value of the goods; and as to the profits and commission and freight, it was insisted that the same thing was insured over and over again, the profits being added to the price, as well as the freight and charges, and the commission being really only a mode of charging the profit over again; and, finally, it was said that the insurance of 1000*l*. for "safe arrival" of the vessel—already abundantly insured—was in reality a repetition of the insurance. In these various ways, it was urged, the over-insurance amounted to several thousands of pounds, and the adventurers had an interest to that amount in the vessel going down. The vessel sailed, thus insured, in April, and on the 18th May went down in mid-ocean, in fine weather, without any apparent cause. Suddenly the ship began to leak, and in an hour or two had eight or nine feet of water in the hold. The captain said he thought he had felt a shock, but no one else had felt it, and he himself said he thought no more of it, especially as he saw nothing to cause it, and he thought it was a mere stroke of the sea. The sea, however, was quiet, with only a "swell," and there was no apparent cause for the catastrophe. However, the ship rapidly filled, and the captain came on deck, and said the ship was sinking, and ordered out the boats, and he and the crew escaped. They were picked up; he and some of the crew went to Hamburg and others to Liverpool. Those who came to London made no secret of their belief that the ship had been scuttled. An inquiry was held at Hamburg, but the captain was absolved and the Hamburg insurers paid. The English underwriters, however, were not satisfied. The Globe paid; but the North China, the London and Provincial, and the underwriters at Lloyd's resisted, and evidence was taken at Hamburg under a commission, where the captain and the mate were witnesses for the plaintiffs. Neither of them, nor any of the crew, was called as witness at the trial, and two of the crew were called as witnesses for the underwriters. They disproved any "shock," and nautical evidence was given to show that any blow which could have caused a serious leak must have given such a shock to the vessel as must have made all its timbers quiver and knocked every one down.

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Sir J. Karslake, Q.C., Butt, Q.C., and F. M. White were for the plaintiffs.
H. James, Q.C., Watkin Williams, and Lanyon for the defendants.

HANNEN, J., summed up the case to the jury. He observed that, notwithstanding the length to which the case had run, he thought their verdict would turn upon certain broad points on which the facts were not materially disputed. The questions for their decision were:—First, whether the valuations, were excessive, especially as to profits? secondly, whether, if so, they were fraudulent? thirdly, was it material for the underwriters to know if the valuations were excessive? fourthly, were they concealed from the underwriters? fifthly, was the vessel lost through the "perils of the seas" insured against? sixthly, was it intended by the assured that the vessel should be lost? As to the question whether the goods were excessively overvalued, no doubt in "valued policies," in which the value of the goods was stated, it was to be taken generally that disputes as to the value were precluded. But this was a question mainly as to expected profits, as on both sides the cost value was agreed at about 8000*l*. Now as to the profits, the question was whether the estimate was above what could be reasonably contemplated under the circumstances. It was not because the estimate was high that therefore it was excessive, provided it was not beyond what might not unreasonably be expected; but there was a limit, and it was not because Whittington got 1000*l*. for a cat that therefore a cat could be insured for 1000*l*. Here it was spirits which were insured, and instances had been given in evidence of enormous profits realised on spirits—as much as 170 per cent. But, on the other hand, it was said that these instances were exceptional, and other parties had insured spirits to the very same place, at a profit of 25 per cent. As to this the jury must judge and decide in their own minds whether the assured could reasonably have expected such a profit as would justify an insurance of spirits which cost less than 1000*l*. for 2800*l*. As to commission, a man could hardly earn commission on his own goods, and to a great extent these goods were Diekmann's own, though he was to receive commission on the goods of others. As to the ship it must be admitted by the underwriters that there was no excess of valuation, and the insurance was for the real value. The ship belonged to another merchant, Vernicke, who had valued his profits at 79 per cent., including spirits. And it was a remarkable fact that while one of the supposed partners in the fraud rated his profits on spirits at 150 to 160 per cent., another of them was satisfied with less than 80—that is, with about half the amount claimed by the other. This was accounted for by the plaintiff Diekmann in this way—that he had been to East Siberia, and knew the market better than his co-adventurer. And if so, then it went to negative the concert which was presupposed in a case of conspiracy. On the other hand, it must not be lost sight of that these parties had, in their correspondence, spoke of valuing their profits only at 25 per cent. On the whole, was the valuation so excessive that it could not be deemed to have been reasonable? If so, was it fraudulent? If there was a clear case of excessive valuation, it was difficult to conceive how it could be otherwise than fraudulent. Even if not fraudulent, was it material

that the underwriters should know of it? As to this, assuming the valuation to be excessive, the assured was far more reason so certain that there would be a loss as to be content to pay an excessive premium; and was it not material that the underwriter should know of it? If so, had it been concealed? As to this the merchants, through their brokers, had certainly laid before the underwriters their valuations, and the slip or proposal for the policy stated that the insurance was to be on profits, "however high they may be." Still this meant possible profits, not such as were impossible, or could not reasonably be expected. Next, was the vessel lost through "the perils of the seas" insured against? As to this the facts were that the vessel, a good stout ship, went down suddenly in fine weather, in mid-ocean, without any known cause. And on the other hand, there was the opportunity and there were the means of scuttling the ship. The captain had access to the hold from his cabin, and he had, with other tools, an auger, by which he could have made holes in the sides of the vessel, and he was in his cabin at the time when the ship began to fill. Then there was the conduct of the captain. He had, he said, felt the shock so slight that he took no notice of it, and no one else on board felt it, and it was suggested that this was the cause of the disaster. Nautical men had given evidence to show that it could not have been so, and though a flustering wreck might perhaps have caused such damage as might sink a ship, it was difficult to understand how this could be, and yet the shock be so slight as scarcely to be felt. And if so, then there was nothing to account for the vessel going down as it did. Indeed, the men all denied that there had been any shock at all, and though the crew had been separated they concurred in this denial. There was certainly an absence of evidence of motive in the captain to scuttle the vessel, and he had been relieved from the imputation after an investigation at Hamburg. That, however, was a criminal charge against him, and a criminal charge required full proof; whereas here the onus was on the plaintiffs to satisfy the jury that the vessel was lost by the "perils of the seas." If that was not made out to their satisfaction then they must consider whether the captain scuttled the ship. And if he did, then they must consider whether it was done with the knowledge and privity of the real plaintiffs—that is, they knowing beforehand that he was to do it. For if he had done it of his own head, or at the instigation of Vernicke, the shipowner, but without the knowledge of the real plaintiff, Diekmann, then it would be barratry—that is, a loss caused by the misconduct of the crew or the captain, and that would be a loss covered by the policy, for a policy of insurance included a loss by barratry. He left to the jury the questions above stated, and they at once retired to consider their verdict.

Watkin Williams objected that the latter part of the direction as to barratry was erroneous, as it was laid down that if the captain sank the ship at the instigation of Vernicke, the shipowner, without the knowledge of Diekmann, it would be barratry. He submitted that barratry must be a crime against the employer, the owner of the ship.

HANNEN, J., said he adhered to his ruling, intending to lay down that a loss might be barratry

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as regarded one party which was not so as to another (a).

The jury found that the valuations for the insurances were excessive, and that, though they could not say whether the valuations were fraudulent, they were of opinion that they were material, and were concealed. They further found that the vessel was not lost by the perils of the seas, but they could not say whether or not it was intended by the assured that it should be lost.

Verdict for the defendants.

Attorneys for the plaintiffs, *Hillyer and Fenwick*.
Attorneys for defendants, *Thomas and Hollams*.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING and H. F. POOLRY, Esqrs.,
Barristers-at-Law.

Nov. 9 and 12, 1872.

LEBEAU AND ANOTHER v. GENERAL STEAM
NAVIGATION COMPANY.

*Bill of lading—Construction—"Linen goods"—
"Value, weight, and contents unknown"—
Estoppel.*

Where a bill of lading described the goods shipped as "Thirteen packages books, woodwork, whale-bones, Dutch clocks, shoes, and linen goods," and was also stamped by the master with the words, "value, weight, and contents unknown:"

Held, that the proper construction of the contract was, that the shipowners contracted to carry whatever goods were contained in the packages; and that they were therefore bound to carry silk stuffs contained in one of the packages, there being no evidence of wilful or fraudulent misstatement on the part of the shippers.

Held, also, that, although the freight charged for linen goods was lower than that for silk stuffs, the shippers were not estopped from proving the delivery of silk stuffs to the shipowners.

This was an action brought in the Mayor's Court to recover damages for the non-delivery of two

(a) This is a resuscitation of the question whether, notwithstanding the fact of barratry being committed with the knowledge and consent of the shipowner, the freighter may recover against the underwriters. We certainly thought it firmly settled that there cannot be barratry except as against the owner of the ship, and a charterer cannot recover unless he is owner *pro hac vice*. In *Nutt v. Bourdieu* (1 Term Rep. 323), Lord Mansfield said: "The point to be considered is, whether barratry can be committed against any but the owners of the ship? It is clear, beyond contradiction, that it cannot." The reason he gave was this: "Barratry is something contrary to the duty of the master and mariners, the very terms of which imply that it must be in the relation in which they stand to the owner of the ship. An owner cannot commit barratry; he may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry."—"not as for barratry," meaning, of course, for the purpose of giving the owner of goods a right to recover in respect of it as against the underwriters. Phillips (Insurance s. 1079) notices the case of the charterer navigating the ship at his own risk, and having the appointment of the master, who deviated with the privity of the owner, but without the knowledge of the charterer. That was held barratry, to use Mr. Phillips's words, "in respect of others than the owner," but it must not be taken as extending beyond the charterer, for *Darwin*, who was recovered in *Vallejo v. Wheeler* (1 Cowp. 143)—the case referred to—was found by the jury to be owner *pro hac vice*. Unless, therefore, in the above case, Diekmann can be said to have been owner *pro hac vice*, the ruling of the learned judge is clearly wrong: (*Stamma v. Brown*, 2 Str. 1173.)—F. O. C.

pieces of silk broadstuff delivered to the defendants to be carried by them as carriers from *Bonlogne* to *London*.

The first count of the declaration stated "that in consideration that the plaintiffs would deliver to the defendants as and being carriers of goods for hire certain goods, to wit, silk broadstuffs, to be by the defendants carried from *Bonlogne* to *London*, and there delivered according to the directions of the plaintiff, certain perils and casualties only excepted for, freight to be paid by the plaintiffs to the defendants in that behalf, the defendants within the jurisdiction of this court promised the plaintiffs to carry the said goods from *Bonlogne* to *London* aforesaid, and there deliver the same according to the directions of the plaintiffs in that behalf, except as aforesaid, and the plaintiffs within the jurisdiction aforesaid, delivered the said goods to the defendants, and the defendants received the same for the purpose and on the terms aforesaid, and the plaintiffs directed the defendants to deliver the said goods at a certain place in *London* aforesaid, and the defendants were not prevented from delivering the said goods by any of the perils and casualties so excepted, and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to have the said goods delivered by the defendants, yet the defendants did not deliver the said goods to the plaintiffs as aforesaid, but a portion thereof only, and the residue of the said goods was by default of the defendants wholly lost to the plaintiffs."

The second count stated "that in consideration that the plaintiffs delivered to the defendants certain goods to be safely kept and taken care of by the defendants, and to be redelivered by the defendants to the plaintiffs on request for reward to the defendants, the defendants within the jurisdiction aforesaid promised the plaintiffs to safely keep and take care of the said goods, and to redeliver the same to the plaintiffs on request, and afterwards the plaintiffs requested the defendants to redeliver to them the said goods, and a reasonable time for the redelivery thereof elapsed after such request, yet the defendants did not redeliver the said goods to the plaintiffs, but a portion thereof only, whereby the residue of the said goods was and is lost to the plaintiffs. To the plaintiffs, damage of 18*l.* 11*s.* 1*d.*, and therefore they bring suit," &c. &c.

The pleas were: first, that they did not promise as alleged; secondly, that they deny the alleged breaches; thirdly, that the plaintiff did not deliver the said goods for the purpose and on the terms alleged; fourthly, that the alleged agreements were made subject to the terms and conditions, amongst others, that packages containing silk should be specially notified to the master of the defendants' vessels, and, further, that a declaration of separate marks and numbers, and weights of each package should be left at the office of the defendants before delivery on board the defendants' vessel, and that in default of the observance by the plaintiffs of the aforesaid terms, or any of them, the defendants should not be liable for any loss or damage to any such packages, and the defendants say that the plaintiffs did not observe the said terms, but wholly failed so to do.

Replications—first, issue; secondly, to the 4th plea: That the said goods in the declaration

mentioned were not nor did they consist of packages containing silk, nor were they silk within the meaning of the said terms and conditions therein mentioned, or any of them.

The following were the particulars of demand: To two pieces of silk broadstuffs delivered to the defendants on board the steamer *Cologne*, on the 25th Oct. 1871, in a case marked C., and numbered 1146, and S. N. 274, for carriage to, and warehousing at London, but which said pieces of silk broadstuffs defendants have failed, neglected, and refused to re-deliver to plaintiffs, 18l. 11s. 1d. Above are the said particulars.

Dated, 27th March 1872.

It was proved at the trial in the Mayor's Court that the case containing the silk broadstuffs was sent from the plaintiffs' Paris house to Boulogne railway station, where it arrived on the morning of the 25th June 1871. It was weighed at the railway station, and carted thence down to the quay, and afterwards put on board the defendants' steamship *Cologne* at 4 or 5 o'clock p.m. The case was marked at Boulogne L. 1146. A bill of lading of which the following is a copy was signed by the master of the *Cologne*.

Shipped in good order, and well conditioned, by Lebean and Co., as agents in and upon the good steamship or vessel called the *Cologne*, whereof is master for this present voyage Freeman, and new riding at anchor in the port of Boulogne, and bound for London.

L. C. 4941 or H. C. 4698

" 4914 torn

" 4090—4908/70—4698 in bad condition, broken.

" 1153 or 1156

15 packages

Being marked and numbered as on the other side, and which are to be delivered in the like good order, and well-conditioned, at the aforesaid port of London, the act of God, the Queen's enemies, fire, machinery, boilers, steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kindsoever, excepted, unto Messrs. Lebean, and Co., or to their assigns. Freight paid in Boulogne, with prime and average accustomed, in witness whereof the master of the said vessel hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished, the others to stand void. Dated in Boulogne-sur-Mer, 25th Oct. 1871.—H. FREEMAN.

The goods to be taken out within six hours after arrival, or the same will be transhipped into lighters and warehoused or landed on the quay, all at the consignee's risk and expense.

Ship not accountable for leakage or breakage, deterioration in value, or from the wrong delivery of goods caused by error or inefficiency in marks or numbers.

Value, weight, and contents unknown.

Consignees are to consider as null and void any mention added to the bill of lading, stating that the goods have been shipped, wet, damaged, or in any bad condition, unless approved of by Lebean and Co.

(Endorsement.) L. C. 1139 to 1146, thirteen packages, books, woodwork, whalebone, Dutch clocks, shoes, and linen goods.

The words "value, weight, and contents unknown" were stamped on the bill of lading by the master, at the time the goods were received by him. On the arrival of the ship in London the case was warehoused in a part of defendants' warehouse usually set apart for goods consigned to the plaintiff, and on its being opened by the plaintiffs it was found that two pieces of silk stuff were missing. It was proved that the freight charged for silk was much heavier than that for linen goods. The jury found as a fact that the description "linen goods" on the face of the bill of lading was a misstatement, but that the misdescription was inadvertent and not wilfully made in order that the goods might be carried at a lower rate. They found a verdict for the plaintiff for 18l.

A rule having been obtained on the motion of

Mr. Finlay to set aside the verdict for the plaintiff and enter a nonsuit, on the ground that there was no evidence to go to the jury of the contract set out in the declaration and in the particulars, and also on the ground that the plaintiffs were estopped from proving the delivery of goods other than linen goods to the defendants.

Field, Q.C., and *Waddy*, showed cause.—They contended that the words "linen goods" amounted to a representation only, and not a warranty, and (the jury having negatived the evidence of fraud) did not avoid the contract. Moreover these words were overridden by the words "value, weight, and contents unknown," stamped by the defendants on the bill of lading, and the effect was that the defendant had contracted to deliver the goods contained in the package whatever they were. They cited *Jessell v. Bath* (L. Rep. 2 Ex. 270). If this were the true construction of the contract, there could be no estoppel.

Talfourd Salter and *Finlay* in support of the rule.—There was no contract by the defendants to carry silk broadstuffs. The misstatement in the bill of lading amounts to legal fraud, which does not necessarily imply moral fraud: (*Polhill v. Walter*, 3 B. & Ad. 122). The defendants having been deceived by it, are not responsible for the loss.

Kent's Commentaries, p. 604;

Story on Bailments, p. 567;

Angell on Carriers, § 262, 264;

Balton v. Denoran, 4 B. & Ad. 21;

M'Can v. London and North Western Railway Company, 7 H. & N. 477.

By having the bill of lading proffered to them, the defendants were put off making any inquiry as to what were the contents of the package. The only question that the defendants could have asked was whether the statement contained in the bill of lading was correct. There being then no contract to carry silk stuffs the defendants were merely involuntary bailees. They cannot be held liable for the value of goods the freight for which was much higher than that charged for linen goods, and the loss of which would entail upon them a larger payment.

Balton v. Denoran, judgment of Holroyd, J., at p. 37;

Eyles v. Horne, 5 Bing. 217 (judgment of Best, J.);

Titchborne v. White, 1 Str. 144;

Hiley v. Morris, Carthew, 485.

The words "weight, value, and contents unknown," may be read so as to be consistent with the description "linen goods" as meaning linen goods—value, weight, and description unknown.—The true question is, what was the effect of the representation on the carrier?

Belfast and Ballymena Railway Company v. Keys, 9 H. of L. 550;

Walker v. Jackson, 10 M. and W. 161.

Secondly, on the point of estoppel. By representing that the goods were linen, the plaintiffs induced the defendants to alter their position and incur risk. If the freight had been paid as for silk the defendants would have had a larger sum in hand to meet their liabilities:

Paster v. Colby 3 H. & N. 705;

Howard v. Tucker, 1 B. & Ad. 712;

Hellister v. Nowlen, 19 Wend. 294;

Phillips v. Erle, 8 Pick. 182.

BOVILL, C. J.—In this case the jury have negatived the existence of any fraud or misconduct on the part of the defendants, with reference to the description and nature of the goods, and we are precluded from going into the question of the

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LEBBEAU AND ANOTHER V. GENERAL STEAM NAVIGATION COMPANY.

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proper amount of damages. The only question before us is whether the learned judge at the trial was bound to direct the jury in favour of the plaintiffs. The contract declared upon is contained in the bill of lading, and upon that it must be taken that the plaintiffs represented to the defendants that the package in question contained linen goods, but that the defendants refused to contract upon the footing absolutely that it contained linen goods, and declined to assent that the goods were of the description mentioned by the shippers. The effect of this state of things is, that it was no part of the contract that the case contained linen goods, and I am of opinion that the defendants were not bound to deliver linen goods to the plaintiffs. They expressly repudiate any contract as to the nature or contents of the package. The memorandum, "value, weight, and contents unknown," was to prevent their being liable, inasmuch as they had not in fact ascertained, and did not assent that the contents were linen goods. This was the view taken by the learned judges of the Court of Exchequer in *Jessel v. Bath* (L. Rep. 2 Ex. 267.) Now, this being the contract, it lies upon the defendants to get rid of it, and how do they attempt to do so? Simply by alleging the statement made to them that the goods were linen. But that was a mere declaration which appears to have been made innocently, inadvertently, and without fraud. If there had been a fraudulent misstatement made by the plaintiff in order to induce them to carry at a lower rate of freight, then the case would fall within the doctrine of *McCance v. London and North-Western Railway Company* (7 H. & N. 477), and similar cases referred to by Mr. Finlay and by Mr. Salter in his able argument. But in the present case fraud has been negatived by the finding of the jury, and the contract therefore remains valid, and it having been broken the plaintiff has a right of action. I do not say that looking at the evidence which has been brought before us, I am satisfied that the verdict might not with propriety have been delivered the other way, but that is a matter not before us. With regard to the argument of hardship to the defendants, there is a simple mode by which persons in their position may protect themselves. They may require that the bill of lading shall contain not merely a representation, but a warranty of the nature and quality of the goods, and they may insert stringent conditions requiring positively a statement of the value and declaration of the contents. Most of the cases on the subject have turned on the ground of fraud. With regard to estoppel, if the view I have taken be correct, I see no ground upon which it can be argued that there was here an estoppel. The parties did not agree on the footing that the packages contained linen goods only, but that they might contain other goods. The proper mode would have been for the defendants to contend for a reduction of damages, but that question is not open to us now. In my opinion the defendants have failed to show that they are absolved from their contract to carry.

BART, J.—In this case the plaintiffs, acting as forwarding agents for other persons, ship as shippers certain goods for carriage by the defendants. The shippers in the bill of lading represent the goods as linen goods, whereas in fact they were silk broadstuffs. At the time that the

plaintiffs so shipped the goods and presented the bill of lading, they did not know to the contrary, for the jury have found that the misrepresentation was innocent. And the defendants did not sign the bill of lading as presented to them, but stamped it with the words "value, weight, and contents unknown." There was evidence that the goods were stolen, but no evidence of positive negligence on the part of the defendants or their servants, except the fact that the goods were not delivered. The action is brought by the plaintiffs, charging the defendants on the ground of their liability as carriers, and not on the ground of negligence, and the question is whether there was any evidence to go to the jury that the defendants had undertaken to be liable, as carriers, in respect of the silk broadstuffs. Now, this is an action between shippers and shipowners, and if the bill of lading had not been stamped with the words, "value, weight, and contents unknown," there would have been the fact that the goods were carried by persons who assumed to carry as carriers, yet I incline to think that as between shippers and shipowners that misrepresentation could make only a *prima facie* case for the defendants, and that the mis-statement would not have avoided the contract, being as it was merely an innocent misrepresentation of a material fact. In order so to operate it must be wilful, and therefore fraudulent. I should have thought such a bill of lading would be open, as between the shipper and the shipowner, and that the shipper would not be concluded by the bill of lading, if the goods were described in it as of a less weight or a different kind. But it was argued that here was a representation made which would lay a larger liability on the defendants, and that it must be taken that that became the basis of the contract, and that, as in *McCance v. London and North-Western Railway Company*, it was a representation which bound the plaintiffs, and that the plaintiffs were not entitled to show that the goods were silk. It is material to know what the stamp meant. Did the shipowner act upon the representation? The cases which have been cited, and especially the American case of *Clark v. Barnwell* (12 How. 272; see *Parsons on Shipping*, vol. 1, 198, note) show the real meaning. The package is offered to the shipowner closed up, with the representation contained in the bill of lading, "linen goods." The shipowner may accept the bill of lading, without alteration or not. If he alter it by adding the words, "contents unknown," it shows that he declines to assent to the representation, and that his meaning is, "I accept this case as it appears on the outside, but accept no statement you make as to its contents." The statement thus made by the shipowner wipes out that of the shipper. The bill of lading with the stamp affixed thus constitutes a contract by the shipowner to carry as a carrier whatever goods are in the case, and therefore he becomes liable in respect of such goods. Whether he is liable only for the value which such goods would have possessed if they had been linen, as was at first represented, is a question not before us, and upon which I express no opinion. Then it was said that this representation created an estoppel. But an innocent representation creates no estoppel. Lord Wensleydale, a master in the art of laying down propositions of law in mercantile cases, said in *Walker v. Jackson* (10 M. & W., at p. 168), "I

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take is now to be perfectly well understood according to the majority of opinions upon the subject, that if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary; if he ask no questions and there be no fraud to give the case a false complexion on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask questions; if they are answered improperly so as to deceive him, then there is no contract between the parties; it is a fraud which vitiates the contract altogether." I have omitted to say that in the case before us no question was asked by the shipowner as to the contents of these packages. I am of opinion, upon these grounds, that the learned judge was right in refusing to nonsuit the plaintiff.

GRONK, J.—I have had some doubts upon this case which are not yet entirely removed, but which are not strong enough to induce me to differ from my learned brethren. Had the words "value, weight, and contents unknown" not been added, the case would, of course, have been much stronger in favour of the defendant. But it struck me that Mr. Salter's argument had some weight, that the construction of the whole document is, "I take the goods for what they are represented to be, but must not be responsible as if I knew what were the contents." The case of *Jessel v. Bath* might be distinguished from the present on the ground that there the protective words were put in for the protection of a person who had no opportunity of examining the goods. On the whole, the balance of my mind is with the rest of the court, but I still feel some doubt. On the point of estoppel I agree entirely with the rest of the court.

DENMAN, J.—After hearing the able argument on both sides, I feel no doubt that the rule should be discharged. I think the true effect of what took place was that there was a contract to carry case No. 1146, whatever goods it might contain. I threw out a suggestion, which was followed up by Mr. Salter, and more elaborately by Mr. Finlay, that the words, "value, weight, and contents unknown," might be taken as meaning "linen goods—value, weight, and nature unknown;" but after hearing the American case of *Clark v. Barneswall*, cited in *Parsons on Shipping*, I prefer the construction adopted by the Chief Justice and my brother Brett. I think, therefore, that the case falls within the principle of *Jessel v. Bath*, and the general doctrine laid down by Lord Wensleydale in *Walker v. Jackson*. On the question of the amount of damages, I altogether abstain from giving any opinion.

Rule discharged.

Attorneys for the plaintiffs, Leary and Co.

Attorneys for the defendants, Ashley and Tce, for Phillips and Pearce.

COURT OF ADMIRALTY.

Reported by J. F. ASHFALL, Esq., Barrister-at-Law.

Friday, June 28, 1872.

THE LE JONET.

Salvage—Dissolution of seaman's contract—His right to salvage—Expenses paid by salvors.

The abandonment of a vessel in distress by her master (accompanied by the majority of the crew)

operates a dissolution of the contract between the owners and seamen, and if one of the crew voluntarily remains on board and renders salvage services, he is entitled to salvage reward.

Expenses incurred in saving a vessel, such as pumping, watching, &c., which strictly ought to be paid by the marshal, will, if paid by the salvors, be deducted by the court from the value of the salvaged vessel in assessing the salvage reward.

THIS was a case of salvage instituted on behalf of the Goole Steam Shipping Company, the owners of the steamship *Colletis*, and on behalf of the master and crew of that vessel against the barque *Le Jonet*, and her cargo and freight, and against her owners intervening.

The *Le Jonet* was a barque of 422 tons register, and was on the 3rd April 1872 bound on a voyage from Torrobiga to Gelle, with a cargo of salt. Between 8 and 8.30 p.m. on that day, whilst about twenty-five miles S.E. by S. of Lowestoft, she was run into by a Spanish barque, which, with her starboard side, struck the *Le Jonet's* stem and port bow, cutting down the bowsprit and damaging the stem and port bow. The port anchor of the *Le Jonet* dropped into the Spanish barque, and held the vessels together for some time, during which the master and all the crew of the *Le Jonet*, except the mate, went on board the Spanish barque. The mate of the *Le Jonet*, however, remained on board his vessel. According to his evidence he could have got on board the Spanish barque if he had wished, but seeing that the man at the wheel of the *Le Jonet* had abandoned it, he went aft to take the wheel. He then looked for a man to cut away the chain that held the two vessels together, but before he found it the ships parted. He determined to remain on board, as he thought the vessel might be saved. He was not sure that there was not greater risk in going on board the Spanish barque. He got the ship before the wind, which was N. by E., and set the course S.S.E. to ease the seas on her bow. About midnight, the foretopmast was carried away, and the wind shifted to the N.W., and moderated, and the mate laid the *Le Jonet* by the wind, and in the morning hoisted a signal for assistance. The *Le Jonet* ran about eighteen miles S.S.E. after the collision. In the mate's opinion she would have floated for another day. He was in the track of vessels.

The *Colletis*, running between Hull and Ghent with cargo, sighted the *Le Jonet* about 5.30 a.m. on 4th April about forty miles distant from West Capelle, which bore S.S.E. The *Colletis* ran down to the *Le Jonet* and found her rolling heavily. The master of the *Colletis* boarded the *Le Jonet* in his life boat with some difficulty. He found the mate alone on board, and that the *Le Jonet* was making water fast, and had six feet of water in her. The mate of the *Le Jonet* requested the master of the *Colletis* to save the *Le Jonet*. The master of the *Colletis* returned to his own vessel and dispatched two of his officers and four seamen to the *Le Jonet*. They cleared away the wreck, and made fast a hawser from the *Colletis*, which proceeded to tow the *Le Jonet* towards Lowestoft. They then set to work at the pumps. The mate of the *Le Jonet* took the helm for a considerable time. At 6 p.m. Lowestoft was sighted at a distance of seven miles, but the master of the *Colletis*, finding that the draft of the *Le Jonet* would not allow of her entering that port in safety, bore away for Hull, where the

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two vessels arrived in safety at about 3 p.m. on April 5th, and the *Le Jonet* was there placed in dock. She then had eight feet of water in her hold. The weather was fine and moderate during the services. The men had been constantly engaged in pumping, and after their arrival in Hull pumps were engaged. The pumps sucked on April 7th, and then two men were sufficient to keep the vessel dry. The plaintiffs claimed 108*l.* 1*s.* for pumping, dock dues, and other expenses. Part of this money was paid for pumping after the marshal had taken possession of the barque in this suit.

The *Colletis* was 318 tons gross register, had engines of 50-horse power, and a crew of thirteen hands. Her value was 700*l.*; that of her cargo 5500*l.*; of her freight 113*l.* The value of the *Le Jonet*, her cargo and freight, when saved was about 890*l.* The services lasted thirty-three hours.

When the case was called on the learned Judge called the attention of counsel to the services of the mate of the *Le Jonet*, saying that on the pleadings he appeared to have rendered salvage services and that "the principle which I consider should be applied to such a case as that, where a sailor has not only stuck to his ship as it was his duty to do, but has also rendered further services of a meritorious character, he is entitled to salvage reward and that this court is competent to deal with the matter;" and he suggested that in order to save the expense of another suit that the mate should be considered as before the court in the present suit. It was agreed by the defendants' counsel that the owners of the *Le Jonet* should pay to the mate whatever the court might award to the mate. It was admitted that salvage services had been rendered by the *Colletis*.

Clarkson for the owners, master, and crew of the *Colletis*.—The mate of the *Le Jonet* stayed on board his vessel to save his own life, and was not even in the same position as a passenger, who can have no claim for salvage, being bound to assist in saving himself and the ship. [Sir R. PHILLIMORE.—The abandonment of the vessel by the master was a dissolution of the contract between the owners and the crew.] He stopped only because there was greater risk in the other ship and, therefore, he was saving his own life and not the ship. The *Le Jonet* was practically a derelict when picked up by the *Colletis*.

Gainsford Bruce for the defendants.—The barque was no doubt in need of assistance, but the danger really consisted in not having sufficient hands on board to pump. The service was little more than towage. The vessel cannot in any way be recognised a derelict, as she was never actually abandoned, and the mate contributed materially to her safety: *The Beavor*, (3 C. Rob. 292.) The contract was at an end when the master and crew abandoned the ship, and his services were, therefore, salvage services.

The Neptune, 1 Hagg. 227;

The Warrior, 6 L. T. Rep., N. S. 133; 1 Mar. Law. Cas. O. S. 204.

The claim for pumping is exorbitant. The plaintiffs are not entitled to costs. The value of the *Le Jonet* is under 1000*l.*, and the case should have gone before the magistrates.

Clarkson in reply.—Before seamen can claim salvage for services to their own ship, there must have been a severance between them and their

ship: (*The Florence*, 16 Jur. 572). In that case they were placed in safety before they volunteered to render services.

Sir R. PHILLIMORE.—This is a salvage suit for services rendered to a vessel injured by collision. The barque *Le Jonet* was run into by the Spanish barque *Isabelita Blanca*, on 3rd April 1872, between 8 and 8.30 p.m., about twenty-five miles south-east by south of Lowestoft. The consequence of this collision was that serious damage was inflicted upon the barque *Le Jonet*, and her captain and all her crew, except one man, the mate, went on board the Spanish vessel. The mate, however, remained on board the *Le Jonet* up to the time of the rendering of the salvage service, and until the vessel was placed in safety. The salving vessel, the *Colletis*, is an iron screw steamship navigated by a crew of thirteen hands, and at the time of the collision in question, was on a voyage from Ghent to Hull. She sighted the *Le Jonet* on the morning after the collision at about 5.30, and immediately went up to her. Some of the crew of the *Colletis* went in their life boat on board the *Le Jonet* and found her in great distress, making water, and with her foretopmast and her jibboom gone. There can be no doubt that she had been kept by the exertions of the mate from drifting like a log upon the water. She was in a condition of great peril, and there is some reason to doubt whether, if the weather had been bad, they could have saved the vessel at all. After clearing the wreck the salvors took the *Le Jonet* in tow, and brought her in safety into the port of Hull, after about thirty-three hours' service. In the first place the salvors claim for a sum of 108*l.* 1*s.*, which was paid by them for pumping and other expenses incurred in dock at Hull. That sum must either be paid as part of the salvage reward or independently of that reward. It cannot be paid in both ways. I consider that it must be paid independently of salvage, and that it must be paid to the plaintiffs as expenses. It ought, strictly speaking, to have been defrayed by the marshal, and must, therefore, be added to the expenses incurred by him, and will consequently reduce the net sum with which I have to deal to the sum of 790*l.* Now it has appeared that there is in this case a salvor who is not, strictly speaking, before the court. I intimated that this was the opinion of the court upon the facts as they appeared by the pleadings, and the evidence produced before me has greatly strengthened this opinion. I adhere, as Dr. Lushington did in the *Warrior* (6 L. T. Rep. N. S. 133; 1 Mar. Law Cas. O. S. 204), to the doctrine laid down by Lord Stowell in the *Neptune* (1 Hagg. 227, 236), that a crew of a salved vessel cannot, under ordinary circumstances, have a *persona standi* as salvors as against their own vessel. That principle I consider should be maintained in its integrity, but the crew of a salved vessel may, by the acts of their master, be placed in such a position that the engagement into which they have entered is at an end. Dr. Lushington, in the *Warrior* (sup.) said, "Such a contract may be dissolved either by the occurrence of circumstances which would operate as a dissolution of the contract, or by the act of the master dismissing the sailors from his employment, if he thinks fit, and there are reasons in his judgment for so doing." In this case the master abandoned his vessel with all his crew, except his mate, who

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voluntarily stayed on board, and the mate's contract with the master to serve in that capacity must be considered at an end. There are two questions which I have to decide: Was the seaman's contract at an end; and, if it was at an end, and the mate stayed on board voluntarily, did he render salvage services? As to the first question, I decide in the affirmative; and as to the second, I think he did render salvage service, not only in working for the safety of the ship during the night after the collision, and in showing the signal of distress on the morning after, but also in taking the helm after the crew of the *Colletis* came on board. This, I consider, was a very meritorious service indeed, and if the example of courage he set had been followed by the rest of the crew it is probable that there would have been no need of the salvage services of the crew of the *Colletis*. Although the mate is not technically before the court, the owners of the *Le Jonet* have undertaken to give him such sum as I may award. It would be a great waste of money for soother snit to be instituted, and I shall, therefore, recommend that he should receive a certain sum. Bearing that sum in mind, I shall award salvage reward to the owners, master, and crew of the *Colletis* as the merit of the case deserves. To the *Colletis* I award 210*l*. I recommend that the owners give 40*l*. to the mate of the *Le Jonet*, making the total sum awarded 250*l*. The expenses paid by the salvors will be paid out of the fund in court, and I shall certify for costs, as I consider it was a proper case to be brought in this court.

Solicitor for the plaintiffs, *Thomas Cooper*.

Solicitor for the defendants, *Rothery and Co.*

Tuesday, July 9, 1872.

THE MIRANDA.

Salvoe—Salving and salved vessels belonging to the same owner—Claim against cargo.

Where a screw steamship, carrying a general cargo under bills of lading, containing the exception "accidents from machinery," becomes disabled through her machinery breaking down, and another vessel belonging to the same owners renders salvoe services, and brings the disabled vessel into safety, those services, being over and above the contract to carry safely and deliver in like good order and condition as shipped, entitle the shipowners to salvoe reward as against the cargo of the salved vessel. The master and crew of the salving vessel are entitled to reward as against ship, cargo, and freight.

This was a claim for salvage. Two causes were instituted, the one on behalf of the Lodon Steamship Company (Limited), the owners of the steamship *Rozana*, and on behalf of her master and crew, against the cargo lately laden on board the steamship *Miranda*, and against the owners of that cargo intervening; the other, on behalf of the master and crew of the *Rozana* against the *Miranda* and her freight, and the owners intervening. The causes were consolidated by order of the court. The *Miranda* and the *Rozana* belonged to the same owners, the Lodon Steamship Company (Limited).

The facts are set out in the petition of the plaintiffs, which was as follows:

1. The *Rozana* is a screw steam vessel of 674 tons register, and 160 horse-power, and at the time when the

services hereinafter stated were rendered was manned by a crew of twenty-three hands, including her master, and was proceeding on a voyage from London to Genoa, with a cargo of general merchandise. She was at such time of the value of 13,000*l*; her cargo was of the value of £20,000; and her freight was of the value of £557.

2. The *Miranda* is a screw steam vessel of 735 tons register, and 140-horse power; and at the time when the said services were rendered was on a voyage from Patras to London with a cargo of dried fruit. She was at such time of the value of £15,000; her cargo was of the value of £18,775; and her freight in course of being earned, amounted to £1875.

3. At about six p.m. on the 13th Oct. 1871, the *Miranda*, whilst proceeding on her said voyage under steam, was about from eighteen to twenty miles to the south-east of Cape St. Vincent, when in consequence of her engines making an extraordinary noise, they were stopped; and it was found that the crank shaft of her after-engine was so nearly broken in two pieces that another turn or two of her propeller would have separated it.

4. The master of the *Miranda*, after consulting with his officers and engineers, determined, for the general preservation of his ship and cargo, to request the assistance of the said steamship *Rozana*, which was in sight and prosecuting her said voyage.

5. The *Miranda* accordingly signalled to the *Rozana*, and the *Rozana* was thereupon turned round and came up under the stern of the *Miranda*.

6. The master of the *Miranda* informed the master of the *Rozana* that the *Miranda*'s screw shaft had just broken, and requested the master of the *Rozana* to take the *Miranda* in tow, and tow her back to Gibraltar, and this the master of the *Rozana* agreed to do.

7. A hawser was then passed from the *Miranda* to the *Rozana*, and made fast; and the *Rozana* proceeded to tow the *Miranda* towards Gibraltar. At about 7.20 p.m. the hawser broke, owing to the heavy strain on it; and the *Rozana*'s 10-inch hawser, 90 fathoms long, was then got up, and passed to the *Miranda*, and the *Rozana* towed therewith until the morning of the 16th of the said month, when another hawser, with about 30 fathoms of stream chain bent to it to prevent chafing, was passed from the *Miranda* to the *Rozana*, and the *Rozana* then towed with the two hawsers.

8. On the morning of the 16th of the said month the wind, which had been light, freshened from the eastward, and blew hard from that quarter, with a high sea; and the ships in consequence laboured heavily, but little progress was made. At about 8.30 p.m. the light on Europa point was seen, bearing N. by E. $\frac{1}{2}$ E., distant about seventeen miles. The *Rozana* was kept in mid-channel throughout the night, steering alternately to the eastward and westward, with the *Miranda* in tow.

9. Shortly after seven a.m. on the 17th day of the said month the ships rounded Europa Point; and at 8.30 a.m. the *Miranda* cast off and anchored in Gibraltar Bay, and the *Rozana*, after coaling, left Gibraltar on the same day, and resumed her voyage to Genoa.

10. The *Miranda*, which was built, fitted, and rigged with a view to depending principally on her steam power, was, by reason of the aforesaid accident to her machinery, deprived of the use thereof, and rendered to a great extent unmanageable; and in case of bad weather coming on, especially from the southward, she would, with her cargo, have been exposed to imminent risk of being lost.

11. By reason of the premises, the plaintiffs rescued the cargo of the *Miranda* from a position of danger, and rendered a salvage service thereto.

12. In effecting the said services to the *Miranda* and her cargo, the towing hawser of the *Rozana* (which was of the value of £45) was so chafed and strained as to be rendered useless. She consumed about 25 tons of coal, at a cost of £38 2*s*. 6*d*.; and she incurred about £3 for port charges; and she was delayed on her voyage for about forty hours.

The answer filed on behalf of the defendants admitted the allegations contained in articles 1 to 9 of the petition inclusive, and the allegations in article 12 to be true. It denied articles 10 and 11, but evidence was produced by the plaintiffs at the hearing in support of those allegations, and was not rebutted. The answer further pleaded:—

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3. The sole owners of the vessel *Miranda* are and were, at the time mentioned in the petition, the plaintiffs, the London Steamship Company (Limited), and the said plaintiffs are and were at the same time the sole owners also of the vessel *Rozana*.

4. The cargo laden on board the *Miranda*, at the time mentioned in the petition, was so laden by the several owners thereof, on the terms of certain contracts then entered into between them and the plaintiffs, the London Steamship Company (Limited), whereby the said plaintiffs contracted with the several owners of the said cargo to carry the said cargo to London for freight, to be by them earned on the usual terms. The act of the plaintiffs, the London Steamship Company (Limited), in towing the *Miranda* to Gibraltar, was done only in fulfilment of their contract to carry the said cargo to London as aforesaid, or for the purpose of enabling their own vessel to earn the freight on the said cargo, or for the sake of bringing their own vessel safe into port, and was in any case an act done for the sole behalf and advantage of the said plaintiffs, and was not, so far as the said plaintiffs are concerned, a salvage service.

5. The cargo laden on board the *Miranda*, as aforesaid, was so laden on the implied condition and warranty that the *Miranda* was stout, staunch, and strong, and well equipped and fitted and in all respects seaworthy for the voyage; whereas, in fact, the crank shaft of the after-engine was not sufficiently strong, or there was some other improper fitting in the said after-engine, or otherwise the said implied warranty was not complied with. Wherefore, and for no other cause, the said crank shaft of the after-engine of the *Miranda* was broken, or nearly broken, as in article 3 of the petition stated, and the *Miranda* came in need of and received the assistance of the *Rozana*, as in the said petition stated.

6. In the circumstances aforesaid the plaintiffs, the London Steamship Company (Limited) are not entitled to any salvage remuneration.

7. The defendants submit to pay such remuneration to the plaintiffs, the master and crew of the *Rozana*, for the services rendered by them as to this court shall seem just and equitable; but they contend that they contend that such remuneration should in the circumstances be of small amount.

The reply filed on behalf of plaintiffs was as follows:—

1. The cargo laden on board the *Miranda*, at the time mentioned in the petition, had been laden on board her by the respective shippers thereof, under certain bills of lading, which were in one or other of the three forms annexed hereto, and marked respectively A, B, and C. No other contract had been entered into with respect to the carriage of the said cargo by the plaintiffs, the London Steamship Company (Limited). Save as herein appears, the defendants deny the truth of the several allegations contained in the 4th article of the answer filed in this case.

2. As to the 5th article of the said answer, the plaintiffs submit to the judgment of this honourable court, whether any such warranty, as is alleged in such article, was implied or existed, regard being had to the terms of the said bills of lading. The plaintiffs further say, that at the time when the *Miranda* sailed from her respective ports of loading she was in all respects seaworthy for her intended voyage to London; and they deny the truth of the several allegations contained in the said answer.

3. The plaintiffs further say that the *Miranda* and her freight on the said voyage were respectively fully insured at the time of the said services rendered by the *Rozana*.

The bills of lading referred to in the answer and the reply were in three different forms. The first (A) was as follows:

Shipped in good order and condition [name of consignee] in and upon the steamship called the *Miranda*, whereof Dilly is master for this present voyage, and now lying in the port of Zante, and bound for London, with liberty to call at any port or ports, in any rotation, in the Mediterranean or Adriatic, or on the coasts of Spain, Portugal, France, Great Britain, or Ireland, for the purpose of receiving and delivering coals, cargo, or passengers, or for any other purpose whatsoever, to sail with or without pilots, to tow and assist vessels in all situations, and to carry goods of all kinds [here followed the description of the goods], being marked and numbered as per

margin, and to be delivered from the ship's deck, where the ship's responsibility shall cease, in the like good order and condition, at the aforesaid port of London, or so near thereto as she may safely get (the Act of God, the Queen's enemies, pirates, robbers, thieves, restraint of princes and rulers, fire at sea or on shore, accidents of the seas, rivers, and navigation, damage by vermin or from other goods by sweating or otherwise, barratry of master and mariners, damage or loss from collision, or from any act, neglect, or default of the pilot, master, or mariners in the navigation or management of the ship, accidents or damage from machinery, boilers, and steam, of whatever nature or kind soever excepted), unto [name of consignee], or to his or their assigns, he or they paying freight for the said goods, in cash free of interest, on ship's arrival, at the rate of 35s. per ton of 20wt. gross weight delivered, with 10 per cent. primage and average accustomed; and a proportion of 10 guineas gratuity.

In witness whereof the master or agent of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void.

Dated in Zante this 22nd Sept. 1871.

The second form (B) related to goods shipped at Cephalonia, which were thereby to be similarly delivered at the port of London, "the act of God, the Queen's enemies, &c., accidents from machinery, boilers, steam, or any other accidents of the seas, rivers, and steam navigation, of whatever nature or kind soever, &c., excepted. The third form (C) related to goods shipped at Patras, and was identical with the first (A).

The *Miranda* was insured at the time of the accident for 12,500*l.*, and her cargo for 2040*l.* Shortly before that voyage she had been fitted with new boilers, and her engines had been thoroughly overhauled, but no perceptible flaw had appeared in the shaft to which the accident happened. This was proved by the plaintiffs.

It was admitted that the master and crew of the *Miranda* were in both suits entitled to salvage reward.

Butt, Q.C. and *E. C. Clarkson* for the owners, master and crew of the *Rozana*.—This was a salvage service giving to the owners of the *Rozana* a right to reward from the owners of the cargo of the *Miranda*. Our clients contracted to carry the goods safely so long as they were not prevented by any of the excepted perils. They were prevented by "an accident to machinery," and any act done after that was not part of their contract, and therefore a salvage service. *Dr. Lushington* lays down the true principle in *The Maria Jane* (14 Jnr. 857), where he says, "The true test by which to try the right to salvage is, whether the service be within the contract or not." It was no part of the contract to save the cargo. [*Sir R. J. Phillimore*.—The same principle was also applied by me to the recent case of *The La Jonet* (ante, p. 438; 27 L. T. Rep. N.S. 387), where a seaman, who remained by his ship after she had been abandoned by her master and the rest of the crew, was held entitled to salvage. His contract was at an end.] That is the same principle, and that was the ground of the decision of the Privy Council in *The Sappho* (ante, p. 65; L. Rep. 3 P. C. 690, 694; 24 L. T. Rep. N.S. 8, 795). The defendants set up in their answer (par. 5) that there existed in the contract an implied warranty that the *Miranda* was seaworthy, and that there was a breach of this warranty by reason of the weakness or improper fitting of the crank shaft. This is no defence to this suit, because even if such a warranty exists where the rights of parties are governed by a written

instrument such as a bill of lading or a charter-party, that warranty clearly has not the same effect as a warranty of seaworthiness in a policy of insurance where non-compliance with it would vitiate the policy altogether, and where even a latent defect, although not contributing to the loss of the vessel, is sufficient to prevent the policy attaching: (2 Arnold on Marine Insurance, 591, 4th edit.) The effect there is to make the contract entirely null and void, unseaworthiness being a condition precedent to its performance. In charter-parties and bills of lading, on the other hand, such a warranty is not a condition precedent, and an action may be brought by the shipowner for his freight after delivery, even though his ship may have been unseaworthy, or for any other non-performance of the contract by the owner of the goods. This supposed warranty not being a condition precedent, and the contract contained in the bills of lading not being, therefore, void *ab initio*, the exceptions in the bills of lading apply, and the performance of the contract is excused by the words "accidents from machinery." In case of total loss through the breaking of the shaft, the plaintiffs would not have been liable to the owners of cargo for their goods, and as their only contract was to carry the goods safely in the *Miranda*, unless prevented by certain exceptions, any services rendered by them with another steamer, on the happening of one of these excepted perils, were over and above their contract, and entitled to reward. Moreover, if any such latent defect existed, it lies upon the defendants to show that it did exist, as the breakdown of the machinery did not happen until some time after her departure from port: (2 Arnold on Marine Insurance, 618, 4th edit.) and the defendants have given no evidence on this point. These services being over and above the contract, were not rendered by the plaintiffs solely for their own benefit. If any independent vessel had rendered assistance, the plaintiffs would not have been liable to pay salvage in respect of the cargo, but the owners of cargo would have been liable to that independent vessel. The plaintiffs, therefore, are equally entitled to reward in the present case.

Milward, Q.C. and *W. G. F. Phillimore* for the owners of cargo on board the *Miranda*.—The services rendered by the owners of the *Rozana* were for the purpose of enabling them to carry out their contract to deliver the cargo of the *Miranda*, and to earn their freight. They were not excused from the performance of their contract by the happening of any peril excepted in the bills of lading. The accident which happened was not included in those perils. "Accidents from machinery" are not an excuse where the ship only is injured and stopped, but are intended to operate in favour of the shipowner only where the cargo has received actual damage from the machinery itself: (*Cock v. The General Steam Navigation Company*, 17 L. T. Rep. N. S. 246; 3 Mar. Law Cas. O. S. 5; L. Rep. 3 C. P. 14.) The shipowners contracted to carry safely as common carriers (Abbott on Shipping, 417 note 1, 5th American edit.; *Redhead v. The Midland Railway Company*, 16 L. T. Rep. N. S. 455; 20 L. T. Rep. N. S. 628; L. Rep. 2 Q. B. 412; L. Rep. 4 Q. B. 379), and to deliver "in like good order and condition" as shipped; in such a contract there is an implied warranty of seaworthiness and that the vessel was in a fit condition to carry the cargo safely at the time of

shipment. If a latent defect existed in her machinery she was not in that condition.

Patman v. Wood, 3 Massachusetts Rep. 481; *Redhead v. The Midland Railway Company* (sup.) Abbott on Shipping, 5 American Edit. 417, note 2.

There is nothing to explain the breaking down of the shaft of the *Miranda*, and it is to be presumed that it was caused by a latent defect existing at the commencement of the voyage; this breakdown happened soon after the commencement of the voyage and it lies upon the shipowners and not upon the owners of cargo, to rebut the presumption (Arnold on Insurance, 4th edit. 618). Where a shipowner sets up the exceptions in his contract as an excuse for non-performance it lies upon him to show their existence: (*The Freedom*, 22 L. T. Rep. N. S. 175; 24 L. T. Rep. N. S. 452; 3 Mar. Law Cas. O. S. 355; *ante*, p. 28; L. Rep. 2 Adm. & Ecc. 346; L. Rep. 3 P. C. 594.) This the shipowners have not done, and the vessel must be considered to have been unseaworthy. The shipowner being thus guilty of a breach of warranty, the exceptions in the bills of lading, even if they apply to such a case, cannot excuse the shipowner, as the performance of the warranty must be considered as a condition precedent to the attaching of those exceptions. The shipowners, having by their default in not providing a seaworthy vessel placed the cargo in jeopardy and saddled it with the lien of the master and crew of the *Rozana* for salvage reward, are not entitled to salvage as they would thereby profit by their own wrong:

The Cargo ex Capella, 16 L. T. Rep. N. S. 800; 2 Mar. Law Cas. O. S. 552; L. Rep. 1 Adm. & Ecc. 356.

Butt, Q.C. in reply.—Even in contracts of affreightment in which a warranty of seaworthiness is expressly given, that warranty is not a condition precedent: (*Tarrabochia v. Hickie*, 1 H. & N. 183.) There is no express warranty here, nor can it be implied as the contract is contained in the written terms of the bills of lading to which nothing can be added.

Sir R. Phillimore.—The facts are not in controversy, and those which it is material to mention are as follows: The *Miranda*, a screw steamer vessel, having a valuable cargo on board, received salvage services from the *Rozana*. The *Miranda* was bound to London on a voyage from Patras, while the *Rozana* was proceeding on a voyage from London to Genoa. When the vessels were in sight of each other, and about fifteen or twenty miles to the south-east of Cape St. Vincent, the master of the *Miranda* signalled to the *Rozana*, and requested her assistance. The damage the *Miranda* had sustained was this: The crank shaft of her after-engine was so nearly broken that another turn or two of her propeller would have broken it. The *Miranda* wished to be towed back to Gibraltar, and she was accordingly taken in tow by the *Rozana*, and was towed into Gibraltar, the service beginning between six and seven o'clock on the evening of 13th Oct., and ending at about half-past eight on the morning of 17th Oct. The weather was fine at the time, and the service was performed without danger either to the *Rozana* or her crew, but apart from the peculiar circumstances to which I am about to advert, the service was a service for which the court would be disposed to award a considerable sum, the value of the property being high, that is about 36,000*l.* The

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court, however, cannot award, and indeed, it is not asked to award any salvage remuneration to the owners of the *Rozana* either on the value of the *Miranda*, or on the value of her freight. But the master and the crew can, according to the decision in *The Sappho* (*ubi sup.*), a decision which has been affirmed on appeal by the Privy Council (*ante*, p. 65; L. Rep. 3 Priv. Co. 690; 24 L. T. Rep. N. S. 795), claim on the entire sum, that is on the value of the *Miranda*, her cargo and freight. The defences raised by the owners of the *Miranda* to the claim preferred by the owners of the *Rozana*, are the following: First, that the owners of the *Rozana* were bound by their contract with the owners of the cargo laden on board the *Miranda* to carry the cargo of the *Miranda* to London, and that they would not have fulfilled this contract unless they had rendered assistance to the *Miranda*, which assistance is to be considered as an act done for the sole benefit and advantage of the owners of the *Rozana*. Secondly, it was said that implied in the contract between the owners of the *Rozana*, and the owners of the cargo of the *Miranda* there was warranty of the seaworthiness of the *Miranda*; that the accident arose from the breach of such warranty; and that the owners of the *Rozana* were, therefore, liable for all the consequences of such breach, and so were not entitled to salvage remuneration for averting a loss which if it had happened, would have fallen upon themselves. It is replied to these defences that the contract is to be found in the bills of lading, admitted to have been made between the parties. If I am to decide the question whether the owners of the *Rozana* are entitled to salvage reward, I must first determine whether they are so entitled apart from the question of their being the owners of the vessel saved. I think, unquestionably, they rendered a service entitling them to salvage remuneration, unless peculiar circumstances have rendered it impossible for them to recover that remuneration. It becomes necessary, therefore, to decide the question of law. The contract set out in the bills of lading is, that the *Miranda* should take her cargo on board and deliver it at the port of London in the like good order and condition as shipped. Then follow many exceptions, which are to be considered as affording a justification for the non-performance of the contract, and among these exceptions is included one about which there has been much discussion. This exception, which is contained alike in all the bills of lading, though not expressed in precisely the same words, is as follows: "accidents from machinery." If I had to determine this case upon the point raised with reference to the alleged implied warranty of seaworthiness, I should rule that the burden of proving such warranty rests with the defendants, and that sufficient evidence as to the vessel's state and the state of her machinery has not been given to lead the court to find that she was in an unseaworthy condition at the time the cargo was shipped. But I think the true question in the case is, does the exception, "accidents from machinery," include the present case? I must come to the conclusion that the accident in question finds its place among the excepted perils; it is, therefore, unnecessary for me to discuss the able argument which has been addressed to the court with respect to a warranty of seaworthiness being implied in the contract. I have now to consider the amount

of the sum to be awarded. I must remember that the *Miranda* was owned by the owners of the *Rozana*, and that the owners of the *Rozana* were earning freight for the carriage of the cargo of the *Miranda*, and that no material deviation from her voyage occurred to the *Rozana*, as she towed the *Miranda* in the direction of the port to which she herself was bound. I must also bear in mind that the weather was fine, and that there was no danger. In the peculiar circumstances of the case, I shall award to the owners of the *Rozana* 350*l.* to be paid out of the proceeds of the cargo. Remembering that the ship was the principal agent in rendering the salvage service, I shall award to the master and crew the sum of 120*l.*, to be paid out of the proceeds of the ship, freight and cargo.

On application being made to his Lordship, he apportioned the sum awarded to the master and crew as follows: 70*l.* to the master and the residue to the crew, according to their rating.

Solicitors for the plaintiffs, *Hillyer, Fenwick, and Stibbard*.

Solicitors for the defendants, *Watsons, Bubb, and Walton*.

July 31 and Aug. 3, 1872.

THE *IDA*.

Bottomry—Unliquidated claim—Ship under arrest—Personal debt.

A bottomry bond on ship, given by a master to a creditor in satisfaction and as a compromise of an unliquidated claim for breach of contract in non-delivery of goods on a previous voyage, is bad, and will not be upheld by the Court of Admiralty, even where the ship is arrested at the suit of the creditor in a foreign port, and the bond is necessary to obtain her release.

THIS was a cause of bottomry instituted on behalf of Robert Wilson and Ebenezer Campbell Stevenson, of Liverpool, merchants, the holders of a bottomry bond upon the schooner *Ida*, her tackle, apparel, and furniture, and against her owners intervening.

On 12th Feb. 1871, the *Ida* was at Monte Video, in Uruguay, South America, and was on that date chartered by the plaintiff, Robert Wilson, to load a cargo of coals and other merchandise, and to carry the same to Corrientes, Paso de la Patria, or Cerrito, in the river Parana, and "deliver the same agreeably to bills of lading, on being paid freight as follows, 4*s.*—forty shillings sterling in full (the act of God, &c., excepted). The cargo to be brought to and taken from alongside at merchant's risk and expense, as customary at ports of loading and discharge, and to be stowed away on board at vessel's expense. The master to sign bills of lading at any rate of freight the charterer or his agents may require, but without prejudice to this charter-party, it being understood that he shall have an absolute lien on the cargo, for the recovery and payment of all freight, dead freight, and demurrage. The vessel to be consigned to charterer's agents at port of discharge . . . The freight to be paid after true and right delivery of the cargo, as customary at port of discharge. . . . And lastly, for the true performance hereof, the said master doth hereby bind himself, his heirs and assigns, the said vessel her freight and appurtenances, and the said charterer doth in like manner bind himself, his heirs and assigns, and the cargo to be laden

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on board the said vessel, each unto the other in the penal sum of estimated amount of freight." Under this charter-party Wilson loaded the *Ida* with a cargo consisting of 202 tons of coals and 940 bags of bran, both on his own account. Before the *Ida* left Monte Video, the master being utterly without funds, and applying to Wilson for a loan, Wilson made an advance to the master on account of the freight of the coals, by giving the master his bill at two or three months' date for 404l. This sum represented the total amount of freight on the 202 tons of coals at 40s. per ton. The master was unable to get the bill cashed, and Wilson thereupon cashed it for the master, deducting 6 per cent. for interest and insurance, and 2½ per cent. commission on the freight of the coal.

The *Ida* proceeded to Corrientes, and was ordered to Paso de la Patria, and there discharged about half her cargo of coals, but the plaintiff's agents not appearing to receive any more, the master, after due notice to them of his intention, sold the remainder of cargo of coals to pay, as he alleged, demurrage and expenses incurred by the delay. The facts as to this part of the transaction are fully set out in the judgment.

The *Ida* then made other voyages, with other cargoes, after the completion of which she proceeded to Buenos Ayres, in pursuance of a charter, which had been obtained for her by her master, to load a cargo for carriage thence to Liverpool. She arrived at Buenos Ayres on 10th Feb. 1868, and commenced to load her cargo. While the *Ida* was at Buenos Ayres, a suit was instituted in the National Court at that place to compel the master to refund the value of the coals he had disposed of, to pay the damages caused by the non-delivery, and the costs and charges incurred; and by order of the judge of that court, notice was served upon the master, and an order was issued to the harbour master to prevent the departure of the *Ida*, which was done by showing the judge's order to the master of the *Ida*, and getting the latter to sign the order. By the law (Code of Commerce, Nos. 1028, 1070) in force at Buenos Ayres, a person claiming damages for breach of charter may institute a suit in rem against the ship for the damages, and the National Court has jurisdiction to entertain such a suit, and that court may order the arrest of the vessel at the instance of creditors presenting their claims in due form.

Before the arrival of the *Ida* in Buenos Ayres the British Consul at that place, Mr. Parish, had received a letter from the defendants, the owners of the *Ida*, expressing dissatisfaction with the master's proceedings, and requesting the consul to order him home at once, stating that they had written to the same effect to Rosario and Corrientes, and asking for information about the vessel. On her arrival the consul communicated with the master, and made inquiries as to his proceedings, but just at this time the above suit was instituted, and the consul took upon himself, on behalf of the owners, to ascertain the merits of the case instituted against the ship, and, as he said in his evidence, "being thoroughly satisfied that it would have been next to useless resisting a claim of that nature, and that the master had no power to sell the cargo on any plea whatever," he determined to use his "influence with Mr. Wilson to obtain as satisfactory an arrangement of the case as possible," and the captain, accepting his advice, recognised the proceedings he took to this effect.

The steps he took are described in his evidence as follows:—

After some correspondence with Mr. Wilson, I persuaded that gentleman to accept as a compromise, for the payment of all claims, the sum of 450l., which was the estimated value of the coal sold, with some additional expenses thereon. Captain Coleman, acting on my advice, accepted this arrangement, and by so doing the parties who were loading his vessel desisted from their intention to withdraw the charter. Captain Coleman, having no money, was unable to pay the amount due to Mr. Wilson, and I had no alternative but to advertise for the money on bottomry, and no person tendering for the same, I induced Mr. Wilson to accept the risk, and to accept payment of his claim in this form. On his agreeing to do so, bottomry bills for the amount of 450l., with an additional premium of 90l., were drawn up and signed in the Consulate, and Mr. Wilson withdrew the law proceedings, by a formal act, which I recommended him for his better security to enter into. The prohibition which had been placed upon the sailing of the vessel was removed, and the ship proceeded to sea.

The bond referred to was drawn up at the consul's office on a common printed form, and as far as material is as follows:—

Capital	...	...	...	...	...	£450
Premium	...	...	...	...	...	90
Total	...	...	...	...	...	£540

Ten days after my arrival at the port of Liverpool I promise to pay to the order of Messrs. Wilson and Stevenson this my first bill of bottomry, second and third of this tenor and date not paid, upon the schooner *Ida*, under my command, and bound on a voyage to Liverpool, being for amount of expenses incurred in this port; which sum of 540l. sterling, excepting 90l. sterling for premium, was actually laid out in disbursements and charges for the use of the said schooner, to enable her to proceed on her present voyage, and for the payment of which sum of 540l. sterling, in lawful money of Great Britain ten days after my arrival at Liverpool as aforesaid, I do hereby bind myself, my heirs, executors, administrators, firmly by these presents, and particularly the said schooner, with all her tackle, apparel, and furniture, and it is hereby declared that the same are thus assigned over for the security of the said 540l. sterling, and shall be delivered to no other use or purpose whatever until payment of this bill or bond is first made with the premiums due thereon. Now the condition of this obligation is, &c. (the usual form.)

In witness whereof I have hereunto set my hand and seal at Buenos Ayres, this 11th day of April 1868.

HENRY P. COLEMAN, Master (L. S.).

Signed sealed and delivered in the presence of

FRANK PARISH, British Consul at Buenos Ayres.

No money was passed upon the making of the bond which was given by the master solely to secure the sum of 450l. as agreed.

According to the defendants' evidence, at the time of making the bond the plaintiff Wilson was indebted to the owners and master of the *Ida* in a large sum of money by way of demurrage and expenses in respect of the aforesaid detention of the *Ida*, and had not discharged that debt at the time of this suit.

July 31.—*Butt*, Q.C. and *W. G. F. Phillimore* for the plaintiffs.—There was an absolute necessity for this bond. The ship was liable to arrest for the payment of the sums due to Wilson in consequence of the master's default, and she was under arrest at the time the bond was given by process of the local court. To obtain her release the master was forced to give the bond, he having no credit, and unless released she could not have proceeded on her homeward voyage for which she was under charter. It is objected that the liability was incurred in respect of a voyage anterior to that during which the bond was to run, but such

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a bond is valid where it is given to release a ship from arrest.

The North Star, Lush. 45;

The Prince George, 4 Moore, A. C. C. 21;

The Edmund, Lush. 57, 211;

The Karnak, L. Rep. 2 Adm. & Eco. 287, 300;

18 L. T. Rep. N. S. 661; 3 Mar. Law Cas. O. S. 103.

The anxiety of the owners to get the ship home, and the necessity for completing her charter, were circumstances which made it more prudent to compromise Wilson's claim than to risk loss of charter and expense by defending the suit in the foreign court. Moreover, all that was done at Buenos Ayres was done under the sanction of the consul who was instructed by the shipowners to send the ship home with all dispatch. It was true that no money actually passed between Wilson and the master on the bond being signed; but that, it is submitted, does not affect the question, because in substance the transaction was an advance by Wilson for the benefit of the ship. Wilson had advanced the whole of the freight on the coals, and the master had not afterwards earned this freight, and so had given Wilson a claim upon the ship by the *lex loci* for breach of contract. Releasing the ship from this claim was substantially advancing money for the ship. Even if this advance is to be considered as money already advanced when the bond was given, it must be presumed that the release took place on condition that a bond should secure the advance, and the consideration was, therefore, bottomry, and was valid:

The Karnak (*ubi sup.*)

Milward, Q.C. and Clarkson for the defendants, —The very essence of a valid bottomry transaction is, that it must be for actual advances of money for the necessities of the ship on the voyage during which she is pledged. In this case there was no advance of money for the necessities of the ship; there was nothing beyond a settlement of accounts between the parties. The master had no authority to give the bond for that purpose; his character as master gave him no right to turn an unliquidated into a liquidated claim, and to secure the payment of that claim by a bond with a bottomry premium. Even enjoining Wilson's claim to have been maintainable at all, the defendants' claim for demurrage and expenses would have exceeded it and should have been set off against it. The defendants' claim arose out of the default of Wilson in not receiving the cargo, and it was in consequence of this default that the sale took place, and he was in fact not entitled to make any claim. Again Wilson's claim was in respect of a previous voyage, and had nothing to do with the voyage on which the ship was engaged when the bond was given. This alone would invalidate the bond.

The Edmund (*sup.*);

The Augusta, 1 Dodson, 286.

The conduct of Wilson and his relation to the ship renders it impossible for the court to uphold the bond. The fact that by the *lex loci* the ship could be and was arrested, is not in itself sufficient to render the bond valid:

The Augusta (*sup.*);

The Osmanli, 14 Jar. 53; 3 W. Rob. 211; 7 Notes of Cases 322.

The arrest could not alter the nature of the transaction, which was not a good ground for bottomry.

Phillimore, in reply.

Aug. 3rd.—SIR R. PHILLIMORE.—In this case a

question arises as to the validity of a bottomry bond. The material facts are as follows: *The Ida* being an English vessel lying at Monte Video, was chartered by the plaintiff Wilson to receive a cargo of coals and to proceed to Corrientes, Paso de la Patria, or Cerrito, and deliver the same agreeably to bill of lading on being paid freight, 40s. sterling in full. The master was to have "an absolute lien on the cargo for the recovery and payment of all freight, dead freight, and demurrage; freight to be paid after true and rightful delivery of the cargo as customary at port of discharge." 202 tons of coals were loaded. Wilson advanced on account of the freight, under conditions certainly not unfavourable to himself, and on a bill at two or three months date, 404l. This bill Wilson afterwards cashed. The *Ida* proceeded to Corrientes with a letter to Don Candido Gomez, consignee, and with instructions from Wilson to deliver it. The *Ida* arrived at Corrientes on the 1st June, 1867. The letter was duly delivered, but Gomez seems not to have appeared; at all events, he referred the captain to one Reis as his agent. Reis said the *Ida* must go on to Paso de la Patria, but the communication between Reis and the captain was not satisfactory, and the captain, after waiting six days and consulting the captain of the port, advertised in a newspaper. About the 16th June the brother of Gomez appeared, but gave no orders, and on the 19th June the captain entered a protest. On the 25th June this Gomez again appeared with the bills of lading. Gomez gave the bills of lading to Reis, and told the captain to take his orders from the latter. Reis ordered the captain to go to Paso, and he sailed next day, arriving there on the 27th June. Three or four days afterwards he met Reis there, and began to discharge; he went on slowly till the 25th July. An arrangement had been made between the captain and Reis by which the former was to be allowed eighteen days for discharging the cargo, and forty-eight hours waiting for orders. The rate of demurrage was to be 5s. per day. The consignees had received about 107 tons, when on the 26th July the captain wrote the following letter to Reis: "To Victor Reis. Dear Sir,—As you are acting agent of Candido Gomez, consignee of the above vessel, cargo of coal and bran, I now inclose you my bill for demurrage and expenses up till Monday next, and trust to have an immediate settlement of the same, or I shall place the cargo into other people's hands, and sell it to defray expenses. Your humble and obedient servant, Henry P. Coleman." Then there follows the bill for demurrage, &c., which amounted to 1238 patacons, I think they are called. Reis never came again for coals. On the 30th July, Captain Coleman wrote another letter to Reis: "Dear Sir,—I wrote to you on Friday last, the 26th inst., and sent you my bill for demurrage and expenses; you thought proper not to answer that letter, therefore I am obliged to send you another bill inclosed with this for the said demurrage and expenses, and if you fail in coming to a settlement before forty-eight hours after the delivery of this letter, I shall, after the expiration of the said forty-eight hours, sell the remaining cargo of coals to the highest bidder. Trusting you will come to an immediate settlement, I remain, dear sir, your most humble and obedient servant, Henry P. Coleman." No answer was returned to these letters. On the 1st, 2nd, 5th, and

14th Aug. the captain sold the remainder of the coals, having returned on the 5th to Corrientes. The money obtained by the sale the captain says was applied towards the payment of balance of freight and claims for demurrage, and expenses caused by his detention, and the refusal of the consignees to receive the cargo. The *Ida* then made divers other voyages with other cargoes, and on the 10th Feb. 1866 arrived at Buenos Ayres, having previously obtained a charter for Liverpool. While loading her cargo the captain was summoned before the national tribunal, and an embargo was laid upon the *Ida*. The captain found himself in a great difficulty, the charterers threatening to withdraw their cargo, and he having no funds. The aid of the British consul, Mr. Parish, was invoked, and he thinking the claim of Wilson on the whole maintainable, advised a compromise of the conflicting claims for £500, and that the captain should raise this sum by bottomry, and so procure the release of the ship. Mr. Parish says in his evidence—[His Lordship here read the passage of the consul's evidence, before set out.] The bottomry bond was as follows—[His Lordship read the bond down to the words "I do hereby bind"—and the usual conclusion follows; it is signed by Coleman, master, and Mr. Parish, British consul at Buenos Ayres. The recital as to the money being actually laid out in disbursements and charges, is untrue, this recital is indeed part of the printed form of the bond, but nevertheless I regret to see it, and I am somewhat surprised that it escaped, as it must have done, the notice of the consul. The fact is, that no money passed at all between Wilson and the captain, and that the bond was not for disbursements or charges, but to obtain the release of the ship seized or detained on what was in truth a matter of account between the parties to it. Was such an instrument drawn in such circumstances a legal bottomry bond? In the case of *The Karnak* I reviewed at length and carefully considered all the decisions of this court bearing upon the subject of bottomry bonds, granted for the purpose of raising money to obtain the release of a British ship detained in a foreign port on account of a lien allowed by the municipal law of that port. I adhere to the principles of law laid down in that case with the greatest confidence because they were subsequently proved by the Privy Council (21 L. T. Rep. N. S. 59; 3 Mar. Law Cas. O. S. 276; L. Rep. 2 P. C. 505). I think it expedient to refer to two of the authorities cited and relied on by me in *The Karnak* (sup.). In the case of *The Prince George* (4 Moore P. C. C. 25), before the Privy Council, their Lordships said: "If it had been proved that the law of New York gave the lien upon the ship as suggested, we should have thought, upon the general principle, that where the master cannot in any other way raise money, which is indispensably necessary to enable the ship to continue her voyage, he may hypothecate the ship; this power would extend to a case where the ship might be arrested and sold for a demand for which the owner would be liable. It seems immaterial whether the necessity for funds arises from such a demand or to pay for repairs, stores, or port duties." I do not know, however, that the law upon this subject has as yet been carried farther than to uphold an hypothecation on account of a lien by a creditor in a foreign port for the necessary expenses and charges in respect of the

ship, and even then only for those in that port. It is not necessary to decide whether the principles laid down in *The Prince George* (sup.), and *The Karnak* (sup.) might be considered to cover the case of a bottomry bond given for the purpose of raising money not to be raised in any other way, and to repeat the language to which I have just adverted, "which was indispensably necessary to enable the ship to continue her voyage," without reference to the character of the expenses to be defrayed by the money so raised. I say it is not necessary to make a decision upon this point, because the case before me presents a circumstance which raises another principle of the greatest importance relative to instruments of this peculiar character, namely, the capacity of the particular person to become the obligee of such a bond, or, in other words, the capacity of the captain to grant the bond to Wilson. It is contended by the defendants that the failure of Wilson to fulfil his contract with respect to receiving the cargo by himself or his consignees within a reasonable time at the proper port, caused the expenses, in order to defray which the sale of the coal became necessary, and which act subsequently necessitated the bottomry bond, and now it is not denied that such default was made by Wilson. His contention is that, nevertheless, on a balance of the accounts between him and the captain, the latter is still his debtor, and, therefore, he arrested the vessel. In *The Karnak* (sup.) I cited a decision bearing on this point of Story, J., which I will now read. That very learned judge said, "It is undoubtedly true that material men, and others who furnish supplies to a foreign ship, have a lien on the ship, and may proceed in the Admiralty Court to enforce that right; and it must be admitted that in such a case a bona fide creditor, who advances his money to relieve the ship from an actual arrest on account of such debts may stipulate for a bottomry interest, and the necessity of the occasion will justify the master in giving it, if he have no other sufficient funds or credit to redeem the ship from such arrest. But it would be too much to hold, as was contended for by the counsel for the appellants, that a mere threat to arrest the ship for a pre-existing debt would be a sufficient necessity to justify the master in giving a bottomry interest, since it might be an idle threat which the creditor might never enforce, and until enforced, the peril would not act upon the ship itself; and if, supposing a just debt might in such a case be a valid consideration to sustain a bottomry interest in favour of a third person, such an effect never could be attributed to a debt manifestly founded in fraud or injustice. Nor does it by any means follow, because a debt sought to be enforced by an arrest of the ship might uphold an hypothecation in favour of a third person, that a general creditor would be entitled to acquire a like interest. It would seem as against the policy of the law to permit a party in this manner to obtain advantages from his contract for which he had not originally stipulated. It would hold out temptations to fraud and imposition, and enable creditors to practise gross oppressions, against which even the vigilance and good faith of an intelligent master might not always be a sufficient safeguard in a foreign country." That is the case of *The Aurora* (1 Wheaton's Rep. 96, 104). Now, by accepting this bottomry bond Wilson has not only converted a personal debt into a

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bottomry transaction, but he has, as Mr. Clark-son clearly and forcibly said, turned an un-liquidated into a liquidated claim with a bottomry premium. I am of opinion that it was not com-petent to him to take this step. I agree with the opinion of my predecessors in this chair, that bottomry bonds ought to be, so to speak, favoured by this court; that is, that the interests of com-merce require that they should not be invalidated upon technical or minute grounds. But to pro-nounce for the validity of this bond in the circum-stances which I have stated, and in the hands which now held it, would be to introduce a new principle into the law relating to these instruments, which would be, I think, contrary to the founda-tion on which they rest, and not conducive to the interests of commerce. I must decree in favour of the defendants, with costs.

Proctors for the plaintiff, *Toller and Sons*.
Solicitor for the defendant, *Thomas Cooper*.

COURT OF APPEAL IN CHANCERY.

Reported by E. STUART ROOME and H. PRAT, Esqrs.,
Barristers-at-Law.

Tuesday, July 23, 1872.

(Before the LORDS JUSTICES.)

ALEXANDER v. CAMPBELL.

Marine insurance — Mutual society — Policy — Deposites — Rule requiring undertaking by mort-gagees or assignees — Condition precedent.

One of the rules of a mutual insurance association, which was incorporated in their policies, was in these words: "No member, mortgagee, or assignee, the whole or any part of whose share in a ship insured in the association shall, at the time of entering or afterwards, be mortgaged or assigned to any person or persons, shall have any claim by virtue of this policy, nor shall any assignee of such policy have a claim for any loss or damage which may be sustained by such ship unless previous to the occurrence of such loss or damage such member, mortgagee, or assignee shall have delivered to the manager an undertaking approved of by the mortgagee or assignee, whereby he shall covenant with the manager to pay and discharge all sums of money which are or may become due from such member in respect of such ship and her insurance, and in respect of the insurances under-written on his behalf in this association."

A member of the association deposited a policy of insurance on his ship with a creditor to secure payment of his debt. This creditor was also a mortgagee of the ship prior to the assignment. The depositor did not give the undertaking required by the rules, but he, in fact, paid and discharged all sums payable in respect of the ship and her insurance. The ship having been lost, the depositor filed a bill against the associa-tion to recover the money due on the policy:

Held (reversing the decision of Bacon, V.C.), that as the depositor, who was an assignee within the meaning of the rule as well as a mortgagee, had not given the required undertaking, he was not entitled to recover the money due on the policy, and that his bill must be dismissed with costs.

THIS was an appeal by the managers of the Alliance Ship Insurance Association from a decision of Bacon, V.C.

The hearing in the court below is reported ante, p. 373, where the facts of the case are suffi-ciently stated.

The Vice-Chancellor having held that the plain-tiff was entitled to receive the money due on the policy, the association appealed.

Swanston, Q.C., Miller, Q.C., and Maidlow for the appellants.—*Turnbull v. Woolfe* (2 Mar. Law Cas. O. S. 63; 2 L. T. Rep. N. S. 483; 9 Jur. N. S. 57), where Lord Westbury overruled the decision of Stuart, V.C. (3 Giff. 91), shews that the rule requiring a mortgagee to give an undertaking, will be strictly enforced by this court. In that case there was a rule almost iden-tical with the rule of the association in the present case; and the only difference between the two cases is that in that case the owner of the mortgaged ship was the plaintiff, while here the assignee is plaintiff. For that the plaintiff is an assignee within the meaning of the rule is clear from *Dufaur v. The Professional Life Assurance Com-pany* (25 Beav. 599), where a policy was to become void in certain cases, except it should have been legally assigned; and it was held that this meant validly and effectually assigned, and that an equitable charge by mere deposit came within the exception. So, too, in *Jones v. The Consoli-dated Investment Assurance Company* (26 Beav. 256), where one of the conditions of a life policy was that it should be void if the assured died by his own hand, except it should have been assigned to other parties for valuable consideration, six months before his death, it was held that a letter to a cre-ditor charging it with a floating balance due to him, and made three years previous to the death of the assured by his own hand, was within the exception. But at all events the plaintiff is mort-gagee of the ship, as appears from the ship's register, and on that ground his non compliance with the rule precludes him from recovering. Then there was such misrepresentation on the in-surer's part as to vitiate the policy altogether, and *Campbell v. Rickards* (5 B. & Ald. 840), shews that the underwriter's evidence as to the insurability of the ship is not admissible. Then the rules pro-vide that all disputes as to claims shall be referred to arbitration; and the obtaining the decision of arbitrators on the matter in dispute, is by the rules declared to be a condition precedent to the right of any member to maintain any action or suit on his policy, and that being so, *Scott v. Avery* (5 H. L. Cas. 811), shews that the plaintiff cannot sue until an award has been made. They also referred to

Hughes v. Tindall, 18 C. B. 98;
31 & 32 Vict. c. 86.

Kay, Q.C. and Marten, for the plaintiff, were not called upon as to the alleged misrepresentation, or as to the necessity of a previous submission to arbi-tration.—The defence that the plaintiff had not complied with the rule by giving the required undertaking, and therefore was not entitled to recover, was not raised by the answer, but was raised for the first time by affidavit at the hearing. *Phillips v. Phillips* (5 L. T. Rep. N. S. 655; 4 De G. F. & J. 206) shews that such a defence cannot be set up by affidavit at such a stage of the case. There is no evidence of any mortgage of the ship except the ship's register, and that evi-dence is inadmissible, no such defence having been raised by the answer. Then the plaintiff is a mere depositor of the policy, and cannot be con-

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sidered an assignee within the meaning of the rules.

Without calling for a reply.

Lord Justice James said that the plaintiff clearly was an assignee of the policy. He came to this court as equitable assignee of the policy which had been granted to someone else, and he had no title to sue for the money secured by the policy unless he was in equity the owner of it. He was an assignee of the policy within the meaning of the 15th rule; end, that being so, the words of the 15th rule which was incorporated in the policy made it quite clear that he could not recover upon the policy unless he had given the undertaking mentioned in the rule. He had also been proved by the evidence to have had a mortgage of the ship prior to the equitable assignment of the policy to him. Therefore, even if he was not an assignee of the policy, he was still subject to the 15th rule, for the fact that he was mortgagee of the ship brought him equally within that rule. His Lordship was, therefore of opinion that the defendants had made out their case. The Vice-Chancellor's decree must accordingly be reversed, and the bill be dismissed with costs.

Lord Justice MELLISH was of the same opinion.

Solicitors for the appellants, *Stocken and Jupp*.

Solicitors for the respondents, *Thomas and Hollams*.

V.C. BACON'S COURT.

Reported by the Hon. ROBERT BUTLER and T. H. CARSON,
Esq., Barristers-at-Law.

Tuesday, Nov. 5, 1872.

TANNER v. PHILLIPS.

Mortgage of ship and freight—Charter-party—Advances for ship's disbursements—Account.

By the terms of a charter-party it was provided that the charterers should advance necessary funds for the ship's disbursements, not exceeding a specified amount at the port of lading. Previously to entering into the charter-party the owner had mortgaged the ship and freight. The charterers made advances for the ship's disbursements, considerably in excess of the amount specified in the charter-party. Before the freight became due the mortgagees took possession of the ship, and stopped the cargo for freight.

Held that the charterers were not entitled to deduct from the amount due for freight the advances made by them in excess of the sum provided by the charter-party.

THIS suit was instituted by the assignees of the freight against the charterers of the ship *Pharamond* for the purpose of having an account taken of the freight earned by the ship while chartered by the defendants.

In Sept. 1862, H. J. Hall, being the owner of the *Pharamond*, mortgaged her to the plaintiff Tanner, and by a deed of even date assigned to him the freight to become due on account of the ship.

In Nov. 1863, Hall, without the knowledge of the plaintiff, chartered the *Pharamond* to the defendants Phillips and King, who had no notice of the assignment to the plaintiff.

By the terms of the charter-party the ship was to load at Algora Bay, and proceed from thence to

London, the freight to be paid on unloading and right delivery of the cargo as customary. "Necessary funds for ship's disbursements, not exceeding 150*l.*, to be advanced the master at port of loading, free of interest and commission, but subject to insurance," and the owners of the ship were to have an absolute lien on the cargo for all freight. The ship was duly loaded at Algora Bay, and while there the defendants advanced sums amounting to 289*l.* 9*s.* 1*d.* to the master of the ship, the receipts for which sums were endorsed on the charter-party.

The ship arrived in the London Docks on the 1st Sept. 1864, and on the 6th Sept. the defendants advanced a sum of 350*l.* to pay wages due to the sailors and other disbursements of the ship.

On the 8th Sept. the ship began discharging her cargo. On the 26th Sept. the plaintiff took possession of the ship, at which time the whole of the cargo had not been delivered, and on the 30th he stopped the cargo in the hands of the London and St. Katherine's Dock Company. The cargo was, however, released upon a sum of money being paid into court on account of the freight.

The question now was whether, in taking the accounts, the defendants were to be allowed to deduct from the amount due for freight the total amount which they had advanced, or only the 150*l.* as provided by the charter-party.

E. K. Karslake Q.C. and W. W. Karslake, for the plaintiffs, submitted that the advances made by the defendants, in excess of the 150*l.* which they were authorised to advance, were mere personal loans, which they were not entitled to charge against freight. They referred to—

Smith v. Plummer, 1 B. & Ald. 575;
De Silve v. Kendall, 4 M. & S. 37;
Manfield v. Matland, 4 B. & Ald. 583;
The Salacia, 32 L. J. 43, P. M. & A.; 1 Lush. Adm. Rep. 545; 1 Mar. Law Cas. O. S. 322;
Gibson v. Ingo, 6 Hare, 112;
Bristol v. Wilmors, 4 L. T. Rep. N. S. 622; 31 L. J., 467 Ch.; 1 Mar. Law Cas. O. S. 95.

W. F. Robinson, for the defendants, contended that the mortgagee could not be in a better position than the owner of the ship, and that, therefore, the sums which had been advanced for the ship's disbursements must be allowed out of freight.

THE VICE-CHANCELLOR said that the defendants' contention could not be sustained. The terms of the charter-party were quite distinct and clear that 150 and no more was to be deducted from the amount of the freight. When the mortgagees took possession of the vessel the whole amount of the freight, minus the 150*l.* authorised by the charter-party to be deducted, became payable to him. The advances in excess of the 150*l.* were mere personal loans, and had nothing to do with freight, and could not therefore, be deducted out of it.

Solicitor for the plaintiff, *Southgate*.
Solicitor for the defendants, *Cotterill*.

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STANTON V. RICHARDSON; RICHARDSON V. STANTON.

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COURT OF COMMON PLEAS.

Reported by H. H. HOCKING, and H. F. FOLLEY, Esqrs.,
Barristers-at-Law.

June 7 and 9, 1872.

STANTON v. RICHARDSON; RICHARDSON v. STANTON.

Charter-party—Ship unfit for cargo—Refusal to provide cargo—Warranty of seaworthiness—Reasonableness of cargo.

The obligation imposed upon a shipowner who has entered into a charter-party is to supply a ship that is reasonably fit to carry the cargo stipulated for in the charter-party. The respective duties of charterer and shipowner are that the charterer must offer a reasonable cargo of the kind specified in the charter, and the shipowner must provide a ship reasonably fit to carry such a reasonable cargo. (a)

If the shipowner commits a breach of charter such as to justify the charterer in not putting the cargo stipulated for on board at the moment of the breach, and it cannot be remedied within such a time as not to frustrate the object of the voyage, the charterer is altogether absolved from performance of the charter. (b)

The shipowner contracted with the charterer to load a full and complete cargo of sugar in bags, hemp in compressed bales, and measurement goods, always sufficient dead weight to ballast the vessel at Yloilo, and to sail to Cork for orders to discharge at same point in the United Kingdom.

The rates of freight for wet sugar were specified in the charter-party as higher than those for dry sugar.

Before taking cargo on board the ship was surveyed and reported to be a first-class risk, and fit to carry a dry and perishable cargo to any port of the world.

(c) The question of what is a reasonable cargo has been considered in the United States in several cases. It has been there laid down that the usual stipulation in a charter-party to take a cargo of lawful merchandise implies that the articles composing the cargo shall be in such condition, and put up in such a form, that they can be stowed without injury to each other; and that a master of a ship, therefore, may refuse to take goods offered for shipment, if in his honest judgment they are in such a condition or of such a character that they cannot be carried without injury to the rest of the cargo, without violating a charter-party containing the condition mentioned: (*Boyd v. Moss*; 7 Wallace's (U. S. Supreme Court) Rep. 316; see also *Weston v. Foster*, 2 Curtis' (U. S. Circuit Court, First Circuit) Rep. 119; and *Weston v. Minot*, 3 Woodbury and Minot's (U. S. Circuit Court, First Circuit) Rep. 436.)—Ed.

(d) This rule has been more broadly stated in America thus: "Where the whole consideration for any stipulation fails, or if it becomes impossible of being performed substantially as the parties intended, by the voluntary act of one of the parties, the other is not bound to proceed, but may decline performance on his part." (*Erving v. Catara*, 2 Gallison's (U. S. Circuit Court, First Circuit) Rep. 60-74 (per Story, J.). So in another case it was held that a stipulation in a charter-party that the chartered vessel, then in distant seas, would proceed from one port named (where it was expected she would be) to another port named "with all possible dispatch" is a warranty that she will so proceed, and goes to the root of the contract. It is not a representation that she will so proceed, but a condition precedent to a right of recovery. Accordingly, if a vessel go out of the direct course, the charterer may throw up the charter-party! (*Lover v. Bangs*, 2 Wallace's (U. S. Supreme Court) Rep. 728.) The reason of this is manifest. The delay caused by the deviation frustrated the object of the voyage, and the voyage becomes impossible of being performed as the parties intended, time being an essential element of the contract.—Ed.

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A cargo of wet sugar in bags was then shipped by the charterer, but when the bulk had been put on board it was discovered that there was such an accumulation of molasses in the hold, the result of drainage from the sugar, that the ship would not be seaworthy in her then state; nor could the pumps, in consequence of being clogged, get rid of the drainage, although they were in every respect sufficient for ordinary purposes; nor could any pumps be obtained sufficient to deal with the drainage in a less time than six or seven months.

The ship was ultimately unloaded, and the cargo went to Europe in another vessel, when the charterer refused to load another cargo.

Cross actions were brought—one by the shipowner against the charterer—for refusing to load a cargo, and also for loading a cargo in such an unfit condition that the ship could not prosecute her voyage. The other action by the charterer against the shipowner for his not taking proper precautions to keep his ship fit for the voyage, and to recover damages for injury to the cargo.

The jury found at the trial, in answer to the judge, that the cargo was a reasonable cargo to be offered; that the ship was unfit to carry the cargo offered to her, or any cargo of wet sugar; that the damage to the sugar was caused by the ship not being reasonably fit to carry a reasonable cargo of wet sugar; and that the ship would not have been seaworthy without new pumps and with a cargo of wet sugar on board:

Held, that the shipowner was bound to provide a reasonable ship to carry reasonable cargo of the kind specified in the charter party, that the charterer was bound to offer such a cargo, and that by reason of the unfitness of the ship the charterer was entitled to recover; also, as the jury had found that the shipowner could not remedy the defects in his vessel within such a reasonable time as not to frustrate the object of the voyage, the charterer must be taken to be absolved altogether.

THESE were cross actions between the owner and charterer of a ship called the *Isle of Wight* upon a charter-party.

In the action by the shipowner Stanton against Richardson the charterer of the ship, the declaration set out the charter-party in full, and then alleged as breaches that the defendant neglected and refused to load a full and complete cargo on board the ship, and that he neglected and refused to pay the freight.

The second count alleged that the defendant loaded a large portion of the cargo, to wit, sugar in bags, and the same was afterwards properly and necessarily for the safety of the ship and cargo landed by the master at the port of lading, on account of a part thereof being in a damaged state in the hold of the vessel; and that all conditions were performed and all times elapsed, and all things were done necessary to entitle the plaintiff to reload the said portion of the said cargo, and to have the residue of the cargo supplied; yet the defendant refused to allow the said portion to be reloaded, and to have the residue of the cargo supplied, &c.

The third count was similar to the second. The fourth count set out the charter-party, alleging as breaches of the said charter-party, that though a large portion of the cargo, consisting of sugar in bags, was loaded on board the ship by the defendant, a portion of it was in such a bad, dangerous, and unfit state for conveyance in the ship, that the

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same damaged and injured the ship and her pumps and also the residue of the sugar, so that the ship could not safely set sail and proceed on her voyage whereby the plaintiff was injuriously affected and suffered damage, &c.

The fifth count was an ordinary money count. The defendant by his pleas traversed all the allegations in the declaration, and further pleaded that the ship was not light, staunch, and strong, or fit to receive and carry a cargo as she was required to be according to the true intent and meaning of the charter-party; and that the defendant could not, although he was ready so to do, safely or securely load on board the ship a full and complete or any cargo, and by reason of the condition of the ship was prevented from deriving any benefit from the charter-party, and the consideration for the same wholly failed.

The plaintiff took and joined issue on all the defendant's pleas.

In the second action by the charterer (Richardson) against the shipowner (Stanton) the first count of the declaration after setting out the terms of the charter-party, alleged as a breach, that the master did not take all proper means to keep the ship tight, staunch, and strong, well manned and sound, and in every way fitted for the voyage, and that the ship at the time of receiving the cargo on board was not a good risk for insurance, and did not load and carry a full and complete or any cargo according to the charter-party; whereby the plaintiff lost the benefit of the charter, and was put to great expense in landing the cargo, and warehousing the same, and was compelled to ship the cargo by another vessel, and a section of the cargo which had been loaded on board the ship was either lost or much damaged and injured, &c.

The second and third counts respectively alleged bailments of certain goods to the defendant to carry in his ship, and alleged damage to the goods through the negligence of the defendant and his servants, and through the defective and unseaworthy condition of the defendant's ship.

The fourth count contained the money counts in the usual form. The defendant by his pleas traversed all the material allegations. Upon which pleas issue was joined.

The material facts of the charter-party, as far as is sufficient to understand the present case, were as follows: It was agreed between the master of the ship called the *Isle of Wight* for and on behalf of himself and the owner of the said vessel of the one part, and the Borneo Company (Limited) as agents for and on behalf of the charterer of the other part, that the said master should, after having discharged his inward cargo with all proper dispatch, "sail for Manilla, or as near thereunto as he might safely get for orders to load within, there or at Yloilo or at Zebu, the following cargo of lawful merchandise, &c., a full and complete cargo of sugar in bags, hemp in compressed bales, ^{and} measurement goods, always sufficient dead weight to ballast the vessel;" and that the vessel, being so loaded, should sail to Cork or Falmouth for orders to discharge in a port in the United Kingdom or in Europe, between Havre and Hamburg. The provisions concerning rate of freight specified that the rate should be 4l. 2s. 6d. for dry sugar, 4l. 5s. for wet sugar, and 4l. 15s. for hemp and measurement goods. The charter did not

commence with the usual clause as to the vessel being tight, staunch, and strong, but contained the following provision: "The master engages that the vessel, before and when receiving cargo, shall be a good risk for insurance; and he will when required, provide a survey report declaring her to be so; and during the voyage the master shall take all proper means to keep the vessel tight, staunch, and strong, well manned and provided, and in every way fitted and provided for the voyage."

These cross actions were tried at the sittings in London after Hilary Term, before Brett, J. and a special jury, when the following facts were proved: The *Isle of Wight* proceeded to Manilla, and thence in consequence of orders received from the charterer's agent, to Yloilo, a port in the Philippine Islands. In pursuance of the terms of the charter-party, wherein it was agreed she should be surveyed at Yloilo, she was overhauled, and reported to be a first-class risk, and fit to carry a dry and perishable cargo to any part of the world. A cargo of what is known as wet sugar in bags was provided for her by the charterer. It appears that a very large quantity of moisture drains from cargoes of wet sugar, and when the bulk of the cargo had been loaded it was found that there was such a large accumulation of molasses in the hold, the result of the drainage from the sugar, that the ship would not be seaworthy for the voyage if she proceeded in the condition she then was. Efforts were made to get rid of the drainage from the sugar by pumping the ship. The pumps were in good repair, and of the usual kind for a ship of the character of the *Isle of Wight*, and quite sufficient for all ordinary purposes; but owing to the depth of the ship's hold, and the nature of the material, they were unable to deal with the drainage of the sugar. The ship was perfectly seaworthy, except with respect to this particular cargo of wet sugar, and the incapacity of the pumps to deal with it. Eventually it became necessary to unload the cargo again, and warehouse it at Yloilo, whence it was afterwards, by arrangement between the parties, sent to Europe in another ship called the *Milton*. The charterer refused to provide another cargo. It appeared that there was no means of obtaining any other pumps for the purpose of pumping out the drainage from the sugar, except by sending for them to Manilla, and it would have taken a very considerable period (six or seven months) before they could be procured. At the trial the learned judge left the following fourteen questions to the jury, but the jury gave the replies thereto appended.

1. Did the charterer in the first place offer a full cargo?—Yes.
2. Did the charterer refuse to allow the cargo to be re-shipped, or any cargo, after the first was discharged, to be shipped and carried in the *Isle of Wight*?—Yes.
3. Was the sugar shipped on board the *Milton* by mutual consent?—Yes.
4. Was the sugar which was offered to the captain a reasonable cargo to be offered?—Yes.
5. If not, was the defect such, and so apparent, that a captain of ordinary care and skill, if he meant to object to it, ought to have objected to it.
6. Was the ship reasonably fit to carry a reasonable cargo of Yloilo wet sugar?—No.
7. Was the ship fit to carry the cargo that was offered to her?—No.
8. Did the captain use reasonable skill and care

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in the treatment of the cargo delivered to him?—No.

9. Was the damage suffered by the sugar the result of its own defective condition, without any defect in the ship or any default in the captain?—No.

10. Was the damage to the sugar caused by the unfitness of the ship to carry the cargo offered to her, or by the ship being unreasonably unfit to carry a reasonable cargo of Yloilo wet sugar, or by want of reasonable care or skill of the captain in treating the cargo delivered to him?—Yes.

11. If the ship was defective, was the captain willing and able to make her fit within a reasonable time?—Willing, but not able.

12. Was he willing and able to make her fit within such a time as would not have frustrated the object of the adventure?—Willing, but not able.

13. Would the ship, without new pumps, and having the sugar that was offered to her on board, have been seaworthy?—No.

14. Would the ship, without new pumps, and with a reasonable cargo of Yloilo sugar on board, have been seaworthy?—No.

The learned judge, upon these findings of the jury, directed the verdict to be entered for the charterer in both actions, and reserved leave to the shipowner to move to enter a verdict for him; the court to be at liberty to make all amendments that the judge ought to have made. It was agreed that the damage in both actions should be referred.

Upon a former day *Henry James, Q.C.*, obtained a rule nisi to enter the verdict, pursuant to the leave reserved, on the ground that Richardson, the charterer, had no right to throw up the charter-party and refuse to load a cargo; and that upon the finding of the jury, Stanton the shipowner, was entitled to have the verdict entered for him, and also for a new trial, on the ground of misdirection on the part of the judge in directing a verdict to be entered for Richardson upon the findings of the jury, and in telling the jury that there was a warranty on the part of the shipowner that the ship was fit to carry a reasonable cargo of Yloilo wet sugar; and that there was an obligation on the part of the shipowner and master of the ship to have the ship in a state fit for such a cargo, and that the master should possess the necessary knowledge enabling him to deal with and manage such a cargo; and in telling the jury that the shipowner was bound within a reasonable time to make the ship fit to take such a cargo, and to do so within such a time as would not frustrate the objects of the adventure, or upon the ground that the verdicts were against the weight of evidence; first in the answers given by the jury to the sixth, seventh, and fourteenth questions; secondly, in the answers to the eighth, ninth, and tenth questions; and, thirdly, in the answers to the eleventh and twelfth questions.

Sir John Karslake, *Q.C.*, Butt, *Q.C.*, and J. G. Mathew, showed cause.—There is no doubt, looking at the words of the charter-party, that wet sugar may be loaded if it is a reasonable cargo, and the jury have found that wet sugar is a reasonable cargo. There is an express provision in the charter-party that the ship shall be a good risk for insurance at the time she received her cargo, so that it was intended that the ship should be seaworthy with regard to the particular cargoes

specified; but the jury by their findings prove that the ship was not fit, and that she could not within a reasonable time have been made fit for the purpose for which she was chartered; and where such is the fact it is established by the cases that when the default on the shipowner's part goes to the whole consideration, that is an answer to the charterers refusing to provide a cargo. In *Tarabochia v. Hickie* (1 Ex. N. S. 186; 21 L. J., Ex. 26) it was held the stipulations in a charter-party that "the vessel being tight, staunch, and strong, and shall sail with all convenient speed," are not conditions precedent to the charterers' obligation to load, unless by the breach of such stipulations the object of the voyage is wholly frustrated. Pollock, *C.B.*, says: "The question is whether the lock of the vessel not being tight, strong, and watertight is a condition precedent to the performance by the defendant of his contract. I think not." In like manner it is not a condition precedent that the vessel should sail with convenient speed or in a reasonable time. Where, indeed, the charter-party provides that the vessel should sail on a particular day, that is a condition precedent. The distinction is obvious. In *Abbot on Shipping*, part 4, c. 1, s. 5, it is said: "Whether or not a particular covenant by one party be a condition precedent, the breach of which will dispense with the performance of the contract with the other, or an independent covenant, is a question to be determined according to the fair intention of the parties to be collected from the language employed by them." An intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed. The general rule laid down by Lord Ellenborough *Daivson v. Gwynne* (12 East 381) is, "that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered a condition precedent, but as a distinct covenant for the breach of which the party injured may be compensated in damages." See also *Behn v. Burness* (1 Mar. Law Cas. O. S. 178, 329; 3 B. & S. 751; 32 L. J. 204, Q. B.). In *McAndrew v. Chapple* (2 Mar. Law Cas. O. S. 339; L. Rep. 1 C. P. 643; 14 L. T. Rep. N. S. 556) Willes, *J.*, says, "It is settled that a delay or deviation which goes to the whole root of the matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship is an answer to an action for not loading a cargo; but that loss, delay, or deviation short of that gives an action for damages, but does not defeat the charter." This case nearly resembles a contract for the supply of goods which shall answer a certain description, and he fit for a specific purpose for which they were ordered. In *Redhead v. The Midland Railway Company* (L. Rep. 2 Q. B. 433; 16 L. T. Rep. N. S. 485), there was a distinction drawn between the two classes of carriers who convey goods by sea and by land. The shipper of goods has a right to expect a seaworthy ship, and may sue the shipowner if it is not, and if the obligation on the part of the shipowner to provide a ship reasonably fit for the voyage is absolute, a failure on his part to fulfil that obligation is enough to put an end to the liability of the charterer to load a cargo. It would be absurd to say that the charterer is to load a cargo on board an unseaworthy and unfit ship—for instance to put silk into a leaky ship—

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and therefore the charterer was not bound to reload; and, according to the learned judge's finding, he was totally absolved from the obligation of providing a cargo, and was entitled to recover damages for the breach of contract on the part of the shipowner:

Clapham v. Langton, 2 Mar. Law Cas. O. S. 54; 10 L. T. Rep. N. S. 875.

Burgess v. Wickham, 1 Mar. Law Cas. O. S. 303; 3 B. & S. 609.

Knill v. Hooper, 26 L. J. 377, Ex.; 2 H. & N. 277.

Thompson v. Gillespie, 5 E. & B. 209.

Lyon v. Malla, 5 East. 427.

Torres v. Henderson, 4 Ex. 890.

Gibson v. Small, 4 H. of L. 353.

Abbott on Shipping, 5th edit. 218; 11th edit. 321.

Pothier, Charterparty.

Bell's Commentaries on the Laws of Scotland, s. 407.

Cliphaw v. Vertue, 5 Q. B. 265.

Henry James, Q.C., Watkin Williams, and Cohen in support of the rule.—One of the questions for the court to decide is whether the shipowner was bound to provide a ship to carry such a cargo as was offered him. The ship was seaworthy, and fit to carry any ordinary cargo, but the wet sugar choked her pumps, and rendered her unseaworthy only so long as the wet sugar was on board. On the removal of the cargo, the ship was at once fit to take goods of any other quality on board. It cannot be said that the shipowner is to go to the expense of altering his ship for the purpose of carrying a particular cargo; for although the charter-party specifies that the charterer may load various cargoes of lawful merchandise, the intention must be taken to be such cargoes, as are suitable for the ship. The charterer must be satisfied that the ship which he chartered is fit for the purpose for which he employs her, and if he chartered a ship which is unsuitable for the cargo, that is not the shipowner's fault; and it would be hard indeed on the shipowner if he were to be called upon to adapt his ship to suit the nature of a cargo the character of which must naturally be more within the knowledge of the charterer than of the shipowner. The specification of a cargo as it appears in the charter-party refers only to a cargo of ordinary description, and not to an extraordinary cargo as this was. For instance, if the specification was for machinery, and no measurements were given, would the charterer be at liberty to offer, and would the shipowner be bound to accept, machinery of such a size that it would be impossible to get it into the hold without taking up the decks? The shipowner is bound to do what he can, I admit, to carry the cargo, but not to go to such extraordinary length as to alter the structure of the ship. As to the finding of the jury, that the captain did not use reasonable skill and care in the treatment of the cargo delivered to him, it is contended that the obligation is to bring reasonable skill and care to the case of an ordinary cargo; but he cannot be expected to have any special knowledge necessary to the management of an exceptional cargo. If the charterer could show that the ship could not be of any use whatever to him, he might repudiate the contract; but if he cannot show such to have been the case, the whole consideration has not failed, and his remedy is by cross-action for any damage he may have suffered: (*Behn v. Burness*, 1 Mar. Law Cas. O. S. 178, 329; 3 B. & S. 752; 32 L. J. 204, Q. B.) Any other cargoes specified in the charter-party, except the one in question, could have been taken by the ship, and even this could have been carried with considerable delay. The cases lay it down

that the whole purpose of the adventure must be rendered impossible to exonerate the charterer.

Tarrabochia v. Hickie, 26 L. J. 26, Ex.;

McAndrew v. Chapple, 2 Mar. Law Cas. O. S. 339; 14

L. T. Rep. N. S. 550;

Dimech v. Corlett, 12 Moore, P. C. 199;

Blasco v. Fletcher, 1 Mar. Law Cas. O. S. 380; 9

L. T. Rep. N. S. 100; 14 C. B., N. S. 147.

Even if the charterer would have been entitled in the first instance to refuse to load a cargo, on the ground that the ship was not fitted with sufficient pumps for a cargo of wet sugar, having loaded the sugar he had waived the condition precedent, and could not reject the ship, because the parties could not be placed in their former position.

BOVILL, C.J.—The verdict in both these actions was for the charterer, the defendant in the first action and the plaintiff in the second. A rule was obtained on behalf of the shipowner to enter a verdict for him in both actions on the findings of the jury or for a new trial, on the ground of misdirection, and that the verdict was against the evidence. After hearing the evidence given at the trial read over, I have come to the opinion that the findings of the jury were in accordance with the verdict. My brother Brett is not dissatisfied with the verdict; and, on the whole, it does not appear to me that there is any sufficient ground for disturbing the verdict on any of the questions that were left to the jury. With regard to the motion to enter the verdict, or for a new trial on the ground of misdirection, the matter depends upon the relative obligations of the shipowner and the charterer. The facts with reference to this question are not in dispute. The ship was good and sound enough for all ordinary purposes, and the cargo was a proper cargo for a ship that was suitable to carry it. The charter-party into which the parties entered was not quite in the ordinary form with regard to the fitness of the ship. The usual terms do not occur in the beginning; but the contract which is between the master of the one part on behalf of the owner, and agents of the charterer of the other part, is that the master, after having discharged his inward cargo, shall sail for Manila for orders to load within three or at Yloilo, the following cargo of lawful merchandise, namely, a full and complete cargo of sugar in bags, hemp in compressed bales, and measurement goods. In that part of the charter nothing is said as to the nature of the sugar, but in the clause relating to the rate of freight it is provided that the rate shall be 4l. 2s. 6d. for dry sugar and 4l. 5s. for wet sugar. Towards the end of the charter is this engagement by the master "that the vessel before and when receiving cargo shall be a good risk for insurance, and he will when required, provide a survey report declaring her to be so; and during the voyage the master shall take all proper means to keep the vessel tight, staunch, and strong, well manned and provided, and in every way fitted and provided for the voyage." Under this charter the charterer was clearly at liberty to offer a cargo of wet sugar. He was clearly at liberty to load the ship at Yloilo. It appears to be well understood that the sugar, which at that port is wet sugar, is of such a description that there is a considerable drainage from its molasses and moisture. Under such a charter there is no doubt that the cargo offered must be a reasonable cargo of the description specified; but I am not aware of any authority to support the proposition that the charterer is

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bound to offer a cargo suitable to the particular ship in the state in which she is at the time of loading. The only limit with respect to the nature of the cargo which the charterer may ship appears to be that of reasonableness. Mr. James suggested, as an illustration of his contention, the offer of exceptionally large pieces of machinery or heavy guns under a charter which simply provided for a cargo of merchandises. The answer to the argument derived from that illustration appears to be that in such a case the jury would probably say that such a cargo was not a reasonable cargo to offer. That seems to me to be the only mode in which such a case can be disposed of. Another illustration may be taken. Suppose the charter provided for a cargo of cattle, could it be said that the charterer was bound to offer a cargo of cattle suitable to the ship in the state she was at the time? If the ship was not properly fitted to receive a cargo of heavy cattle, is the charterer to be bound to provide a cargo of light cattle? I think the ship must be fit to receive any reasonable cargo of the nature that the shipowner undertook to carry. The jury in the present case found that the sugar offered was a reasonable cargo to be offered. They have also found that the ship was not reasonably fit to carry a reasonable cargo of Ylolo sugar. There is a further finding that the captain, though willing, was unable to make the ship fit to carry the cargo within a reasonable time, or within such a time as not to frustrate the object of the venture. The reason of the unfitness of the ship arose from the nature of the sugar and the character of the pumps. If the cargo had remained on board, or had been reloaded, the pumps being wholly unequal to dealing with the accumulation of the drainage from the sugar, the safety of the vessel would have been endangered and the cargo wholly ruined and rendered unmerchantable. The jury having found that the vessel was not only unfit, but that she could not have been made fit in such time as not to frustrate the object of the adventure, the question arises, what is the obligation of the shipowner with reference to a ship chartered to carry a particular sort of goods? It seems to me that he is bound to furnish a vessel fit to carry the cargo that the charterer has undertaken to put on board. There are additional terms in this charter, viz., as to what is to be done during the voyage, and that the vessel is to be a good risk before and at the time of receiving the cargo. The jury found that the vessel at such time was unfit to receive the cargo. Is there any obligation, under such circumstances, on the charterer to load, or if, having been loaded, the cargo is obliged to be immediately discharged, as here, to reload? The question appears to me to answer itself. The charterer is not bound to load or reload unless the ship is fit to receive the cargo and to carry it. It is said there was an absence of authority as to the exact obligation of the shipowner in relation to these questions. This may arise from the absence of doubt as to the nature of such obligation. There seems to me, however, to be sufficient authority for the propositions for which I am now contending Lord Ellenborough, in the case of *Lyon v. Mells* (5 East. 429), said, "In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, implied

by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public." It is true that these observations apply chiefly to persons following a public employment, and are made on the footing that the nature of such employment will be a guide to what the contract must be between the parties. But in a late case before Lord Ellenborough, a similar question arose under a charter-party. That case is *Hawcock v. Geddes* (10 East. 564); and there Lord Ellenborough says, "Had the plaintiff's neglect precluded the defendants from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted as an entire bar." That was because then the consideration would have wholly failed. Here the jury found that what occurred did wholly frustrate the objects of the voyage, and so this case comes distinctly within the doctrine laid down in the passage I have cited. It was argued by Mr. Williams that this doctrine about frustrating the objects of the voyage was a new doctrine introduced by the case of *Tarrabochia v. Hickie* (1 H. & N. 183; 26 L. J. 26 Ex.) This is not really so, in my opinion. Several other cases, establishing the same principle, have been referred to in the argument, which are much older than *Tarrabochia v. Hickie*, and especially the case of *Freeman v. Taylor* (8 Bing. 124). The question there was one of deviation. Tindal, C.J. laid it down to the jury that if the deviation was so long and unreasonable as that in the ordinary course of mercantile business it would frustrate the whole object of the voyage, the contract was at an end. He left the case to the jury precisely as my brother Brett left the present case, and the court, after taking time to consider, upheld his ruling. The same doctrine may be traced back as far as the case of *Cometella v. Cloberris* (Palm. 397), where the covenant was to sail with the first wind. It appears to me, therefore, in the present case, that the object of the voyage being frustrated the charterer was not bound to load a cargo. It is true that he did load a cargo in the first instance, but after it was so loaded it had to be removed from the vessel, because she was unfit to carry it. It appears to me that the same reasoning applies to the question whether he was bound to reload as applies to the question of his obligation to load. The question may be regarded from another point of view. When there are concurrent acts to be performed on each side, as for instance, where one is to receive cargo and the other to deliver it, the party who claims for a breach of the contract must have been ready and willing to do his part. The jury having found that the ship could not have been made fit within a reasonable time, or such a time as that the object of the voyage would not be frustrated, that finding appears to me to amount to a finding that the shipowner was not ready and willing to receive the cargo offered. For these reasons I think the verdict must stand, and the rule be discharged.

BYLES, J.—I am of opinion that in these cross actions the charterer is entitled to the judgment of the court, and to hold his verdicts. In other words, that the ship was to blame, and not the sugar. The charter-party provides in express terms that wet sugar may be shipped, but at a higher rate of freight than dry sugar. The evidence shows that the ship's pumps were of such a size, diameter, and description that they would not and did not discharge the water mixed with

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the drainage of the wet sugar; the ship, therefore, was not, in respect of the pumps, reasonably fit to carry the goods, that is to say, the wet sugar she had contracted to carry. The charterer knew nothing of the existing pumps, neither their power or capacity. The shipowner or captain was bound to know, and did know. The charterer, perhaps, knew nothing of the disproportion of the thick drainage to the power of the pumps. The jury have found the negligence to be in the shipowner. My brother Brett's directions, which were in accordance with this view of the case, seem to me to be unassailable. The learned judge is not dissatisfied with the verdicts in these cases, therefore they must stand.

BRETT, J.—It seems to me that three questions arise in this case. First, whether the correct questions were left to the jury; secondly, if so, and they were properly answered, what is the effect of such answers on the rights of the parties? thirdly, whether they were properly answered. The answer to the first question seems to depend on what the rights and obligations of the parties are. It appears to me they must be decided by the written contract, the construction of which is for the court, without regard to any consideration as to the knowledge of either party, and with respect to the charterer of the ship and cargo. Such considerations are immaterial with respect to a written contract. The contract is a charter-party, by which the charterer is to have the option of loading a full and complete cargo of sugar in bags, hemp in compressed bales, ^{and} _{or} measurement goods. This stipulation, giving an option as to the nature of the cargo, is in favour of the charterer. Amongst the things which the charterer has the option of shipping is a cargo of wet sugar; the shipowner undertakes to carry such a cargo. In addition, the shipowner took on himself the obligation to provide a vessel that should be a good risk for insurance, and procure a survey report proving her to be so. It was argued that by virtue of that stipulation the shipowner was bound to provide a ship that was seaworthy when the cargo was on board or whilst loading. I should be sorry to rest my decision on that express undertaking. I think the question turns on another undertaking, not express, but implied. I admit that some of the questions that were put to the jury may not, in point of form, define with perfect strictness the obligations of the shipowner, and the rights of the charterer; but it appears to me that, taking all the questions together, in substance the case was correctly presented to the jury. It is found that the cargo offered was a reasonable cargo; and therefore the answers to questions six and seven become in the event equivalent to one another. What then is the effect of these findings, considered with regard to the reciprocal duties arising between the charterer and shipowner from the mere fact of their having entered into an ordinary charter-party? It seems to me that the obligation of the shipowner is to supply a ship that is seaworthy in relation to the cargo which he has undertaken to carry. I do not think, however, that this proposition completely expresses his liability, though the proposition I am about to state with regard to such liability in many cases may amount to the same thing only in effect. I think the obligation of the shipowner is to supply a ship reasonably fit to carry the cargo

stipulated for him in the charter-party. This appears to be the measure of his liability, as stated in the case of *Lyon v. Mills* (5 East, 427), and by Lord Wenlaydale in the case of *Gibson v. Small* (4 H. L. Cas. 353), and again by Lord Ellenborough in *Havelock v. Geddes* (10 East, 536). The same rule is adopted in the edition of Abbott on Shipping, by Shee, J., and by my brother Blackburn in the case of *Redhead v. The Midland Railway Company* (16 L. T. Rep. N. S. 485; L. Rep. 2 Q. B. 412), and affirmed on appeal (20 L. T. Rep. N. S. 628; L. Rep. 4 Q. B. 379). It is argued that the charterer is bound to ship a cargo that is suitable for the particular ship. That would be to destroy the option that is expressly reserved by the charter-party to him. With all the assistance rendered to me by counsel, I can find no more decisive mode of stating the true proposition with regard to the duties of charterer and shipowner than that the one must offer a reasonable cargo of the kind specified in the charter, and the other must provide a ship reasonably fit to carry such a reasonable cargo. In truth, it often happens in jurisprudence that the law can lay down only such general rules, leaving the application of them to the particular facts to be determined by the findings of the jury. If such be the rights and duties of the parties, what is the effect as to these two actions? With respect to the action by the charterer, he sues for damages for not providing a ship according to the charter. For the purposes of that action, it is sufficient to hold that by reason of the unfitness of the ship there was a breach of contract, and all damages necessarily occasioned by such breach of contract *ex. gr.* damage to the sugar, and expenses are recoverable. With regard to the action for not loading or not reloading, the further question arises whether under the circumstances the charterer had a right to refuse to load or to reload. In this action we must decide whether there was not only a breach of contract, but such a breach of contract as entitled the charterer to refuse to load or to reload. The question in such cases is said to be whether the warranty was a condition. I apprehend that a stipulation amounting to a condition is necessarily also a warranty, and there may be circumstances preventing its being treated as a condition, and then it is only available as a warranty; as, for instance, when the stipulation is that the ship shall be ready to load within a fixed time, or a reasonable time, and the cargo is loaded and carried. Though before loading this might be a condition precedent, inasmuch as the charterer has loaded and derived benefit from the charter, he cannot rely on it as a condition, but must treat it as a warranty. The question, therefore, here is: Whether the unfitness of the ship may be treated as a breach of a condition precedent; that is to say, whether it amounted to a breach of contract entitling the charterer to refuse to load or to reload. I think the questions as to loading and reloading are the same, for in my opinion the effect of the agreement between the parties was that the matter should be treated as if the charterer had a cargo ready to load and refused to load it. Now, assuming that to be so, and the findings to be correct, the jury have found that the ship was not reasonably fit to carry the cargo, and that she was so unfit as to be unseaworthy with the cargo on board. But it is not necessary to decide whether the charterer would be entitled on account of such

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unfitness and unseaworthiness to reject the ship at once, for the jury have gone further, and found that not only was the ship unfit and unseaworthy, but also that she could not be made reasonably fit and seaworthy, not only within a reasonable time, but within such a time as would not entirely frustrate the whole adventure. It seems to me that the conclusion to be drawn from all the cases analogous to this, is that if the breach of contract by the shipowner be such as to justify the charterer in not putting the cargo on board at the moment of the breach, and it cannot be remedied within such a time as not to frustrate the object of the voyage, this absolves the charterer altogether. It would be a gross injustice if it were otherwise. The charterer must be taken to have entered into the contract with the usual mercantile objects of such a contract, which objects must be taken to be known also to the shipowner, and it cannot be that the shipowner is to hold the charterer to his bargain if these objects are frustrated. If in such a case as the present he were bound to put the cargo on board in the first instance, he clearly was not bound to reload after what occurred. The only remaining question is whether the findings of the jury were against the evidence; and with regard to this question, I cannot say that after the case was fully gone into, there appeared to me to be much difficulty with regard to the facts. It seems to me that the verdicts ought not to be disturbed, and for these reasons the rule must be discharged. *Rule discharged.*

Attorneys for charterer, *Waltons, Bubb, and Walton*; for shipowner, *Thomas and Hollams*.

Thursday, Nov. 14, 1872.

THARIS SULPHUR COMPANY v. LOFTUS.

Arbitration—Average adjuster—Liability for want of care.

Declaration that the plaintiffs were owners and consignees of cargo on board a vessel, and that it became necessary to adjust certain average and other losses, and thereupon the master of the vessel, on behalf of the owners and of the plaintiffs, retained and employed the defendant as an average adjuster to investigate vouchers and accounts and settle and adjust an average statement; that the defendant accepted and entered upon the retainer and employment, and thereupon it became his duty to take due and proper care and use proper skill and diligence, &c. Yet the defendant did not take due and proper care, but conducted himself so carelessly that the statement made up by him was erroneous, whereby, &c.

Plea, that before the making of the said average statement by the defendant, it was agreed between the plaintiffs and the shipowners that it should be referred to the defendant to ascertain and adjust the amount to be paid by the plaintiffs in respect of such losses, and the plaintiffs agreed to abide by his decision, and the defendant, acting in good faith, made the said erroneous statement.

Demurrer.

Held, that the plea was good, for the defendant came within the protection afforded by the law relating to arbitrators and was not liable for negligence.

DECLARATION in the following terms:—

"Whereas Henry M. Loftus was summoned to answer the Tharis Sulphur and Copper Com-

pany, Limited, in the Court of Passage of the Borough of Liverpool, in the County of Lancaster, by virtue of a writ of summons duly issued on the first day of September in the year of our Lord 1871 out of the last mentioned Court, and by a writ of *certiorari* duly issued on the third day of October in the year of our Lord 1871 out of the Court of Common Pleas at Lancaster, Liverpool District, and directed to the judge of the said Court of Passage, the said action with all things touching the same were sent into the said Court of Common Pleas at Lancaster. And hereupon the said Tharis Sulphur and Copper Company, Limited, by William Grandy Bateson, their attorney, declare against the said Henry M. Loftus, for that before and at the time of the retainer and employment of the defendant, and of his committing the grievances hereinafter mentioned, the defendant carried on and exercised the business of an average adjuster; that before the said retainer and employment, and before the committing of the said grievances, a vessel called the *Emma*, having on board a large cargo of copper ore of which the plaintiffs were the consignees and owners, whilst on her voyage from Huelva to Liverpool, met with tempestuous weather and sustained injuries, and her said cargo became damaged, and she was thereby compelled to put into a port of distress for repairs and other necessary purposes, and incurred certain general average and other losses, charges, and disbursements, which said losses, charges, and disbursements, upon the arrival of the said vessel at Liverpool aforesaid, it became and was necessary to adjust and apportion in manner by usage and custom used and approved, and thereupon the master of the said vessel on her arrival at Liverpool aforesaid, as well for and on behalf of the owners of the said vessel as for and on behalf of the plaintiffs as such consignees and owners of the said cargo as aforesaid, at the request of the defendant, and for reward to him in that behalf, retained and employed the defendant as such average adjuster as aforesaid to investigate and examine the vouchers and accounts of the said losses, charges, and disbursements, and to settle, adjust, make up, and prepare a statement showing the proportion of the said losses, charges, and disbursements to be contributed and borne by the said ship her freight and cargo respectively, according to the usage and custom of Lloyd's, and the defendant then accepted and entered upon such retainer and employment, and thereupon it became and was the duty of the defendant, as such average adjuster as aforesaid under the said retainer and employment, to take due and proper care, and to use and employ proper skill and diligence in and about the investigation and examination of the vouchers and accounts of the said losses, charges, and disbursements, and in and about settling, adjusting, making, and preparing a statement showing the proportions of the said losses, charges, and disbursements to be contributed and borne by the said ship, freight, and cargo respectively, according to the said usage and custom. Yet the defendant, not regarding his duty in that behalf, would not take due and proper care, and would not use and employ due and proper skill and diligence in and about the investigation and examination of the said vouchers and accounts, and in and about settling, adjusting, making, and preparing the said statement, and conducted himself so carelessly, negligently, and unskillfully in that behalf that by

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and through the carelessness, negligence, and unskillfulness of the defendant in that behalf, the said statement so settled, adjusted, made up, and prepared by him was incorrect, erroneous, and imperfect, and was incorrect, erroneous, and imperfect in this, that the proportion of the said losses, charges, and disbursements to be contributed and borne by the said cargo of the plaintiffs was stated, adjusted, and settled at a much larger amount than the same ought to have been stated, adjusted, and settled at, according to the said usage and custom; and in this, that certain special charges were stated, adjusted, and settled as payable by the said cargo of the plaintiffs which were not so payable according to the said usage and custom, whereby and by reason of the premises the plaintiffs confiding in the defendant's performance of his said duty, and not knowing of the breach of the same as aforesaid, and believing that the said statement so settled, adjusted, made up, and prepared, was accurate and correct, and properly made up, adjusted, and prepared according to the said usage and custom, and that the proportion of the said losses, charges, and disbursements in and by the said statement stated, adjusted, and fixed as payable by the said cargo of the plaintiffs was the correct and proper portion payable by the said cargo, and that the said other charges were properly payable by the said plaintiffs' cargo according to the said usage and custom, paid to the owners of the said vessel the said incorrect and excessive proportion of the said losses, charges, and disbursements stated, adjusted, and settled by the defendant in the said statement and the said special charges. And by reason of the premises the plaintiffs have lost and been deprived of the moneys so paid by them over and above what they would otherwise have paid."

Fourth Plea: And for a fourth plea the defendant says that before the making of the said statement by the defendant, an agreement in writing was made between Edward James Brown, master of the said vessel, of the one part, and a certain firm under the style of Messieurs Tennants and Company, as and being the agents of the plaintiffs in that behalf, of the other part, which said agreement was in the words and figures following, namely:—

This agreement made the twenty-eighth day of April, 1871, between Edward James Brown, master and owner of the English schooner or vessel, the *Emma*, of the first part and Messieurs Tennants and Company (which includes all members of that firm), of 20, Red Cross Street, Liverpool, in the County of Lancashire, merchants, being the owners or consignees of cargo by the said vessel, of the second part. Whereas the said vessel, the *Emma*, laden with a cargo of copper ore, sailed from Huelva on the nineteenth day of December, 1870, on a voyage for Liverpool, and on such voyage she encountered a series of heavy storms and seas, and was obliged to put back to Cadiz, and thereby and in consequence thereof considerable damage or loss has been occasioned or sustained to the cargo, and various expenses and disbursements have been incurred, and it will be necessary to have a general average or contribution in respect thereof, to which the said parties hereto of the second part are liable to contribute. Now these presents witness that in consideration of the engagements and agreements of the said parties hereto of the second part, the said Edward James Brown doth hereby engage and agree with the said parties hereto of the second part that he, the said Edward James Brown, will deliver or cause to be delivered at reasonable request and time the said cargo laden on board the said vessel unto the said parties hereto of the second part, their factors, agents, and assigns, and permit them to receive and take possession and remove the same according to their rights, possession, and ownership in

respect thereof, on their paying freight and other charges, and performing conditions as per bill of lading, charter-party, or agreement, in consideration whereof the said parties hereto of the second part do hereby for themselves jointly engage and agree with the said Edward James Brown to pay to the said Edward James Brown or his agents not only the freight and charges of the said goods, but also the proper proportion of the general average loss, general contribution, charges, and expenses in respect of the said cargo, and all legal charges and other contribution, loss, and expenses to which they are or shall be liable, or for or on assurances of which in the judgment of the parties hereinafter named contributions ought to be made by the said parties hereto of the second part, or which the cargo ought to bear under the aforesaid circumstances. And for the better computing as well the question of contribution as the amount which the said parties hereto of the second part will have to pay in respect thereof, and that the same may be more readily ascertained, the said parties hereto of the second part do hereby further agree that the same shall be ascertained and adjusted by Mr. Henry M. Loftus, of Liverpool, average adjuster (meaning the defendant), whose decision they, the said parties of the second part, do hereby agree to abide by and perform, the average to be adjusted in accordance with the usage and custom at Lloyd's. As witness the hands of the parties hereto of the second part the day and year first above written.

TENNANTS & Co.,

Agents for the Thariss Sulphur and Copper Co.

Witness the signing:

Thomas Barrett, 20, Red Cross Street, Liverpool.

And the defendant says that his retainer and employment to investigate and examine the said vouchers, and to settle, adjust, make up, and prepare the said statement in the declaration mentioned, was under and by virtue of the said agreement and not otherwise, and the defendant, acting in good faith, and under such retainer and employment as last aforesaid, took upon himself the burthen of the said inquiry, and investigated and examined the said vouchers, and made the said erroneous statement.

Demurrer to the above plea, and joinder.

The following were the plaintiffs' points for argument: First, that under the defendant's retainer and employment as an average adjuster, the defendant is not relieved from liability for making up an erroneous statement merely by reason of his having acted in good faith; secondly, that the defendant's fourth plea, admitting as it does a breach of duty on the part of the defendant in this, that the defendant conducted himself carelessly, negligently, and unskillfully in the performance of his duty arising from his retainer and employment as an average adjuster, and not showing any excuse for such a breach of duty in fact, is bad in law; thirdly, that the defendant, as an average adjuster, is not, like an arbitrator irresponsible in damages for negligence or carelessness in the discharge of his duties; fourthly, that the defendant must be taken to have held himself out to the plaintiffs as possessed of the skill requisite for the performance of his duties as an average adjuster, and there was an implied undertaking on his part arising from his retainer and employment, as in the case of any other person doing work for reward, that he would perform his duties with skill and care; fifthly, the defendant's fourth plea does not show that there is anything in the relation between the plaintiffs and the defendant created by the said retainer and employment to take the case out of the rule which makes a party to a contract, which creates a duty, liable for the negligent performance of such duty.

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The defendant's points for argument were: First, that the matters mentioned in the plea show that the defendant acted as an arbitrator in the investigation and adjustment mentioned in the declaration; secondly, that the defendant, acting under the agreement set out in the plea, was not liable in damages for any error made in good faith and without fraud.

Myburgh for the plaintiffs.—The defendant was not acting as an arbitrator or quasi arbitrator, and is therefore not within the protection afforded by the law to persons in that capacity. The ground of the decision in *Pappa v. Rose* (25 L. T. Rep. N. S. 466, and 27 L. T. Rep. N. S. 348 in error; L. Rep. 7 C. P. 32, and 325 in error) was that the defendant was within that protection. But the facts here are different. It does not appear upon the face of the plea that there were any disputes or differences between the parties at the time when the defendant was called in. His position was more like that of a valuer or appraiser.

Leeds v. Burrows, 12 East, 1;

Collins v. Collins, 25 Beav. 308;

Box v. Helsham, 15 L. T. Rep. N. S. 481; L. Rep. 2 Ex. 78 (judgment of Kelly, C.B.)

In *Pappa v. Rose* there was a dispute going on at the time. Further it does not appear clearly on the face of the plea that the shipowner agreed to be bound by the defendant's decision. Lastly, it would be against public policy that persons carrying on a public employment, such as that of an average broker, should be exempt from liability. In *Pappa v. Rose* the broker was not acting in the usual course of his employment. It is difficult to see any reason why a defendant's liability should be less because he is employed by two persons, and they agree with one another to accept his decision.

Russell on Arbitration, 3rd. edit. p. 42.

And even an arbitrator is liable for misconduct.

Gully for the defendant. The word "misconduct" used by Blackburn, J. in the Court of Exchequer Chamber in the case of *Pappa v. Rose* must be taken to be positive misconduct, and not mere want of care. The case of *Re Hall and Hinds* (2 M. & G. 847) incidentally shows that an action will not lie against an arbitrator for misconduct, though the award may be set aside. He also cited:

Batterbury v. Vase, 2 Hurl. & C. 42;

Clarke v. Watson, 11 L. T. Rep. N. S. 679; 18 C. B. N. S. 278.

BOVILL, C.J.—Upon the principal question which has been argued before us, I am of opinion that the present case is wholly undistinguishable from *Pappa v. Rose*. It was agreed between the plaintiffs and the shipowners that the amount to be paid by the former for freight, general average, and other charges, should be referred to a particular person, the defendant, to settle. It must be taken that the defendant accepted and entered upon the employment, and acted in good faith, and that being so it is clear that he is not responsible for want of skill. A distinction may, however, be drawn between want of skill and want of care or negligence. If the arguments and judgments in *Pappa v. Rose*, both in this court and in the Exchequer Chamber, be studied, it will be seen that the question of want of care or negligence was not raised. It is material to notice this, because the distinction is not apparent in the head-notes of the case as reported

in the Law Reports (a). Several observations were thrown out by the judges of the Court of Exchequer Chamber as to the defendant's liability if there had been misconduct on his part, but no opinion was expressed. There is, however, no authority for holding that persons called upon to act as arbitrators, to settle disputes, or adjust accounts, are liable for negligence. In *Watson on Arbitration and Awards* 3rd edit. p. 112, there is the following passage:—"It has been said that an arbitrator is liable to an action if he misconducts himself; but I cannot find any case in which such an action has ever been brought. In two cases at different times, it was decreed in equity that an arbitrator should pay costs where he had declared he would make one party pay the costs." And a few lines farther on "Also if combination be proved against an arbitrator, a court of equity will decree him to pay costs. Indeed, if a party be guilty of misconduct in making his award, he is liable to be made a defendant to a suit in equity, which, generally speaking, would be punishment enough for any ordinary delinquency. The court, however, will always be disposed to view an arbitrator's conduct in the most favourable light; and, unless a clear case of corruption and partiality be made out against him, they will order his name to be struck out of a bill to which he has been made defendant." In the case there referred to in 3 Atk. p. 644, Lord Hardwicke said "Unless there is corruption or partiality in an arbitrator, the party cannot set aside his award; and if it should be allowed to make arbitrators defendants, and give them all this trouble to set forth the particular reasons upon which they founded their award, it would introduce very great inconvenience, and be a discouragement to any person to undertake a reference; if there was any palpable mistake made by an arbitrator, or miscalculation in an account that had been laid before him, the party aggrieved might bring his bill against the party in whose favour the award is made, to have it rectified, and not against the arbitrator." As far as my experience reaches, I have never known such an action brought against an arbitrator. The case of a person acting as arbitrator is one which occurs from day to day, yet though there must be every day disputes between parties and arbitrators, we never hear of their being advised to attempt such an action. Speculative actions for negligence are constantly brought, but there is no authority for such an action as this against an arbitrator. Therefore both from authority and according to the principle of *Pappa v. Rose*, I think it would be very inconvenient to maintain such an action against an arbitrator for negligence, and I am not disposed to lay down a rule that such an action can be maintained. It would be most inconvenient that such persons should be liable to be molested by actions. I am therefore of opinion that the defendant is entitled to our judgment.

KEATINGE, J.—I am of the same opinion. It would be extremely dangerous to say that a party in the position of an arbitrator is to be liable for negligence, and if such were the doctrine it would be extremely difficult to say what amounted to negligence. The Court of Exchequer Chamber has affirmed the principle that such a person is not

(a) See, however, the head-notes in the Law Times Reports.

bound to bring a particular degree of skill to the performance of his duty, and the most frequent ground of negligence is the not bringing due skill. Here the ground alleged is that the defendant conducted himself carelessly, negligently, and unskillfully. It seems clear that he was in the position of an arbitrator, inasmuch as he was the person by whose opinion two persons having differences agreed to be bound. And persons so agreeing must be bound by their agreement for better or for worse, and if the person appointed act honestly and without corruption, they must take him as he is. In the present case the pleadings show that the defendant was in the position of an arbitrator, and discharged his duty in good faith, although erroneously. For this reason I am of opinion that the plea is good.

BRETT, J.—The pleadings show an agreement between the parties thereto to accept the decision of the defendant on the particular points submitted to him, if he would give it, and that he accepted the position offered, and gave his decision. The duty alleged by the declaration is that the defendant would "take due and proper care, and use and employ proper skill and diligence" in and about the business. The question seems to be whether there is such a duty so binding upon the defendant that for the breach of it he is liable to an action. It is urged that it is so, first, because he has undertaken the office of an arbitrator; secondly, because, though not an arbitrator, he is a person who has undertaken to give a decision on the questions submitted to him; and thirdly, because he holds himself out as an average adjuster, and therefore as a person having skill, and bound to exercise due care. As to the first point, a distinction has been suggested between want of skill and want of care. But the allegation of want of care might have been made in a thousand cases, and yet there is no case in the books of an action brought against an arbitrator on such a ground. On the second point, *Pappa v. Rose* shows that although the defendant, who had undertaken to give a decision between two parties, did not come strictly within the definition of an arbitrator, so as to exercise judicial functions, yet that such a person is not liable for want of skill. And the reasoning in that case goes further and points to non-liability for the want of care. Thirdly, as to his liability, even although he was an arbitrator, because he held himself out as a professional average adjuster, and therefore as a person having skill and exercising care, I apprehend that the resolution of the law not to inquire into the conduct of an arbitrator is as applicable to a professional arbitrator as to any one else, and that the fact of his being in a particular business does not affect his liability. I am of opinion therefore that no such duty as alleged was imposed upon the defendant, and therefore that his neglect did not make him liable.

DENMAN, J.—I am of the same opinion. The only reason why *Pappa v. Rose* is not expressly in point is that there the liability sought to be attached was for want of skill. In this case the further point arises of want of care, and therefore we are perhaps extending the doctrine a little further than in *Pappa v. Rose*. The reasoning however, in that case went beyond what was necessary for the decision, and is applicable in the case now before us.

Judgment for defendant.

Attorneys for plaintiffs, *Bateson, Robinson and Morris.*

Attorneys for defendant, *Simpson and North, Liverpool.*

Nov. 20, 1871, and Nov. 14 and 21, 1872.

STEPHENS V. THE AUSTRALASIAN INSURANCE COMPANY.

Open policy—Clean bill of lading given by mistake—Insurable interest—Alteration in declaration after loss known.

An agent acting in a foreign port for shipowners, gave by mistake a clean bill of lading for certain cotton shipped on deck, the cotton having been directed to be received and having been received to be shipped on deck at the shipper's risk. Open policies had been effected by the plaintiff for the shipowners, and declarations made on them by the plaintiff; but the cotton in question had not been declared, as it was supposed to be carried at shipper's risk. The vessel encountered heavy weather, and the cotton was jettisoned. After notice of the loss the plaintiff altered the declarations by striking out certain amounts on cotton shipped subsequently to the cotton in question, and substituting the cotton in question according to the ordinary usage in such a case:

Held, first, that the shipowners had an insurable interest, the bill of lading signed by their agent being equivalent to a contract made by themselves, and making them liable for a loss of the goods by jettison, the result of their being carried on deck.

Held, also, that a usage having been proved which the court did not consider unreasonable, such a declaration might be altered even after the loss was known, and that in the present case the alterations were legally made.

SPECIAL CASE.

1. The plaintiff in this action is an insurance broker, who carries on business in Lime-street-square, London, under the firm of Thomas Stephens and Co. The defendants are an insurance company, having their head office in Australia, and a branch office for marine insurance in Old Broad-street, London.

2. The questions which this action has been brought to settle have arisen in consequence of the loss by jettison of a number of bales of cotton shipped per steamer *Behera* from Alexandria, in Egypt, to Liverpool, which cotton, the plaintiff alleges, was insured under two floating policies, dated respectively the 29th March 1864 and the 12th Jan. 1865, or under one or other of them.

3. In March 1864, Messrs. Chapple and Co. were the owners of a line of steamers plying between Alexandria and other ports in the Levant and Liverpool. They carry on business at Liverpool under the firm of Chapple, Denton, and Co., and in London under the firm of Frederick Chapple and Co. They had an agent in Alexandria (Mr. Charles Grace), who conducted all their business there. The plaintiff was their insurance broker in London.

4. During the American war, Messrs. Chapple and Co. were extensively engaged in carrying cotton from the Levant to Liverpool.

5. During that time it usually happened when a vessel bound upon the voyage referred to was

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laden with cotton, that part of the cargo was carried on deck.

6. When cargo is loaded on deck it is shipped either by the request and at the risk of the merchant who prefers shipping on deck on account of the saving on freight, which is then charged at a low rate, or for the convenience and at the risk of the shipowner, who being desirous of receiving all the freight he can, puts on deck cotton which he has contracted to carry below. When cotton is shipped on deck at the merchant's request, a bill of lading stating that it is so shipped, and is at the merchant's risk, should, according to the usual practice, be made out. When cotton is shipped on deck by the shipowner for his convenience, a clean bill of lading should be given. When shipowners carry deck loads for their own convenience, they often protect themselves from all risk of loss by jettison, by keeping on foot an open policy of insurance especially effected to cover the risk. In case such policy is effected, the course of business is for the agent of the shipowner as soon as he ascertains that a deck load has been shipped at the risk of his principal, to inform such principal of the fact, and he then by his broker declares the value of the deck cargo upon the policy of insurance.

7. According to the usage of the insurance business when a policy is effected "on goods by ship or ships to be thereafter declared," the policy attaches to the goods as soon as, and in the order in which they are shipped, and directly the assured knows of the shipment of the goods, he is bound to declare them to the underwriter on the policy, and to declare them in the order in which they are shipped. He is not entitled to declare some of the risks and remain his own insurer as to others. In case, by overweight or otherwise, the goods are declared on the policy in an order different from that in which they were shipped, the assured is bound to rectify the declarations, and make them correspond with the order of shipment. The underwriter would require to see the bills of lading, and insist on the declarations being made to follow the sequence of the bills of lading. The declarations are often thus rectified, and sometimes even after loss. The witness by whom this usage was proved stated that he was speaking of the ordinary case of policies opened by shippers "on goods by ship or ships to be thereafter declared;" that he had known no instance in which the application of the usage had been enforced in the particular case of a policy relating to goods deck-borne at the shipowner's risk, but that he had known no question raised as to whether the usage applied in such a case. Such policies would not differ in form from the ordinary policies opened by shippers.

8. On the 29th March 1864, Messrs Chapple and Co., through the plaintiff, their broker, effected policies to the amount of 25,000*l.*, on cotton on deck, per steamer or steamers from Asia Minor and Syria to Liverpool. The 25,000*l.* was distributed amongst several insurance companies, the defendants inuring to the extent of 3000*l.*, as appears by the policy entered into by them, which bears date the 29th March 1864. It will be seen that this policy, as it originally stood, only applied to shipments from Asia Minor and Syria to Liverpool. The reason of this was that the season for shipping from Alexandria does not commence until late in September or early in

October, and it was thought when the policy was taken out it would be exhausted by declarations of shipments from the former places before September.

9. In Aug. 1864, however, before any declarations had been made on this policy, it appeared to Messrs. Chapple and Co. to be desirable to make the policy extend to shipments from Smyrna and Alexandria, as well as to the rest of the Levant. They accordingly communicated through the plaintiff, their broker, with the defendants and other insurers, and an arrangement for making the necessary alteration was come to. The agreement for the extension of the policy is endorsed thereon, and the terms upon which it was made will be gathered from the endorsement.

10. It will be observed that the endorsement states that it was agreed to annul the warranty of 1st Aug. This agreement was come to by the parties whilst they were under the idea that the policy contained the usual warranty, that the goods should be shipped before the 1st Aug. It does not however contain such a clause, and therefore the part of the endorsement just referred to is not applicable to the facts.

11. After the policy had been extended as above mentioned Messrs. Chapple and Co. began to take shipments on deck at their risk from Alexandria, and these shipments were from time to time declared on the policy. The declarations down to the 10th Dec. 1864 are as follows:

29th Oct. £3400, on 68 bales valued thereat, per *Lybia* steamer.

29th Nov. £7000, on 102 bales valued thereat, per *Ayah* steamer.

10th Dec. £2500, on 44 bales valued thereat, per *Ocean King* steamer.

12. In the month of Dec. 1864 the *Behera* steamship was loading at Alexandria for Liverpool.

13. Amongst the cargo a quantity of cotton was put on board, some in the hold, some on deck. It is necessary to draw attention to two shipments of cotton, viz., twenty bales consigned to Messrs. Duckworth and Rathbone, of Liverpool, and 102 shipped by Messrs. Choremi, Mellor, and Co., merchants, carrying on business at Alexandria and Liverpool.

14. With respect to the twenty bales belonging to Duckworth and Rathbone these were contracted to be placed below, but were shipped on deck for the convenience of the shipowners.

15. Clean bills of lading were given in respect of this cotton, and Mr. Grace, the agent for Messrs. Chapple and Co., at Alexandria, forthwith sent instructions to have this risk declared on the open policy.

16. This was done by endorsement on the policy of the 29th March 1864. The endorsement is as follows:

31st Dec. £1200 on twenty bales valued thereat, per *Behera* steamer.

17. As to the 102 bales shipped by Messrs. Choremi, Mellor and Co. Before this cotton was put on board the owners engaged with Mr. Celi, the clerk in Mr. Grace's office, for the shipment of ninety bales of cotton by the *Behera* as deck cargo, to be carried at the shipper's risk; the terms of this engagement were entered in a book kept by Grace for the purpose, and called an engagement book. This having been done, Mr. Celi, whose duty it was to attend to the matter, handed to the clerk of Messrs. Choremi, Mellor and Co. (in the

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usual course of business), a memorandum or shipping note, of which the following is a copy:

To the *S. S. Behera*, Captain Childs.

Please receive on board from Messrs. Choremi, Mellor and Co., for Liverpool, the undersigned goods.

No. and Marks. Description.

On deck at shippers' risk. About ninety bales of cotton. Alexandria, 20th Dec., 1864. G. CELI, P. Agent.

18. This note mentions the number of bales as about ninety. The explanation is that after the engagement for ninety had been made out, Messrs. Choremi and Mellor mentioned to Mr. Celi that they would probably have a few more than the ninety bales to ship on the same terms, and accordingly the word "about" was introduced into the shipping note in pencil. As will be seen they really shipped 102 bales. The shipping note first referred to was, according to the usual practice, handed by Messrs. Choremi, Mellor, and Co., to their lighterman, who took it, together with the goods, to the ship, delivering the note up when the goods were on board. Upon delivering up the note the lighterman obtained a receipt from the mate for the quantity put on board, viz., 102 bales.

19. The receipt given on this occasion was by mistake of the mate a clean receipt, that is, it did not mention that the goods were to be shipped on deck at shippers' risk. The following is a copy of this receipt:

Received on board the *S. S. Behera* from Messrs. Choremi and Mellor for Liverpool, the undersigned goods.

No. and marks.

102 bales cotton.

Alexandria, 30 Dec., 1864.

HENRY ASCHER, Chief Officer.

20. It was the duty of the mate to give a receipt for the goods corresponding with the note or order, and he had no authority to deviate from the order.

21. The 102 bales of cotton was stowed on deck, and the *Behera*, being so loaded, left Alexandria for Liverpool on the 29th Dec. 1864.

22. After she had sailed on the voyage, a bill of lading for the 102 bales in question was prepared by the shippers, and presented by them to Mr. Grace for signature; such bill of lading did not contain the words purporting that the cotton was carried on deck at shipper's risk, as it ought to have done according to the arrangement before mentioned. Except as aforesaid no agreement was made by Mr. Grace in reference to the carriage of these goods.

23. The practice of Mr. Grace when bills of lading are handed to him is to refer to the engagement book before mentioned, and see that the bill of lading corresponds with the terms agreed on; but in the present instance, owing to press of business, it being post day, he neglected to do so.

24. During the voyage the *Behera* encountered very heavy weather, so much so that it became necessary on Sunday, the 15th Jan., whilst the vessel was off the coast of France, to throw overboard the whole of the cotton shipped on deck, with the exception of eleven bales. The cargo thus jettisoned comprised the twenty bales consigned to Messrs. Dnckworth and Rathbone, and also 100 out of the 102 bales shipped by Messrs. Choremi, Mellor, and Co.

25. As Messrs. Chapple and Co.'s agent at Alexandria, supposed that the arrangement with the shippers was that the 102 bales were to be shipped on deck at shippers' risk no advice of the risk was sent to them at the time of the shipment, and con-

sequently this risk was not declared upon the policy of the 29th March 1864 at that time.

26. On the 9th Jan 1865, Messrs. Chapple and Co., through the plaintiff, their broker, declared 7000*l*. on 115 bales per *Nyanza*. The endorsement is as follows: "9th Jan. 7000*l* on 115 bales valued thereat per *Nyanza* steamer." After this declaration 3900*l*. remained to be declared on the policy of 29th March 1864.

27. On the 12th Jan. 1865, Messrs Chapple and Co., in anticipation of further deck shipments at their risk, effected a further open policy for 25,000*l*.

28. This 25,000*l*. was also distributed amongst several insurers, the defendants' company taking the risk to the extent of 2500*l*. as appears by the policy entered into by them, which bears date the 12th Jan. 1865, and is annexed to this case.

29. On the 16th Jan. 1815, Messrs. Chapple and Co., by their broker, declared on the two open policies 5500*l*. on eighty-one bales by the *Nyanza*, and 10,300*l*. on 156 bales by the *St. Lawrence*. These declarations were distributed between the two policies, viz., on policy of 29th March 1864, as follows:

16th Jan. 3900*l*. on eighty-one bales valued at 5500*l*. per *Nyanza* steamer, and on policy of 12th Jan. 1865.

16th Jan. 1600*l*. on eighty-one bales valued at 5500*l*. per *Nyanza* steamer.

16th Jan. 10,300*l*. on 156 bales valued thereat, per *St. Lawrence* steamer.

30. The loss of the *Behera* deck load became known to Messrs. Chapple and Co. on the 18th Jan 1865, and not before.

31. The vessel arrived in Liverpool on the 19th Jan. and on the 23rd of that month Messrs. Mellor and Co., as the owners of the clean bill of lading, claimed payment of the value of the 102 bales.

32. This was the first suggestion that Messrs. Chapple and Co. received of the cotton being at their risk.

33. At the time they received this claim they were not aware that the shipment was intended to be made at the risk of the shipper, but they assumed that their agent in Alexandria had, through some oversight, omitted to advise them of the risk.

34. Upon receiving the information just referred to, Messrs. Chapple and Co. communicated with the plaintiff, their broker, and he, upon the receipt of their letter, deemed it advisable to alter or re-arrange the declarations upon the two policies, so that all the shipments might appear in the order in which they would have stood had the plaintiff received instructions to declare the 102 bales shipped by Messrs. Choremi, Mellor, and Co. at the same time as he received instructions with reference to the twenty bales consigned to Dnckworth and Rathbone.

35. This he did by striking out of the declarations on the first policy the two last of the 9th and 16th Jan. 7000*l*. and 3900*l*. which left 10,900*l*. to be declared on that policy. This sum the plaintiff made up by inserting 6000*l*. on the 102 bales per *Behera*, as of the 9th Jan., and 4900*l*. only of the 7000*l*. per *Nyanza*. These alterations in the first policy rendered it necessary to make alterations to correspond on the second policy, which the plaintiff effected as follows: The 1600*l*. balance of 5500*l*. on eighty-one bales per *Nyanza*, 3900*l*. of which had been originally declared on the first policy, and the 10,300*l*. on 156 bales per *St.*

Lawrence, were struck out, and the balance of 115 bales per *Nyanza*, 2100*l.* inserted; and this was followed by the whole of 5500*l.* on eighty-one bales by the same vessel, and the 10,300*l.* on 156 bales per *St. Lawrence*.

These alterations will be clearly understood upon an inspection of the declarations upon the two policies.

36. After the above arrangement of the declarations, 7100*l.* remained to be declared on the policy of Jan. 1865.

37. On the 27th Jan., plaintiff declared 2400*l.* on thirty-six bales per *Lybia*, following 10,300*l.* per *St. Lawrence*. After this was done, 4700*l.* only remained to be declared on this policy. Subsequently the plaintiff considered it advisable again to alter the declarations, and insert them in the order in which the information was received that the goods were at the ship's risk. He accordingly again adjusted the declaration, and put them in the form in which they now stand.

38. Messrs. Chapple and Co., when they first received the claim of Messrs. Mellor, were disposed to allow it, as at that time they were in ignorance of the fact that the original engagement note had in it the words, "on deck at shippers' risk," but having ascertained the real facts of the case, they declined to pay the claim on the ground that by the original arrangement the cotton in question was to be taken on deck at Messrs. Mellor's risk.

39. An action was then brought by Messrs. Mellor and Co. against Messrs. Chapple to recover damages for the loss of the shipment of cotton. This action was tried at the Liverpool Summer Assizes 1865, when evidence was given on behalf of the then plaintiff that the original agreement between the firm at Alexandria and the above-named Mr. Celi was that the cotton should be shipped on deck at the shippers' risk, and carried at the deck rate of 1*d.* per lb, that afterwards, and before the shipment of the cotton, in consequence of instructions received by them from Liverpool, it was arranged with Mr. Celi that the cotton should be shipped under deck, and not on deck as originally intended, and evidence was given that Mr. Celi thereupon stated that a clean bill of lading would be made not at the under-deck rate, and that a clean receipt was accordingly given, and a clean bill of lading was made out at the under-deck rate. The evidence on behalf of these defendants was that the original arrangement as to the shipment of the *Behera* being on deck never was altered, but that the mate's receipt and bill of lading were made out clean and the under-deck rate inserted by mistake, it being alleged that the instructions with reference to deck shipments were not received by the then plaintiffs' Alexandria firm until after the shipment on the *Behera*. It was left to the jury to say whether the cotton was shipped on deck by agreement with the then plaintiffs, and a verdict was found by them for the then plaintiffs for 4330*l.*, the alleged value of the cotton jettisoned, less the freight.

40. The jettison of the deck load of cotton of the *Behera* occurred off the coast of France, as has been mentioned, and a considerable portion of it was washed ashore in the neighbourhood of Brest. Part of this cotton came from the 112 bales shipped by Messrs. Mellor and Co. The cotton which was picked up and saved was sold, and, after deducting charges and expenses, the amount realised by the

portion belonging to Messrs. Mellor and Co. was 600*l.* Under the above circumstances the plaintiff alleges that he is entitled on behalf of Messrs. Chapple and Co. to recover from the defendants, under the said policies of insurance, or one of them, the proportion payable by the defendants of the loss by the jettison of the said cotton.

41. If the plaintiff is entitled to recover against the defendants on the policy of 29th March 1864, the proportion payable by them will be somewhat greater than if the plaintiff is entitled to recover under the policy of the 12th Jan. 1865. The plaintiff also contends that in case he is not entitled to recover on the said policies or either of them, he is entitled to a return of premiums paid in respect of the value of the 120 bales declared as hereinbefore mentioned.

42. The action was brought to recover the proportion of the value of the twenty bales of cotton belonging to Messrs. Duckworth and Rathbone which were shipped on board the *Behera*. The defendants have, however, paid into court a sum sufficient to satisfy this part of the claim, and this amount has been accepted by the plaintiff.

The pleadings in the cause, and copies of the two policies of insurance with the declaration thereon, are annexed to this case and intended to be taken as part thereof.

The question for the court is, whether the plaintiff is entitled under the circumstances to recover the amount of the said premiums.

If the court shall be of opinion that the plaintiff is entitled to recover, then the damages are to be assessed in accordance with the judgment of the court, by the arbitrator by whom the case is stated, and the verdict entered for the plaintiff is to be reduced accordingly. If the court shall be of opinion that the plaintiff is not entitled to recover, then the verdict entered for the plaintiff is to be set aside, and instead thereof a verdict is to be entered for the defendants.

[It is unnecessary to set out the documents annexed.]

Nov. 20, 1871, Nov. 14, 1872.—*Holker, Q. C.* (*Walkin Williams* with him), for the plaintiff.—The goods were carried on deck at the shipowner's risk, and the shipowner having signed an open policy was bound to make good the loss to the shipper caused by the jettison of his goods. The fact that it was the intention of the shipper that the goods should be at his own risk makes no difference; a clean bill of lading having been given the shipowner is responsible. The three bills of lading were given at the shipowner's risk at an increased freight, and the case shows as a fact that the 102 bales of cotton were not at the shipper's risk. There was no necessity for declaring the goods as soon as they were shipped, for the alteration could be made at any time, even after the loss, and this alteration the plaintiff made in accordance with the acknowledged custom of underwriters in such cases. By the usage of insurance business, the plaintiff was not only entitled, but bound, to rectify the declarations and to insert the 102 bales in the policy. In the case of *Harman v. Kingston* (3 Camp. 150), which was an action on a policy of insurance on goods, the insurance was declared to be on sugar and cotton, as might be thereafter declared and valued. It was held that the declaration of interest to be available must be communicated to the underwriters, or someone on their behalf, before

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intelligence is received of the loss; but the declaration of interest is not a condition precedent, and if none is made, the policy is then open instead of valued, and upon proof of interest at the trial the assured will be entitled to recover. There the declaration was not communicated until after intelligence received of the loss. Messrs. Chapple did not know that the goods were at their risk until after the loss had happened, so could not rectify the mistake. The shipowners could not tell what amount of goods were coming by the several ships, and the successive policies constituted one continuous insurance, and the risk would attach on each ship as she sailed.

Gladstones v. The Royal Exchange Assurance Company, 2 Mar. Law Cas. O. S. 142; 5 B. & S. 797; 11 L. T. Rep. N. S. 305.

Sir George Honyman, Q.C. (with him Gainsford Bruce), for the defendants.—The goods were shipped at the shippers' risk, and not at the shipowners'. This was a policy for the purpose of securing Messrs. Chapple against loss by jettison; but here they had no insurable interest in the goods. They were not bound by the act of their agent, who through mistake or negligence, and without any authority, signed a clean bill of lading, notwithstanding the circumstance that the goods were shipped by the desire of the shippers at their own risk. Also the policy for 25,000*l.* having been filled up, the plaintiff cannot turn round and strike out the declarations in the policies, and replace them by others, which completely alter the insurance. In *Gladstones v. Royal Exchange Assurance Company* (2 Mar. Law Cas. O. S. 142; 11 L. T. Rep. N. S. 305; 5 B. & S. 797), Cockburn, C. J., says: "The policy gives the assured the right to appropriate the policy to goods on board any ship, but the ship is to be declared to the underwriters. If the declaration must be made to the underwriters it is sufficient if made and communicated to them at the earliest convenient opportunity, and then the underwriters are protected, because it would be a fraud on them if an appropriation were made to a vessel after knowledge of its loss; or if after the appropriation to one vessel there were an attempt to shift the policy to another." The declaration in some shape or other must be made in such a manner that the vessel shall be covered by the policy in the interval between the appropriation and the declaration to the underwriters.

Ionides v. Pacific Insurance Company ante, p. 141; 25 L. T. Rep. N. S. 400; 1 L. Rep. 6 Q. B. 675.

Holker, Q.C., in reply.—The shipowners have been obliged to make good the loss to the shipper, so that it cannot be said they have no insurable risk.

Kewley v. Ryan, 2 H. Black, 343.

Nov. 21, 1872.—BRETT, J. delivered the judgment of the court (Keating and Brett, JJ.), as follows, stating that Willes, J. had concurred therein:—In this special case the facts stated, which seem to be material, are, that the plaintiff acted in London as insurance broker for Messrs. Chapple and Co., shipowners; that they were owners of a line of steamers plying between Alexandria and Liverpool; that their agent at Alexandria was Mr. Grace; that during the American war Chapple and Co. were extensively engaged in carrying cotton from the Levant to Liverpool; that part of the cotton was frequently carried on deck; that some cotton was so carried by the request and then at the risk of the shipper, and for a loss

freight; that in such case it was the practice that it should be stated in the bill of lading that the cotton was on deck by the shipper's request and at his risk; that some cotton was carried on deck by the shipowner in order to enable him to carry a larger cargo; that in such case it was at the shipowner's risk; that in such case he gave a clean bill of lading; that shipowners who carried deckloads for their own convenience, and therefore at their own risk, often protected themselves against probable loss by jettison, by keeping on foot open policies, especially effected to cover the risk, and by declaring upon them. The case then contained the following statement as to usage: [The judgment set out paragraph 7 down to the words "even after loss"] He is not entitled to declare some of the risks and remain his own insurer as to the others. In 1864 and in 1865 Messrs. Chapple and Co., through the plaintiff, their broker, effected in London, with the defendants and others, certain policies on cotton on deck per steamer or steamers from Asia Minor to Liverpool. The first set of such policies were made on the 29th March 1864, to the amount of 25,000*l.*, and the second set were made for a further sum of 25,000*l.*, to follow on the 12th Jan. 1865. In the autumn of 1864, and at the beginning of 1865, Messrs. Chapple and Co., by Grace, their agent at Alexandria, shipped thence in various steamers cotton on deck, at their risk, and cotton below. Declarations were made on the cotton shipped on deck on the policies before-mentioned in the order of shipments, in respect of all the cotton shipped on deck, except in respect of one parcel shipped on board the *Behera*. Such declarations were made in London by the plaintiff, upon information of the shipments forwarded by Grace to Chapple and Co. The declarations on the policies of the 29th March 1864 were made as follows:

29th Oct. 1864	£3400	on	68	Bales,	per	<i>Lybia</i> .
29th Nov. "	7000	"	102	"	"	<i>Ajios</i> .
10th Dec. "	2500	"	44	"	"	<i>Ocean King</i> .
31st Dec. "	1200	"	20	"	"	<i>Behera</i> .
9th Jan. 1865	7000	"	115	"	"	<i>Nyanza</i> .
16th Jan. "	3900	"	81	"	"	<i>Nyanza</i> .

£225,000

Declarations were also made, but not to the full amount on the policy of the 12th Jan. 1865. It afterwards appeared that under the circumstances stated in the case, Messrs. Choborini, Mellor and Co. had shipped 102 bales of cotton on board the *Behera* at Alexandria on the 20th Dec. 1864, that is to say, before the shipment on board the *Behera* of twenty bales on the 31st Dec. and before the shipments on board the *Nyanza* of the 9th Jan. and the 16th Jan. 1865. The 102 bales were directed to be received, and were in fact received to be shipped on deck at shippers' risk; but by mistake a clean receipt was given for them by the mate, and a clean bill of lading by Grace; he, however, supposing always that the 102 bales had gone at shippers' risk did not advise the defendants to declare them, and they were not declared. The *Behera* sailed from Alexandria, and encountered heavy weather, and on the 15th Jan. 1865, the twenty bales and the 102 bales were jettisoned. The loss became known to Chapple and Co. on the 18th Jan. 1865. The vessel arrived in Liverpool on the 19th Jan. On the 25th Jan. 1865, Messrs. Mellor and Co., of Liverpool, claimed payment of the value of 102 bales as being owners of a clean bill of lading given in

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respect of them. The plaintiff on the 27th Jan. 1865, altered the declarations on the policies of the 29th March 1864, as follows; he struck out the 7000*l.* on 115 bales per *Nyanza*, and 3900*l.* on 81 bales per *Nyanza*, and replaced those declarations as follows: 9th Jan. 1865, 6000*l.* on 102 bales per *Behera*; 9th Jan. 1865, 4900*l.*, part of 115 bales per *Nyanza*. He at the same time altered the declarations to correspond on the policies of the 12th Jan. 1865. A portion of the policies of the 12th Jan. 1865, sufficient to cover the loss on the *Behera* deck cargo, remained still undeclared, and the plaintiff, on the 27th Jan. 1865, filled up the said policies by declaring, amongst other declarations, 6000*l.* on 102 bales per *Behera*. On these facts it was argued before us on behalf of the plaintiff that Chapple and Co. had an insurable interest; that although the intention of the shippers at the time of shipment was in fact that the goods should be carried on deck at their risk, and although at the same time it was the intention of the defendants' agent, Mr. Grace, to receive them to be carried on deck at shipper's risk, yet inasmuch as Grace had by mistake or negligence given a clean bill of lading, Messrs. Chapple and Co. could not protect themselves against the holders thereof in respect of the loss by jettison, even though such holders might be identical with the shippers; that Chapple and Co., therefore, stood to lose by a jettison by reason of perils of the sea, and were, therefore, so far interested as to be entitled to insure against such loss. It was further contended on behalf of the plaintiff that Chapple and Co. were insured against the loss which had occurred on and by virtue of the policies of the 29th March 1864; that by the usage of insurance business they were not only entitled, but bound to rectify the declarations on that policy as they had done, and that the declarations were to be read as if the shipment of the 102 bales on the 20th Dec. 1864 had been declared in due order, and that the declarations might be properly altered after the loss was known. It was contended on behalf of the defendants that the shipowners, Messrs. Chapple and Co., were not bound by the mistake or negligence of Grace in signing a clean bill of lading; that under the circumstances he had no authority to sign any but a bill of lading expressing that the goods were shipped by the request of the shippers, and at their risk; that Messrs. Chapple and Co., not being bound by the clean bill of lading, were at no risk, and therefore had no insurable interest; that if they had such interest, it was not insured, for that by the recognised law of insurance the assured were not bound to declare the goods which they shipped in the order of their shipment; that they were not bound to declare all shipments; that they could not, after they had once declared, alter such declarations; that even if they could at some time alter such declarations, they could not do so after the loss and their knowledge of it; that they were bound to declare within a reasonable time after shipment; that if they did not, a subsequent declaration was void; that no declaration could be properly made after loss and knowledge; that consequently in this case the loss which had occurred was not insured by either policy. The first point raised by these arguments is whether Messrs. Chapple and Co. had an insurable interest. We are of opinion that they had. It may be true

that Grace was not in one sense authorised to sign a clean bill of lading under the circumstances, but it is in the sense that his duty to his principals required him not negligently to sign in that form. He had the authority so frequently given to agents in his position, that to sign bills of lading as or for the master of the ship, and therefore his signature was equivalent to that of his principals, Messrs. Chapple and Co., and made the bill of lading their contract, and a contract in writing applicable to the goods shipped under it, the effect of which, according to the legal construction of the written contract contained in it to be declared by the court, could not at law be varied by evidence that it was signed in its existing form by negligence or mistake. The bill of lading, according to its legal construction, made Messrs. Chapple and Co. liable for a loss of the goods by jettison, the result of their being carried on deck; it follows that Chapple and Co. had an insurable interest. The next question raised is, whether Chapple and Co. were insured in respect of the risk on the 102 bales of cotton on board the *Behera*. Now the usage stated in the case is a large usage, more comprehensive we believe, than it has been proved or assumed to be in any of the cases which are in the books relative to this matter; but if it is not unreasonable it is binding on the court in this case. We are not prepared to say that it is unreasonable. It follows that it is binding. Then it seems clear that Chapple and Co. were insured by the policies of the 29th March, for the 102 bales on board the *Behera* was shipped on board on the 20th Dec. 1864, when the policies were not exhausted by prior shipments to which they were applicable, and Messrs. Chapple and Co. were bound to rectify the declarations, and make them correspond with the order of shipment. It seems to us that the usage as now stated makes the cases of *Gledstanes v. The Royal Exchange Assurance Company (ubi sup)* and *Ionides v. The Pacific Insurance Company (ubi sup)* inapplicable. But if that be not so we still think that the plaintiff, on the statements made in this case, is entitled to recover. The doctrine to be deduced from those cases is that according to the usage of merchants and underwriters as recognised by the courts without formal proof in each case, a declaration of this kind, which it is the right of the assured to make without the consent of the underwriter, may be altered even after the loss is known, if it be altered at a time when it can be and is altered innocently and without fraud. If that be a true proposition, and we think it is, and if it be applicable in this case, we think that the alterations made on the 27th Jan. 1865, in the declarations on the policies of the 29th March 1864, were legally made. At that time the loss of the goods by jettison was known to the assured, but the state of things at the time of shipment was not known to them. They seem to have made the alteration in the *bona fide* belief that their agent had neglected to inform them of the shipment by the *Behera*, and with a *bona fide* intention of rectifying that mistake according to the custom. There is no finding in this special case that they acted otherwise than innocently and without fraud. The judgment must therefore be for the plaintiff, as upon a loss upon the policies of the 29th March 1864, in respect of the loss by jettison of goods loaded on board the *Behera*.

Judgment for the plaintiff.

Attorneys: for plaintiff, *Wallons, Bubb, and Walton*; for defendants, *Westall and Roberts*.

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COURT OF ADMIRALTY.

Reported by J. P. ASPINALL, Esq., Barrister-at-Law.

July 26 and 31, 1872.

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THE OCEANIC STEAM NAVIGATION COMPANY
(LIMITED) (appa.) v. JONES (resp.).

Collision—Suit against pilot—Admiralty jurisdiction.

The High Court of Admiralty has no jurisdiction to entertain a suit in personam against a pilot for damage occasioned to a ship by his negligence whilst in charge of another ship.

The Court of Passage and the County Courts, having no larger Admiralty jurisdiction than the High Court, cannot, therefore, entertain such a suit (a).

This was an appeal from an interlocutory decree of the Court of Passage of the borough of Liverpool (admiralty jurisdiction), in a cause of damage instituted on behalf of the owners of the steamship *Atlantic* (in personam) against Owen Jones, a licensed pilot of the port of Liverpool. The *Atlantic* was on the morning of the 23rd Nov. 1871, moored alongside the Prince's pierhead in the river Mersey in a thick fog. The *Alexandria*, a screw steamer, was going down the river in charge of the respondent (the defendant), and ran into the *Atlantic*, and did her considerable damage. A suit was instituted in rem. against the *Alexandria*, but it was dismissed on the ground that she was in charge of the respondent as pilot, by compulsion of law, and that he alone was to blame for this collision. The present suit was thereupon instituted against the pilot by the usual process, whereupon the court issued a summons in the following form:

ADMIRALTY JURISDICTION.

In the Court of Passage of this Borough of Liverpool. No. 152.

(c) A curious question may arise in consequence of the above decision. By sec. 5 of 31 & 32 Vict. c. 71 it is enacted: "From and after the time specified in each order in council under this Act appointing a County Court to have Admiralty jurisdiction within any district as the time from which this Act shall have effect in and throughout that district no County Court, other than the County Court so appointed, shall have jurisdiction within that district in any Admiralty cause." The whole of the coast line of England has now been placed for the purposes of the Act within the jurisdiction of certain County Courts, and considering the restrictions placed upon instituting suits in County Courts, every "Admiralty cause" must arise within a district framed under the Act. If, then, these County Courts alone have jurisdiction in Admiralty causes, is there any way whatever in which a proceeding can be taken against a pilot in a County Court? This decision holds that the County Courts have no jurisdiction on their Admiralty side, and the 5th section seems to say that no County Courts can try a cause of "damage by collision" against a pilot on their common law side, as such a cause is an Admiralty cause within the meaning of those words as used in sect. 3 of the Act. Sect. 3, it should be noticed, gives jurisdiction "in the following causes (in this Act referred to as Admiralty causes):" It does not expressly say that the County Courts are to have an Admiralty jurisdiction, and it therefore would seem reasonable to suppose that "damage by collision" did not refer only to such damage as is cognisable by the High Court of Admiralty. The only way out of the difficulty, however, would seem to be to take the words "Admiralty cause," as meaning such a cause as the High Court has jurisdiction over, and considering all other causes, although of an exactly similar nature, as common law causes. Such a cause as this would then be cognisable by any County Court.—ED.

The Oceanic Steam Navigation Company (Limited), of No. 10, Water-street, Liverpool, in the County of Lancaster, Plaintiffs.
Owen Jones, of 31, Thomaston-street, Everton, in Liverpool, aforesaid, pilot, Defendant.

Whereas a cause for damage to a ship had been instituted in this court on behalf of the plaintiffs, the Oceanic Steam Navigation Company (Limited), in the sum of 3000, you are summoned to enter an appearance in the said cause within four clear days of the service hereof. You are also warned that if you do not enter an appearance as aforesaid, the assessor of this court will proceed to hear and determine the said cause or to make such orders therein as to him shall seem fit.

Dated this 15th Jan. 1872.

JOHN FLEET, Deputy Registrar.

To the Defendant, Owen Jones.

To this suit an appearance was duly entered on behalf of the respondent (the defendant below), and preliminary acts were filed; but there were no further pleadings. The 14th article of the respondents' (the plaintiffs') preliminary act alleged that "The *Atlantic* was by compulsion of law in charge of a duly licensed pilot. The *Alexandria* was also by compulsion of law in charge of a duly licensed pilot, to wit, the above-named defendant, and the plaintiffs say that the said collision was occasioned by the negligence, unskillfulness, and improper conduct of the said defendant whilst so in charge of the said vessel as aforesaid."

Mersey pilots do not, like Trinity House pilots, give a bond for the due performance of their duties.

The suit came on before the Assessor of the Court of Passage on a motion to dismiss it on the ground that the court had "no jurisdiction to entertain a claim in personam against a person who is not the owner of the ship or vessel causing the damage."

After hearing counsel, the learned assessor dismissed the suit on the above ground, holding that: "The question turned upon the construction of recent statutes to extend the jurisdiction and improve the practice and procedure of the High Court of Admiralty, for the Act which conferred admiralty jurisdiction on this court was not intended to give it a more extensive jurisdiction than the High Court possessed. The first provision which affected the question was the 6th section of 3 & 4 Vict. c. 65, and he was of opinion that the construction of this section contended for by the defendant's counsel was correct, that it was intended only to remove the restriction imposed by 13 Richard 2 c. 5, forbidding the Admiralty Court 'to meddle with anything done within the realm, but only things done upon the seas,' and to give the court cognizance of suits for damage when the damage was received on a navigable river within the body of a county, and the section did not enlarge the jurisdiction in any other respect. The question mainly depended on 24 Vict. c. 10. The 7th section of that statute gave the Court of admiralty jurisdiction over any claim for damage done by a ship. What was the meaning to be given to these words? On a consideration of the statute, and especially the 5th, 6th, and 11th sections, the only conclusion was that, in respect of such damage, the ship itself, and the owners, master, and persons identified in interest with the ship, were alone answerable to the Admiralty Court. The 35th section gave a choice of proceeding either against the ship or against persons, but only persons identified with the ship; and it was

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not applicable to a pilot who was on board by compulsion of law without the consent of the owner—a stranger who could not be identified with the ship. This view was strongly confirmed by the 13th section of the Admiralty Court Act 1854 (17 & 18 Vict. c. 78), which, in giving a jurisdiction in *personam* to the court, limits such jurisdiction to proceedings against the owner of the ship. Moreover, the case of the *Urania* (5 L. T. Rep. N. S. 402; 1 Mar. Law Cas. O. S. 156; 10 W. R. 97) was a distinct authority in favour of this view. In that case, after the passing of the Admiralty Court Act 1854, Dr. Lushington declined to issue a citation in *personam* against a pilot for damage done to a ship by the ship of which he was in charge by compulsion of law, on the ground that such jurisdiction was not given to the court by the Act. The motion must therefore be allowed, and the suit dismissed." Leave to appeal was given.

From this decree the owners of the *Atlantic* appealed.

Gainsford Bruce for the appellants.—The learned assessor assumes in his judgment that the question turns upon the statutes extending the jurisdiction of the High Court whereas it really depends upon the construction of the County Court Admiralty Jurisdiction Acts (31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51.) For, although I cannot contend, after the decision in *The Hensons* (ante p. 360; 27 L. T. Rep. N. S. 64), that the County Court has a more extended jurisdiction than the High Court over the subject matter, it is otherwise as to procedure. This is a cause strictly of damage by collision over which the High Court clearly has jurisdiction. Apart from the question of the extent of the jurisdiction in the County Courts, the mode of procedure may differ in those courts from that of the High Court, or in other words whenever the subject matter is within the jurisdiction of the High Court, then the County Court on its Admiralty side may proceed not only *in rem* but also *in personam* against any person who has committed a tort which renders him in any way liable to be sued in the court. This is shown by the provisions in the County Court Admiralty Jurisdiction Act 1868 as to costs. By sect. 3, any County Court having admiralty jurisdiction has jurisdiction to try "the following causes (in this Act referred to as admiralty causes); (3) as to any claim for damage to cargo or damage by collision, any cause in which the amount does not exceed 300l." By sect. 5 no County Court other than a County Court duly appointed under the Act to have admiralty jurisdiction, has jurisdiction in these causes. By sect. 9, if a suit is instituted in any superior court and the plaintiff fails to recover a sum exceeding 300l. in a cause of collision, he fails to recover costs. This suit is instituted in the sum of 300l. in a County Court. It is a cause of collision, and must therefore be on the admiralty side of the County Court. If it were instituted in a superior court the plaintiff could recover no costs, and would therefore be practically without a remedy. This indicates that it was intended that all questions of damage by collision should be exclusively heard in the County Courts appointed under the Act, and upon the admiralty side of those courts, irrespective of the persons against whom they are instituted. These Acts have transferred the power, which formerly existed to try such a suit as this on the common law side, to the admiralty side of the County Courts, and if it is held that this power

does not now exist on the admiralty side, the County Courts can have no jurisdiction to try this suit in any way—a result which cannot have been contemplated by the Legislature.

But, assuming that the County Courts have only jurisdiction in *personam* over the same causes as the High Court of Admiralty, then the High Court itself has jurisdiction to try this case, and therefore the Court of Passage. It is assumed below that a suit can be brought in this court in *personam* only against a person against whose property a suit *in rem* might be instituted; that the jurisdiction *in rem* is the foundation of all suits in this court; and that the jurisdiction in *personam* exists only where that *in rem* also exists, being only an alternative form of procedure. In *Olerke's Praxis*, tit. 1, *et seq.*, it is shown that the ordinary form of procedure in the time of Queen Elizabeth was in *personam*. That was the original jurisdiction. The jurisdiction *in rem* was only exercised when the debtor was not to be found (Ib. tit. 28). The procedure *in rem* was only thoroughly recognised as a distinct proceeding from that in *personam* for the first time in the *Bold Buccleigh* (7 Moore, P. C. C. 267) in the year 1851. Formerly this court clearly had jurisdiction on questions of pilotage, and could make pilots answerable for any damages caused by their negligence or unskillfulness. This will be seen on reference to "The Laws of Oleron," art. 33; to "The Inquisition of Queenborough," arts. 16, 23; and to "De Officio Admiralitatis" of Thomas Rowington, art. 26, as contained in the black book of the Admiralty (published by the Master of the Rolls, edited by Sir Travers Twiss, Q.A.; A.D. 1871). In the "De Officio Admiralitatis" it is said (art. 26): "Inquiratur, si quis suscepit in eum onus sive onram alicujus navis sive vasalli docendi de loco in locum, ut lodiemanus, cujus ignorantia, culpa, vel desidia incidit navis in jacturam vel in dampnum quovismodo cum mercandiziis, bonis et rebus in ea existentibus. Pena est, indicatus et convictus per duodecim super hoc, dampna navis possessoribus ejusdem restituere, et mercatoribus jacturam et perditionem mercandiarum bonorum, et rerum hujusmodi, si habeat unde, &c." Although American admiralty courts have succeeded in obtaining a wider jurisdiction than this court, their decisions illustrate this question of personal jurisdiction. [Sir R. J. Phillimore refers to *De Lorio v. Boit*, 2 Gallison's (Amer.) Rep. 398.] That case shows that the admiralty courts have always exercised jurisdiction over all marine torts, and this was also decided by Dr. Lushington in *The Sarah* (Lush. 549), where it was held that the court had jurisdiction over a cause instituted against a barge propelled by a pole for damage done on the high seas. The American cases also show that the admiralty court has jurisdiction over a person committing a tort at sea, even though there may be no property identified with that person that could come within the jurisdiction of the court, as in the case of a suit instituted against a person who had forcibly taken money from on board a ship at sea: (*Mauvo v. Almeida*, 10 Wheaton's Supreme Court, U.S., Rep. 474.) In that case Johnson, J., in delivering the judgment of the Supreme Court, said (p. 489): "The ground of complaint is a maritime tort, the violent seizure on the ocean of a sum of money, the property of the libellants. That the libellants would have been entitled to Admiralty process against

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the property if it had been brought within the reach of our process, no one has yet questioned. The only doubt on this part of the subject is whether the remedy *in personam*, for which this is a substitute (or, more properly the form of instituting it) can be pursued in the Admiralty. On this point we consider it too late to express a doubt. This court has entertained such suits too often, without hesitation, to permit the right now to be questioned. Such was the case of *Maley v. Shatlock* (3 Cranch's Supreme Court U. S. Rep. 458.) Such is the principle recognised in *Murray v. The Charming Betsy* (2 Cranch, 64), where the court decrees damages against the libellant. Such also was the principle in the case of *The Apollon* (9 Wheaton, 362), in which the libel was directly *in personam*, and damages were decreed. We consider that the question, therefore, ought not to be stirred." In the case of *The Sloop Merchant* (1 Abbott's Adm. Rep. 1) a joint libel was filed by seamen against the vessel, *in rem* and against the master and owner *in personam*, to recover wages and moneys paid for the use of the vessel, and Betts, J., in giving judgment, drew a distinction between proceedings *in rem* and *in personam*, saying: "The method of instituting suits in the English Admiralty Court by arrest of the vessel is declared to be of ancient usage: (*The Dundee*, 1 Hagg. 109, 124; 2 Chitty's Practice, p. 536); but at what point of antiquity it became a remedy of the court is not traceable from the published decisions or rules. Evidently it must have been posterior to the compilation of Clerke's Praxis, in the reign of Elizabeth, and which was first published in 1679 (*Brevort v. The Fair American*, 1 Pet. Adm. Rep. 87, 94), because that form of action is not treated of by Clerke. Title 28 of his work has reference to proceedings against property to compel the appearance *in personam* of the respondent. There is certainly no clear authority showing that actions *in rem* preceded those *in personam*, as the general means of exercising the jurisdiction of the court. Far less is there anything to prove that the latter class of actions derived their qualities from the processes or rules of pleading employed in the former. Each form of action is distinct and independent of the other in respect to the methods of procedure employed, and (with a few exceptions) in respect to jurisdiction over the subject matter upon which they may act. Suits *in rem* and suits *in personam* are by no means convertible terms, and if in some instances they are concurrent, there are numerous cases in which one must be employed to the exclusion of the other." Moreover, it has been decided in America, that although a master, having no lien for his wages, cannot in that country proceed *in rem* against his ship, he may, nevertheless, proceed *in personam* in the Admiralty Court against the owner: *Willard v. Dorr* (3 Mason's Rep. 91.) Story, J., in that case, after pointing out that all prohibitions in suits by masters had been in cases where the proceedings were *in rem*, says, "the judges of the Common Law Courts seem to have been ignorant that a seaman could maintain a suit *in personam* in the Admiralty Court for wages (though that is now familiar), as well against the owner as the master. In ancient times the principal mode of proceeding in the Admiralty was by process *in personam*. My opinion is that the admiralty has jurisdiction in cases of this nature *in personam*, though not

in rem. The contract is maritime, and the service is maritime; and I can perceive no principle upon which the court can entertain a suit *in personam* for the seamen, which does not apply to the master. This point has, in fact, been repeatedly ruled in this court." In Abbott's National (U. S.) Digest (vol. 1, p. 46, par. 242) under the title of "Jurisdiction without Lien," it is said, on the authority of *Marshall v. Brown* (7 New York Legal Observer, 392), that "the jurisdiction of the court is *in personam* in matters of contract does not necessarily depend on the question of lien. The person is proceeded against upon his personal liability by process of arrest or citation. And this remedy, if suspended by taking a bill or note, is restored when the note is surrendered to the debtor or produced in court or cancelled." In cases of damage by Queen's ships, the proceeding is against the commander, although there is not jurisdiction over the ship. Over suits for assaults committed on board ship this court has had no doubted jurisdiction *in personam*: (See the cases cited in *The Sylph* 17 L. T. Rep. N. S. 519; 3 Mar. Cas. O. S. 37; L. Rep. 2 Adm. & Ecc. 24.) [Sir R. J. PHILLIMORE.—These cases seem to have been always cases where the master of the ship was the person proceeded against.] The assaults were illegal acts on the part of the master not within his authority, for which the owner could not be liable, and it was a personal jurisdiction. Again, persons could be proceeded against for wearing illegal colours. These were suits *in personam*, and not against the ship. In cases of bottomry this court may pronounce a master liable for the amount of the bond where he has signed it: not because he is master, but on account of the personal liability he has contracted. This case is distinguishable from *The Urania* (5 L. T. Rep. N. S. 402; 1 Mar. Law Cas. O. S. 156; 10 W. Rep. 79), because the decision in that case proceeded on the ground that the Court of Admiralty had no power to enforce a bond given by a Trinity House pilot under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), sect. 372. This court cannot enforce a contract under seal (*House v. Nappier*, 4 Burr. 1944), and therefore not a Trinity House pilot's bond: (*The Carolus*, 3 Hagg. 343, note.) A Trinity House pilot's liability is expressly limited by the Merchant Shipping Act 1854, sect. 373, to the amount of his bond, whilst here there is no bond and no limitation. This court has original jurisdiction apart from statute. [Sir R. J. PHILLIMORE.—Can you not give an instance of such a suit?] It has not been worth while to institute them, as pilots are usually unable to pay for damage done—hence the necessity for the bond. By the statutes giving jurisdiction to this court, however, ample jurisdiction is given to try this suit. The 3 & 4 Vict. c. 65, s. 6, gives "jurisdiction over 'all claims or demands whatsoever in the nature of . . . damage received by any ship or seagoing vessel . . . whether such ship may have been within the body of a county or upon the high seas.' &c. By the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 7, the court has "jurisdiction over any claim or damage done by any ship." These words are wide enough to confer jurisdiction in any case, and the 35th section of the Act expressly provides that it "may be exercised either by proceedings *in rem* or by proceedings *in personam*. Even if it should be considered that

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the 13th section of 17 & 18 Vict. c. 78 (the Admiralty Court Act 1854) gave only a limited jurisdiction by way of monition in cases within the original jurisdiction of the court; yet the 35th section of the Admiralty Court 1861 must be taken to have extended the jurisdiction in *personam* to all cases of which the court has cognizance.

H. H. Bremner for the respondent.—The real question here is whether this court has jurisdiction to entertain a suit in *personam* against a pilot for damage occasioned by his negligence in navigating a ship of which he is in charge by compulsion of law. If this court has no such jurisdiction, the County Court or Court of Passage cannot have it.

Simpson v. Blues, ante p. 236; 26 L. T. Rep. N. S. 697;

Cargo ex Argos; *The Hewsons*, ante p. 360; 27 L. T. Rep. N. S. 14.

The appellants allege the jurisdiction, and it is for them to establish its existence. It exists in this court either as inherent in its constitution, or it has been conferred by statute. If claimed as part of the original jurisdiction, it must be proved by showing cases in which it has been exercised, or at least by reference to works of authority which treat it as well settled. The American cases referred to on the other side to establish the jurisdiction in *personam* do not appear to show that admiralty courts have ever exercised it over other than masters or owners, persons subject to the maritime law, and identified in interest with the ship. This court seems to have claimed a general jurisdiction over masters of ships, though except in the case of Queen's ships which rest on special grounds, there are no cases reported in which a suit in *personam* in a cause of damage has been brought against a master. In *The Sylph* (*ubi sup.*) it is said that "this court has always had jurisdiction over personal injuries committed on the high seas, and has entertained actions in *personam* against captains of merchant vessels for inflicting, whilst on the high seas, excessive punishment upon seamen. In *The Agincourt* (1 Hagg. 271), Lord Stowell condemned the captain of an East Indiaman in 100*l.* damages with costs. In *The Lowther Castle* (1 Hagg. 384), he entertained a similar action, but held the charge against the captain not proved. In *The Buckers* (4 C. Rob. 73), Lord Stowell went a step farther, and allowed a civil suit by a passenger against a master for ill-treatment on the high seas. Reports of cases (both of the Admiralty and Ecclesiastical Courts) were then of recent date, but the registrar, on searching the records back to 1730, found many instances of such suits." In a suit for damage caused by a queen's ship, the proceeding is, no doubt, against the commander, on whose behalf the Lords of the Admiralty direct the Admiralty proctor to enter an appearance, but the submission to the jurisdiction is voluntary:

The Athol, 1 W. Rob. 374;

The Volcano, 2 W. Rob. 337.

In *The Volant* (1 W. Rob. 383, 389), Dr. Lushington thus explains the ancient jurisdiction of the court: "By ancient maritime law, the owners of a vessel doing damage were bound to make good the loss to the owners of the other vessel, although it might exceed the value of their own vessel and the freight. For the purpose of enforcing this obligation, the owners of the damaged vessel might resort either to the courts of common law or to the Court of Admiralty; and if they preferred the

latter, they had the choice of three modes of proceeding, viz., against the owners, or against the master, personally, or by a proceeding in *rem* against the ship itself; but the learned judge does not refer to any case in which the proceeding in *personam* against the master or owner, in a cause of damage, had been resorted to. In *The Trelawney*, reported in a note to *The Hope* (3 C. Rob. 215), a cause of salvage was allowed to be instituted in *personam* against the owners of the vessel salvaged, they having removed their vessel from the jurisdiction.

The Meg Merrilies, 3 Hagg. 346;

The Rapid, 3 Hagg. 413.

It is clear, then, that the maritime law regards the owner of a vessel only as liable to pay for damage done, and each of the three methods of procedure has for its object to enforce payment by him, the proceeding against the master being against one who is his recognised agent in all matters connected with the ship. As the proceeding in *rem* afforded the most efficient remedy, the proceedings in *personam* practically became obsolete, or so doubtful that it was deemed necessary to revive it in the Admiralty Court Act 1854, as against owners only in those cases in which a right of action existed against the property. (a) From this it is to be presumed that the court now has jurisdiction only over those persons who are identified in interest with the property, namely, the owners. It has been alleged that the court, having jurisdiction over the subject matter of damage, must have jurisdiction to enforce a claim for damages against the person whose wrongful act occasioned it. The proposition is based on an erroneous assumption as to the province of a court; a court enforces obligations which are imposed by the system of law it administers, but cannot create obligations, and no inferences as to jurisdiction over persons can be drawn from a consideration of its jurisdiction over the subject matter. The maritime law administered in courts of admiralty imposes no obligation on a pilot to pay for damage done by his negligence, and this court cannot, because it entertains a suit for damage, acquire a jurisdiction to make a pilot pay for it. Has this jurisdiction been conferred by the operation of sects. 7 and 35 of the 24th Vict. c. 10? The construction put upon this Act by the appellants, that this being a claim for damage done by a ship the court has jurisdiction over it by the 7th section, and that by the 35th section, the jurisdiction may be exercised by a proceeding in *personam*, is merely verbal, and does not regard the object of the enactment. Before the Act a ship and her owner were responsible in the Admiralty Court for damage done by the ship, only when the damage was done to a ship or seagoing vessel (*The Bilbao*, 3 L. T. Rep. N. S. 338; 1 Mar. Law Cas. O. S. 5; *Unah*, 149). It was obviously unreasonable that the jurisdiction

(a) The Admiralty Court Act 1854 (17 & 18 Vict. c. 78), s. 13. In all cases in which a party has a cause or right of action in the High Court of Admiralty of England, against any ship, or freight, goods, or other effects, whatsoever, it shall not be necessary to the institution of the suit for such person to sue out a warrant for the arrest thereof, but it shall be competent to him to proceed by way of monition, citing the owner or owners of such ship, freight, goods, or other effects, to appear and defend the suit, and upon satisfactory proof being given that the said monition has been personally served upon such owner or owners, the said court may proceed to hear and determine the suit, and may make such order in the premises as it shall seem right.

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of the court should be so circumscribed, and the 7th section removed the limitation and allowed a suit to be maintained against a ship in any case of damage done by it, irrespective of the thing that received the damage. That this was the operation of the Act is shown by several cases in which suits were allowed to be instituted against ships for damage done by them, not merely to vessels not seagoing, but even to things fixed and immovable in the sea.

The Ohio, 19 L. Rep. N. S. 89; 3 Mar. Law Cas. O. S. 148; L. Rep. 2 Adm. & Ecc. 29;

The Excelsior, 19 L. T. Rep. N. S. 87; 3 Mar. Law Cas. O. S. 151; L. Rep. 2 Adm. & Ecc. 293;

The Clara Killan, 23 L. T. Rep. N. S. 27; L. Rep. 3 Adm. 161; 3 Mar. Law Cas. O. S. 463;

The Minna, L. Rep. 2 Adm. & Ecc. 97.

In all these cases the proceeding was *in rem* against the ship. The section was not intended to alter the remedies or procedure of this court, but only to apply them to claims for damage formerly not within the jurisdiction of the court. Still less can it be said that the section has the effect of creating the entirely novel remedy of giving to the owner of a ship receiving damage by collision a right to proceed *in personam* against a pilot in charge of the ship in fault. The 7th section was discussed in *Smith v. Brown* (ante p. 56; 24 L. T. Rep. N. S. 808; L. Rep. 6 Q. B. 729), and there received even a stricter interpretation. The 35th section applies in terms only to "the jurisdiction conferred by this Act," and these cannot be taken to enlarge the jurisdiction, except in matters there expressly enacted: it refers to procedure only. The 3 & 4 Vict. c. 65, s. 6, only extended the territorial jurisdiction of the court to causes arising in the body of a county. Again, independently of principle, it has been expressly decided on precisely similar facts, that the court had no power to grant a monition against a pilot to appear in a cause of damage (*The Urania sup.*) In that case the jurisdiction was claimed as conferred by 24 Vict. c. 10, and not as belonging to the court by virtue of its original constitution, and the court even refused to issue a monition. It was contended that the ground of the decision in *The Urania* (*ubi sup.*) was the inability of this court to enforce the bond of a Trinity House pilot given under the 373rd section of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 105), but Dr. Lushington expressly says that the Admiralty Court Act 1861 gives him no jurisdiction in such a case. The section of the Merchant Shipping Act recognises the liability of the Trinity House pilots, but they should be proceeded against in a court of common law. Lastly, the jurisdiction is not called for by necessity or expediency. To hold that this remedy existed would be to deprive the respondent of the right to have his liability tried by a jury. Moreover, as this court, in case both parties are found to blame, divides the damage between them, the respondent might be forced to pay damages for which he could not be held responsible in a court of Common Law where a plaintiff, against whom contributory negligence is established cannot recover.

Goineford Bruce in reply.

July 31.—Sir R. PHILLIMORE.—This is an appeal from the Court of Passage at Liverpool. The question raised is whether that court, exercising Admiralty jurisdiction, had power to entertain a

suit brought by the owner of a ship, which had been injured by collision on the high seas, against the pilot in charge of the wrong doing vessel at the time of the collision. The court below held that it had no power to entertain such a suit. The contrary position was argued before me with considerable learning and ability by Mr. Bruce, and I think it right to state that if the question were *res integra* I should be of opinion that under the provisions contained in the sects. 7 and 35, 24 Vict. c. 10, the court had jurisdiction in this suit, but it appears to me that this very question was distinctly raised before my predecessor, who in *The Urania* (*sup.*), without doubt, decided the contrary. The case, I must observe, is reported (in 10 W. R., p. 97) by Dr. Tristram, the counsel who argued it. In these circumstances, and in the absence of any precedent, and remembering that the plaintiff has a remedy at common law, it would, I think, be wrong in me to reverse this judgment. But in accordance with the principles laid down by me in *The Samuel Laing* (22 L. T. Rep. N. S. 891; 3 Mar. Law Cas. O. S. 463; L. Rep. 3 Adm. & Ecc. 284), I will give leave to appeal to the Privy Council. I must dismiss this appeal with costs.

Solicitors for the plaintiffs, Wood and Tinkler, agents for Jenkins, Rae, and Jenkins.

Solicitor for the respondent, Bremner.

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Collision—Vessel in stays—Going about in the river Thames—Duty of steamer to avoid sailing vessel.

Where a sailing vessel is beating up the river Thames on a flood tide against the wind, and has gone over towards the south shore to the edge of the tide, and as near to that shore as she can safely go, so as to avoid collision with vessels at anchor on the south side of the river, she is entitled to go about without warning vessels of her intention, and a steamer coming up astern of her ought to know from her position and the state of her sails that she is going about, and is bound to take measures, by stopping or otherwise, to avoid a collision (a).

(a) *THE PRICILLA*.—The case of the *Palatine* illustrates the duty of a steamer coming up behind a sailing vessel who about to tack. The duty of a sailing vessel under similar circumstances is laid down in *The Pricilla* (3 Mar. Law Cas. O. S. 503; L. Rep. 3 Adm. & Ecc. 125), which holds that where two vessels are sailing in company and beating to windward on the same tack, the following vessel, as soon as she sees the other go about, is bound to go about also, if by not doing so she incurs risk of collision. In giving judgment, however, the learned judge of the Admiralty Court found as a fact that the *Pricilla* had gone about and was standing towards the *Victory* (the other vessel) at the time the *Victory* saw the *Pricilla's* green light. This caused an appeal to the Privy Council, not reported. The facts were shortly as follows: The schooner *Pricilla* was standing close hauled on the starboard tack across the Gull stream towards the Goodwin Sand; she was followed on the same tack by the schooner *Victory* at the distance of from a quarter to a half mile, and about four points on the starboard quarter of the *Pricilla*. When the *Pricilla* had approached as near to the Goodwin Sand as her master deemed it prudent to go, he gave orders to go about on the port tack. The owners of the *Pricilla* alleged that as she was coming round with her helm to port, and before she had got any steerage way on her, the *Victory* stood across her bows, and with her port main rigging caught the jibboom and bowsprit of the *Pricilla*,

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THIS was a cause of collision instituted on behalf of the owner of the brigantine *Douglas*, the owner of her cargo, master, waterman and crew, against

and the *Victory* fell alongside of her. The owners of the *Victory* alleged that the crew of the *Victory* saw first the green light and afterwards both lights of the *Priscilla* about a point and a half on their lee (port) bow, distant about half a mile, so that the *Priscilla* had gathered way when they met; that the *Victory* kept her reach close hauled, and the *Priscilla* came into collision with her. In fact, the important question between the two vessels was whether the *Priscilla* had gathered way after she had gone about; and the Admiralty Court finding that the *Priscilla* had gathered way, and yet that it was the duty of the *Victory* to keep out of her way, the owners of the *Victory* appealed to the Privy Council, on the ground that, as the *Priscilla* had way on her, the two vessels were crossing vessels within the meaning of the sailing rules, and that it was, therefore, the duty of the *Priscilla*, as being on the port tack, to avoid the *Victory*, which was close hauled on the starboard tack. The judgment of the Privy Council has not been reported, and is therefore given below.

Dr. Deane, Q.C. and Prichard appeared for the appellants.

Butt, Q.C. and E. C. Clarkson appeared for the respondents.

The judgment of the Judicial Committee (the Right Hon. Sir James W. Colvile; James, L.J.; Mellish, L.J.), delivered 30th Nov. 1870, is as follows: Their Lordships, in the course of the argument, intimated that if the learned judge of the Admiralty Court had found as a fact upon this conflicting evidence that the *Priscilla* had not completed her manœuvre of tacking—or perhaps it would be more correct to say had not gathered way after tacking—they would not have interfered with or questioned that finding, which must have proceeded entirely upon the credit to be given to the witnesses on either side; and that they would also have thought that the conclusion which the learned judge drew from such a state of facts was justified—namely, that the *Victory* ought to have observed what the *Priscilla* was about, and ought to have avoided this collision by tacking herself. It unfortunately happens that though their Lordships might have inferred from the second paragraph of the printed judgment that this was what the learned judge intended to find, the last paragraph makes this somewhat doubtful.

The learned judge is made to say that the *Victory* must have known that the *Priscilla* had gone about, and was "standing towards her at that time." Finding those expressions in the judgment, their Lordships therefore thought it lay upon them to examine closely the evidence given on either side as to the whole transaction, and to draw their own conclusions from that evidence, because, if the *Priscilla* had really gathered way, and was standing towards the *Victory*, then it seemed to their Lordships that the case would probably fall within the 12th Article, and that the 17th article would not apply to such a case. They are by no means prepared to say that the learned judge did mean to find that the vessel had gathered way. They are inclined to think, upon a view of the whole of the circumstances, that that expression which has been quoted may have been inaccurately used, and that it did not really express what might have been in the learned judge's mind. In any case, after considering the evidence, their Lordships are disposed to give more credit to the case sworn to by the *Priscilla* than to the case made on the part of the *Victory* which, it is to be observed, rests very much on theory, whereas, if their Lordships reject the case made by the witnesses for the *Priscilla*, they must impute wilful perjury to three or four witnesses who have sworn to the actual state of the rigging, the steering, and the other manœuvres of the *Priscilla*, their evidence being inconsistent with the notion that that vessel, though she might have almost completed the manœuvre of tacking, had really gathered way, so as to bring the two within the category of crossing vessels, under the 12th Article. Their Lordships have had the benefit of consulting their nautical assessors, and that is the view that those gentlemen also take. The nautical assessors think that the vessel had not gathered way, and that being the case, they concur with those who advised the learned judge in the court below; and as their Lordships concur with the

the screw steam yacht *Palatine* and her owner, the Right Honourable Thomas Egerton, Earl of Wilton, intervening. The collision took place in Erith Randa, in the river Thames. Both vessels were proceeding up the river. The wind was about W.N.W., and the tide was flood and running about two or three knots an hour; it was daylight. The *Douglas* was working up the river with several vessels in company, and just before the collision was standing over to the south shore, close hauled on the starboard tack. When she got to the edge of the tide upon the south shore, and (according to the evidence produced on her behalf) as near to the vessels anchored off Erith as it was prudent to go, her helm was put down to go about from the starboard to the port tack. Her master, who was at the helm, alleged that he looked round but saw nothing to prevent him going about, and he gave no signal or warning of any kind of his intention to alter his course. Whilst the *Douglas* was in stay the *Palatine* ran into her, striking her on the starboard side amidships with such force that she sank as soon as the *Palatine* backed out of her. The petition in the cause alleged that the *Palatine* "improperly neglected to take in due time proper measures for keeping out of the way of the *Douglas*, and improperly neglected to keep out of the way of the *Douglas*;" that "those on board the *Palatine* did not duly observe and comply with the provisions of article 16 of the Regulations for Preventing Collisions;" and that "those on board the *Palatine* improperly kept their vessel under a starboard helm."

On behalf of the *Palatine* it was proved that she was proceeding up Erith Reach at less than half speed with the tide, making not more than four knots an hour. On entering the Reach those on board the *Palatine* observed the *Douglas* with two other sailing vessels about a mile ahead, beating up the reach on the starboard tack. As the *Palatine* drew nearer to them the two other vessels put about from the starboard to the port tack, and thereupon the *Palatine* starboarded her helm to go under the stern of those two vessels. She was then about half a mile below them. When

learned judge in thinking that, under the circumstances, the fault was the fault of the *Victory*, they must humbly recommend her Majesty to dismiss the appeal with costs.

Proctors for the appellants, *Prichard and Sons*.

Proctors for the respondents, *Deane, Son and Rogers*.

The effect of this decision is that the following vessel is bound to avoid the vessel ahead, and that the court below was right in the main; but that if it meant to find that the *Priscilla* had gathered way after going about, and that that vessel had therefore ceased to be upon the same course, the finding was erroneous. The rule as laid down is that a vessel is entitled to go about in such a place as is ordinary and usual, and a following vessel must be prepared for such a manœuvre. Several American cases have decided this question in the same way. As to sailing vessels, it has been held as a general rule that one vessel following another is bound to keep out of the way of the latter: (*Whitridge v. Dill*, 23 Howard's (U.S. Sup. Court) Rep. 44.) A case very similar to the *Priscilla* is *The Nellie D.* (5 Blatchford's U.S. Circuit Court (Second Circuit) Rep. 245; see also *The Morning Light* (2 Wallace (U.S. Sup. Court) Rep. 550), where it was held that a following vessel was not to blame, on the ground that the night was so dark that the crew could not see that the vessel ahead had gone about. As to steamers following one another, see *The Rhode Island* (Olcott's Adm. Rep. 505; 1 Blatchford's U.S. Circuit Court (Second Circuit) Rep. 363); *The Governor* (Abbott's Adm. Rep. 108); *Porter v. The Bella Donna* (Newberry's Adm. Rep. 510); *the Columbia* (2 Wallace (U.S. Sup. Court) Rep. 53)—*Ed.*

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the *Palatine*, stem was about level with the stern of the vessel on the port tack which was lowest down the river, the *Douglas*, which had up to that time continued on the starboard tack, suddenly ported her helm and came across the bows of the *Palatine* at the distance of about two ships lengths. The helm of the *Palatine* was instantly put hard-a-starboard, and her engines were stopped and reversed full speed astern, but the vessels notwithstanding came into collision. The master of the *Palatine* stated in his evidence that he was shaping his course to go between the *Douglas* and the other two vessels as soon as they should have opened out sufficiently to allow him to go through; that if the *Douglas* had held on a minute longer he should have gone clear, and that there was room for the *Douglas* to have gone further to the southward. The defendant's answer alleged "that a good look-out was not kept on board the *Douglas*;" that "the *Douglas*, in the time and circumstances in which she ported her helm improperly ported," and that "the *Douglas*, in the circumstances, improperly neglected or omitted to give any intimation that she was to go about from the starboard to the port tack."

The cause was heard before the Judge, assisted by Trinity Masters.

Bull, Q.C. (Clarkson with him) for the plaintiff.—The *Palatine* is to blame for not having stopped her engines when her helm was starboarded to get out of the way of the two coasters on the port tack. She was not justified in attempting to run the risk of getting through the narrow space between the *Douglas* and those coasters. They ought not to have depended on the *Douglas* holding on.

Milward, Q.C. (W. G. F. Phillimore with him) for the defendant.—A vessel has no right to put about in a crowded river without looking out for vessels near them, and giving notice of their intention. The *Douglas* was bound to take precautions. She improperly placed herself in stays.

The Sea Nymph, Lush, 23;

The Leonidas, Stuart's Vice-Admiralty Reports for Lower Canada, 229.

Sir R. PHILLIMORE.—This is a case of damage arising out of a collision between a sailing vessel and a steam yacht in Erith Rands, about eleven o'clock in the morning of July 22nd last. The direction of the wind at the time was about north-west, and the weather was fine and clear. The vessels which came into collision were the *Douglas*, a brigantine of 168 tons register, bound on a voyage from Guernsey to London, with a cargo of granite, and manned by six hands all told, and the *Palatine*, a screw steam yacht of 192 tons, and having a crew of twenty-three hands, from Cowes to London. The tide was flood, of about the force of three and a-half knots, and both vessels were going up the Reach. According to the case set up by the *Douglas*, she was working up the reach with other vessels in company, and was under all plain sail except her royal and topgallant sails and flying jib and gaff topsail; she stood over to the southward close hauled on the starboard tack to the edge of the tide upon the south shore; her helm was then put down that she might go about. According to the plaintiff's evidence, if she had gone any further she would not only have come into slack water, but into collision with the yachts anchored off Erith; it was also proved that when she was in stays and had come up into the wind, and four or five points round from the wind, the

stem of the *Palatine* struck her amidships, and it is not unimportant to remark that the violence of the blow was such as to cut through her deck planks. At any rate we had it proved in evidence that the steamer went so far into her deck that she had to be backed out. Before, however, we consider whether the *Palatine* is or is not to blame for the collision, I must observe that it has been contended that the *Douglas* is *primâ facie* to blame on her own showing, on the ground that under the circumstances she was wrong in going about at the time she did; at least without having given any warning of the manoeuvre she was about to execute. It was contended that she could have gone further inshore, and that if she wished to pot about in the place she did, she was bound to inform vessels astern of her that such was her intention, and also that her master ought to have looked round before he tacked, so as to see if he would be likely to cause danger of collision by putting his vessel about. We are of opinion that some craft may have been in the way which intercepted the view of the steamer, though her master says that he took a look round before going about; but anyhow she was in the exercise of her right in tacking as she did, and her position and the state of her sails would under the circumstances be sufficient notification to other vessels. She had every reason to expect that the *Palatine* would do her duty and keep out of her way. Now the *Palatine* says that she was coming up the Reach about mid-channel, and was waiting for an opportunity of going under the stern of two vessels which were beating up the reach in company with the *Douglas*, but on the other tack, and that the *Douglas*, which was sailing on the starboard tack, suddenly ported her helm and came right across the bows of the *Palatine* at the distance of about two ship's lengths off. The helm of the *Palatine* was put hard-a-starboard, and her engines were stopped and reversed, but she did not succeed in clearing the *Douglas*, though it is in evidence that the *Palatine* had got so far round that in another minute she would have done it, and her master has told us, "If we had stopped then (when he first starboarded), there would have been no collision." We think, therefore, the *Palatine* ought to have stopped; she ought to have seen from the position of the *Douglas* that the *Douglas* was about to tack, and according to the evidence of the mate, if she had stopped there would have been no collision. We are of opinion that the *Palatine* was unquestionably to blame, and, moreover, that the blame is in no degree shown to have been shared by the *Douglas*. We consider that there was nothing improper in her navigation or in her manoeuvre, and I must accordingly pronounce that the *Palatine* is alone to blame for this collision.

Solicitor for the plaintiff, T. Cooper.

Solicitors for the defendants, Clarkson, Son, and Grenwell.

Tuesday, Nov. 19, 1872.

THE ONEIDA.

Solicitors' lien on fund in court—Change of solicitors—New appearance—Practice.

Where a solicitor for a defendant in a wages suit was entitled to a lien for his costs on the balance of a sum of money paid into the

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registry in lieu of bail (after payment of the plaintiff's claim and costs) and the defendant, wishing to dispute the registrar's report on the plaintiff's claim, to which he had previously submitted caused a second appearance to be entered for him by other solicitors without previously paying his original solicitors' costs, the court ordered the second appearance to be set aside, and the original solicitor's costs to be paid out of the fund after payment of the plaintiff's claim and costs, leaving the other solicitors to apply to enter an appearance after this had been done (a).

This was an application to the court on behalf of the solicitors for the defendant in a wages suit against the ship *Onesie*. The cause was a consolidated cause in which the mate and seamen of the vessel were plaintiffs, and William Styles Morton, the owner, was the defendant. Messrs. Ingledew, Ince, and Greening had acted throughout on behalf of the defendant, and on his personal instructions. The defendant admitted at an early stage of the cause that wages were due, and thereupon the question of amount was referred to the registrar, assisted by a merchant, and was heard by them, counsel appearing for the defendant. After the reference had proceeded for some time, the defendant instructed his counsel and solicitors to withdraw any further defence and to submit to the decision of the registrar, and this was done by the defendant's counsel before the registrar and in the presence of the defendant. The registrar reported the amount of wages due.

In order to obtain the release of the vessel, the sum of 800*l.* had been paid into court in lieu of bail. The fund in court was the only available property of the defendant in this country, as he was a British American, and did not reside here. Messrs. Ingledew, Ince, and Greening had become entitled to costs in defending the suit to the amount of 150*l.* or thereabouts. The amount reported due for wages was 514*l.* 1*s.* 1*d.* After paying this out, together with plaintiff's costs, there would be still sufficient in court to pay Messrs. Ingledew, Ince, and Greening's costs, no part of which had been paid to them.

On 5th Nov. 1872, after the registrar's report had been made, the defendant being dissatisfied with the report and wishing to appeal to the court, which Messrs. Ingledew, Ince, and Greening refused to do as they advised him that they were precluded from so doing by the submission to the report, consulted other solicitors, Messrs. Thomas and Hollams, and they, giving notice to Messrs. Ingledew, Ince, and Greening, filed an appearance in the cause on behalf of the defendant, purporting to be an appearance entered by them "on

behalf of William Styles Morton and others, the owners of the ship or vessel *Onesie*, in lieu of Messrs. Ingledew, Ince, and Greening," and filed notice of objection to the registrar's report. No offer was made to pay Messrs. Ingledew, Ince, and Greening's costs in consideration of their consenting to a change of solicitors. Thereupon Messrs. Ingledew, Ince, and Greening filed the following notice of motion and served it upon Messrs. Thomas and Hollams.

Wa, Ingledew, Ince, and Greening, solicitors for the defendant in this cause, give notice that we shall by counsel, on the 19th day of Nov. 1872, move the judge in court to set aside the appearance entered by Messrs. Thomas and Hollams in this cause on behalf of the defendant, and to direct payment out to us, as defendant's solicitors, of the balance which will remain in court after payment thereof of the amount reported to be due to the plaintiffs, and their costs to be taxed, and to further order that defendant be not allowed to change his solicitors in this suit until our costs against him are paid, and to condemn defendant in the costs of this motion.

Kemp, in support of the application, submitted that the court would protect the solicitors, and would not allow a change of solicitors without payment of previous costs. This is the practice of the Courts of Common Law and Chancery. The second appearance entered should be set aside, as otherwise the original solicitors would lose their control over the fund in court, and would not be able to secure payment of their costs.

Sir R. PHILLIMORE.—I think Mr. Kemp is entitled to have his application granted, and I shall make an order according to the terms of the notice of motion. Messrs. Thomas and Hollams have had notice of this motion, and therefore an opportunity of being here to-day. If they are desirous of entering an appearance they will be able to do so upon application after the taxed costs due to Messrs. Ingledew, Ince, and Greening, have been paid out of the registry. This apparently is the course of the practice in the Courts of Chancery and Common Law.

Solicitors, *Ingledew, Ince, and Greening*.

Tuesday, Nov. 10, 1872.

THE MOORSLEY.

County Court appeal—Collision—Admission of fresh evidence at the hearing of the appeal.

The Court of Admiralty is very cautious as to admitting fresh evidence at the hearing of an appeal from the County Court, and will not do so unless the principles of justice require the admission of such evidence.

Semble, surprise is a ground for the admission of fresh evidence. An application for admission of evidence refused on the ground that there was no surprise shown.

This was an application on behalf of the appellants in an appeal from the County Court of Durham, holden at Sunderland, to admit fresh evidence at the hearing of the appeal. The cause was instituted (in personam) in the County Court by the respondent, Pietro Giacomo Cosulich, the owner of the Austrian barque *Genio*, under the County Court Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), sect. 3, sub-sect. 3, against James Laing of Sunderland, the owner of the steamship *Moorsley*, for damage by collision. The collision took place in the river

(a) This decision assimilates the practice of the Court of Admiralty to that of the Courts of Common Law and Chancery, and it would be still better if a rule of court were made that no change of solicitors could be made without the consent of the court. A solicitor has an undoubted lien on the fund in court, and the court will retain possession of the thing proceeded against until this lien is satisfied. (See *The Heinrich*, ante, p. 299; *Haymes v. Cooper*, 33 L. J. 488, Ch.; *The Jeff Davis*, L. Rep. 2 Adm. & Ecc. 1.) The same rule prevails in American Admiralty Courts. (See *The Sarah Jane*, Blatchford and Howland's Adm. Rep. 401; *The Victory*, J.C. 443; *Guineas v. Turris*, Abbott's Adm. Rep. 297, 301.) And it is country it is clear that a solicitor cannot be changed without the consent of the court: (See *Stee v. Low*, & Blatchford's U. S. Circuit Court (Second Circuit) Rep. 268).—En.

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Tyne, and the County Court Judge held that the *Moorsley* was alone to blame, and condemned the appellant (the defendant below) in damages and costs. At the hearing in the County Court the evidence was taken down by a shorthand writer, and a transcript was brought up on the appeal. The County Court Judge was assisted by nautical assessors; but the opinions of these assessors differed on almost every question put to them by the judge. From affidavits filed by the appellant it appeared that two important witnesses had not been examined at the hearing in the County Court; one of them was not summoned by the neglect of the appellant's servants; the other, although summoned, was unable to attend. The affidavits alleged that if the witnesses had been present, there was reason to believe that the judgment would have been different. An affidavit filed by the respondents alleged that the appellant consented to try the cause without these witnesses; that the evidence was taken down by the shorthand writer sufficiently for the purposes of the appeal; and that the appellant knew that these two witnesses would not be present. These allegations were denied by the appellant's affidavits.

Clarkson, for the appellant, in support of the application.

Kemp, for the respondent, *contra*.—The appellants have shown no ground for the admission of this evidence. The decision in *The Busy Bee* (ante, p. 293; L. Rep. 3 Adm. & Ecc. 527; 26 L. T. Rep. N. S. 590) proceeded on the ground that the evidence was not taken down by a shorthand writer. Here it was. The appellants might have applied to the County Court judge to adjourn the case for the production of these witnesses. There was, therefore, no surprise on the appellants.

Sir R. PHILLIMORE.—I am of opinion that I ought not to grant the motion. I say now as I said before, that I cannot be too cautious as to admitting fresh evidence on appeal. Before I can do so in any case, the circumstances must show that the principles of justice require the admission of such evidence. In this case I cannot find that there is any surprise on parties making this application owing to the absence of these witnesses. Moreover, the fact that this was such a doubtful case that the nautical assessors differed in their opinions is an additional reason why I should refuse this application. Now that this fact has appeared, it has become more clear where the pinch of the case was, and a great temptation exists to supply what was wanting by fresh testimony. Looking at all the circumstances of the case, I reject the motion.

Solicitor for the appellant, *Thomas Cooper*.

Solicitors for the respondent, *Ingledew, Ince, and Greening*.

Wednesday, Dec. 11, 1872.

THE ELPIE.

Bottomry—Necessaries—Mergers—County Court Admiralty jurisdiction—Transfer—Jurisdiction.

An instrument, drawn in the form of a bill of exchange for the payment of necessary disbursements for a ship, but which is payable after the arrival of the ship at her destination, and pledges the ship, "except in case of total loss," is, although

not stipulating for maritime interest, a bottomry bond. (a)

A claim for necessities, to secure the payment of which the master has given a bottomry bond on his ship, is merged in the bond, and cannot be enforced by the material men on the simple contract. (b)

Where a cause of necessities is instituted in a County Court under the County Courts Admir-

(a) In considering what is a good bottomry bond, both American and English Admiralty Courts are agreed in holding that maritime risk is an essential element, and that unless the lender takes upon himself that risk, he can have no claim as for bottomry; he can only recover his money under that head on the safe arrival of the ship at the end of the voyage or at some defined place: (see *The Atlas*, 2 Hag. 65; *Simmonds v. Hodgson*, 6 Bing. 114; *The Brig Draco*, 2 Sumner's U. S. Circuit Court (First Circuit) Rep. 157). In the last mentioned case Story, J., elaborately reviews the whole law of bottomry bonds. With regard to whether maritime interest is equally an essential, the authorities are not quite so clear. In the United States it has been said expressly in two cases that such interest is essential: (see *Leland v. The Medora*, 3 Woodbury and Minot's Circuit Court (First Circuit) Rep. 92; *Greely v. Smith*, 3 Id. 326, 348). In those cases, however, this is laid down on the authority of former English and American cases which scarcely bear out the doctrine. In *The Atlas* (ubi sup.), there quoted, it was not so held, and in *The Emancipation*, (1 W. Rob. 124, 130), Dr. Lushington said that it was not absolute necessity that a bottomry bond should carry maritime interest, but that the parties may be content with ordinary interest. In *The Brig Draco* (ubi sup.), Story, J., although defining bottomry to be a contract for the loan of money on the bottom of the ship at extraordinary interest upon maritime risks, does not lay great stress on the necessity for the great interest, but seems to consider the risk as the more important element; in that case the interest on the marine risk was 5 per cent. only, and therefore could hardly be called extraordinary, and yet the bond was not bad on that account. The case will repay a careful perusal, as it contains almost every authority on the subject existing at the time. In a later American case (*The Sloop Mary*, 1 Paine's U. S. Circuit Court (First Circuit) Rep. 671) no interest was claimed by the bond, and yet it was held good, the court saying that the interest was probably included in the amount secured, and that it ought to be so presumed. There can be no doubt that where the words indicating that the bond is subject to maritime risk are of doubtful construction, it becomes of importance to see whether maritime interest is secured, because as such interest is a usual stipulation in a bond, the fact that it is secured by the bond is evidence that the parties intended the bond to be a bottomry bond; on the other hand it is submitted that where the bond expresses clearly and unambiguously that the lender makes the loan subject to maritime risk, it is immaterial whether the bond stipulate for interest or not: (See *The Royal Arch*, Swab, 269, 280, 281.). If the lender is content to take the risk without interest, it is not for the Court of Admiralty to say that his security is bad on that account. He cannot be bound to claim more than he chooses, and if he waives his claim for interest that is his concern only. So long as the bond clearly expresses the maritime risk the question of interest ought to be immaterial. In the present case the money could not be recovered in case of total loss of the ship, and the loan was therefore subject to maritime risk, which the court held to be sufficient, without interest, to make the bond valid.—Ed.

(b) There can be no doubt that this ruling is in accordance with true principles of law. Although the question has not arisen before in the Admiralty Court in this country, it has been considered in the United States, where it has been held that a bottomry bond given to cover money advanced for necessary repairs excludes and is inconsistent with the lien implied by maritime law to secure such advances—that is to say, the simple contract debt for the advances is merged in the bond: (See *The Brig Ann C. Pratt*, 1 Curtis Circuit Court (1st Circuit) Rep. 340; *Bray v. Bates*, 9 Metcalf's (50 Massachusetts) Rep. 237.).—Ed.

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rally Jurisdiction Act 1868 (31 & 32 Vict. c. 71), and is transferred under sect. 8 to the High Court of Admiralty, and the petition of the plaintiff shows the claim to be based on a bottomry bond (the County Court having no jurisdiction over bottomry bonds), the High Court will reject the petition.

Semble, that where a suit is instituted in a County Court over which that court has no jurisdiction, the High Court of Admiralty cannot acquire jurisdiction by transfer, even if it has original jurisdiction in such a suit.

This was a motion to reject the petition filed in a case of necessities against the owners of the brig *Elpis*. The petition was as follows:

Hillyer, Fenwick, and Stibbard, solicitors for the plaintiffs in a cause on behalf of Luigi Desobazo and Vittorio Brosinovich, against the owner or owners unknown of the brig *Elpis*, say as follows:—

1. The above-named brig *Elpis* belongs to the port of Syra in Greece. In the year 1869 she was called by the name of the *Carlos Primos*, and was lying in the river Tyne, bound for Syra, and required certain necessary repairs to enable her to prosecute her voyage from Newcastle to Syra.

2. Vassilios Colucoridis, the master of the said brig, being without funds and credit at Newcastle, and being unable to obtain money to enable him to get the said repairs executed and to pay the expenses necessary to be incurred to enable the said brig to prosecute her said voyage, applied to the said Messrs. Desobazo and Brosinovich and Co., of North Shields, the plaintiffs in this suit, for the loan of 35*l.* sterling, which sum they lent him, to enable him to get the repairs executed and to pay the said expenses, upon the security of the following instrument, which was duly executed by the master of the said vessel:

“35*l.* sterling. North Shields, 20th Sept. 1869.

“Except in case of the total loss of my vessel, the *Carlos Primos*, of Syra, on her now intended voyage from Newcastle to Syra, I promise to pay, seven days after arrival there, to the order of Messrs. Desobazo, Brosinovich and Co., this first of exchange (second and third unpaid) the sum of 35*l.* sterling, at the course of exchange in London, value received in disbursements for the use and on account of my vessel *Carlos Primos*, and owners; and I hereby pledge myself and vessel and her owners for the payment of the above sum in the manner aforesaid. (Signed) V. COLUCORIDIS.”

3. In consequence of the said advance of money, the said brig was enabled to proceed on her said voyage and arrived safely in the port of Syra, and seven days after her arrival there, default was made in payment of the said instrument, which remains, and still is wholly due and unpaid.

When the vessel arrived at Syra as stated in the petition, she changed owners, and coming again to this country, a suit was instituted on Feb. 23rd 1872, in the County Court at Swansea, where she was lying, for these necessities. The summons in that suit was as follows:

Admiralty Jurisdiction, No. 26.

In the County Court of Glamorganshire, holden at Swansea.

Whereas a suit for money advanced for necessary expenses has been instituted in this court on behalf of Luigi Desobazo, of Williams-street-west, North Shields, shipbroker, against the owner or owners unknown of the brig called the *Elpis*, whereof Vassilios Colucoridis is now or lately was master, in the sum of 35*l.*

You are hereby summoned to enter an appearance in the said suit within four clear days of the service hereof.

You are also warned that if you do not enter an appearance as aforesaid, the judge of this court will proceed to hear and determine the said suit, or to make such orders therein as to him shall seem fit.

Dated and sealed this 23rd Feb., 1869.

Lewis Morris, Registrar of the court.

To the owner or owners of the brig *Elpis*, and all

persons who have a claim to have any right, title, or interest in the said vessel.

An appearance was entered, and subsequently, on an affidavit that the vessel was about to leave the port, the vessel was arrested under sect. 22 of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), and thereupon the sum of 35*l.* was paid into the County Court as security, and the vessel was released, and left the country. It then appearing that it was necessary to examine witnesses abroad, and the County Court having no power to issue a commission, the County Court judge, under sect. 8 of the above Act, transferred the cause into the High Court of Admiralty. A *præcipe* was thereupon filed in the latter court as follows:—

In the High Court of Admiralty of England.

The *Elpis*.

We, Hillyer, Fenwick, and Stibbard, hereby institute a cause of necessities (by transfer) on behalf of Luigi Desobazo and Vittorio Brosinovich, against the owner or owners unknown of the brig *Elpis*, belonging to Syra in the kingdom of Greece, in the sum of 200*l.*

The plaintiffs then moved to re-arrest the ship for the sum of 200*l.*, to secure the costs of the commission, whereupon it was admitted by the defendants that the *Elpis* was the *Carlos Primos*; that Colucoridis was the master, and signed the bill or instrument above referred to; and that default was made in payment of the bill on the safe arrival of the ship at Syra. The commission was thereupon abandoned, and the plaintiffs filed their petition.

The defendants' solicitors thereupon gave the following notice of motion:

We, Ingledew, Ince, and Greening, solicitors for the defendants in this cause, give notice that we shall lay counsel on the 10th Nov. 1872 move the judge in court to reject the admission of the petition filed in this cause, or order it to be amended on the following grounds:

As to rejecting the admission—

1. That the petition discloses a cause of action over which the County Court had no jurisdiction.

2. That the action is a personal action, and the petition does not allege personal liability in the present defendant.

As to the amendment of the petition—

That the petition does not in the heading correspond with the *præcipe* to institute.

Clarke, for the defendants, in support of the motion.—The power given by the 8th section of the Admiralty Jurisdiction Act 1868 is not to reject a cause and give leave to institute another in this court, but to transfer a cause already pending. This cause was instituted below in the sum of 35*l.*, but a *præcipe* has been filed in this court in a “cause of necessities by transfer in the sum of 200*l.*” The nature of the cause is omitted in the heading of the petition, but the whole of the petition discloses a cause of bottomry. The County Court has no jurisdiction over bottomry bonds, and prohibition would lie if such jurisdiction were exercised. By sect. 8 the court has before it the suit instituted in the County Court; the *præcipe* in the court below was in a suit “for money advanced for necessities.” It now appears that the money was advanced on the security of an instrument which was a bottomry bond. A claim for necessities is a claim which must be paid in any event; but a bottomry bond is payable only on the safe arrival of the ship pledged. Here payment was only to take place on the safe arrival of the ship at Syra, and this therefore is clearly a bottomry transaction. Different considerations arise in cases of bottomry and in cases of necessities. Foreign

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THE ELFIN.

[ADM.]

ships are subject to a lien for necessities supplied in England, and that lien is enforceable in this country; whereas when money is advanced here on bottomry the money is payable, not here, but on the arrival of the ship at her port of destination. Again, this is not a proceeding *in rem*, although the suit was instituted after the passing of the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), by which proceedings may be *in personam* or *in rem*. The suit was instituted against "owner or owners unknown;" the summons was served on the ship; and, lest the ship should have been removed from the jurisdiction, the plaintiff compelled the payment into court of the money under sect. 22 of the County Courts Admiralty Jurisdiction Act 1868. That is clearly a proceeding *in personam*; and, if so, then the defendants are not liable. If this is a bottomry bond there is no personal liability on the part of the defendants, as they were not parties to it. This is clearly a bottomry bond, there being maritime risk: (*The Nelson*, 1 Hagg. 169.) If this is not a bottomry bond, then the court has no jurisdiction, and there is no claim enforceable here; for this is a bond of some sort, and this court has no power to enforce bonds other than bottomry bonds: (*The Indomitable*, Swab. 446, 451.) This is not a bill of exchange, as such an instrument is payable in all events, whilst this is only payable on the safe arrival of the ship. The uncertainty which makes it not a bill of exchange makes it a bottomry bond depending on maritime risk. Again, the suit having been instituted in the County Court, the Admiralty Court cannot acquire jurisdiction by reason of a mere transfer. If this is a suit *de novo* in this court, then it is not rightly instituted, because it appears that the suit was originally for necessities, and now the face of the petition discloses a cause of bottomry.

Gainsford Bruce for the plaintiffs, *contra*.—Admitting for the sake of argument that this instrument is a bottomry bond, there still exists, apart from the bond, a claim for necessities. At common law no doubt a rule exists that any simple contract claim is merged in an instrument under seal. In this court, however, there is no such decision, and there is no reason why the plaintiff, because he chooses to take an instrument of this character, may not also proceed to recover his money in a suit for necessities, using the instrument as evidence of the supply of the necessities, always supposing that the ship arrives safe. He may claim on his simple contract, which is not merged in the bond, and can enforce it before a competent court without falling back on his bottomry security. If he can do this in a court competent to enforce both contracts, then in the inferior court he can enforce the simple contract, and the County Court therefore has jurisdiction. But this is not a bottomry bond, because the fact that the bill is payable after arrival is not sufficient bottomry security, nor is there any maritime interest stipulated: (*The Indomitable*, *ubi sup.*) [Sir R. PHILLIMORE.—There is in this instrument the very essence of a bottomry bond, namely, maritime risk, and I cannot consider it otherwise, although there is no maritime interest.] Then the court has a greater jurisdiction in a transferred suit than the original court, and, if the suit turns out to be a bottomry suit, the court can take cognizance of it. The fact that the nature of the suit is not set out is of no

consequence, as the plaintiff has a claim either on the instrument or on his simple contract. There is no rule of practice in this court requiring the nature of the suit to be set out in the heading of the petition, and it is usual in the registry to enter causes without placing them under any specific heading as to the cause of action. [Sir R. PHILLIMORE: That, no doubt, is the practice of the court; I am so informed by the registrar. But if you wish to claim in this suit for necessities, you ought to strike out of your petition this instrument to put yourself in order.] That I am willing to do, using it as evidence. The defendant says that the claim for necessities is merged in the bond, and yet that he, not being a party, is not bound by it. This is inconsistent. The plaintiff's claim for necessities is against the owners, but the suit is *in rem*, within the meaning of that term as used in this court. The form of summons used is the only one in such a case provided by the rules and orders. The right to arrest the vessel only existed when she was about to leave the jurisdiction. There are only two forms of summons under the rules established for the County Courts: (See General Orders for regulating the practice and procedure of the Admiralty Jurisdiction of the County Courts 1869; Forms.) No. 3 form is directed to all persons interested in the property, and is served on the ship, and calls upon all such persons to come in and defend, and therefore the proceeding is *in rem*. No. 3 form is the *in rem* summons; No. 4 form is the *in personam* summons. [Sir R. PHILLIMORE: You must elect whether you will proceed in a cause of necessities, and, if so, whether you will amend by striking out the instrument.] I elect to proceed in a cause of necessities, and will amend if the court permits it.

Clarkson in reply.—If this is a claim for necessities, it is improperly instituted, and the court has no jurisdiction; it cannot acquire jurisdiction by consent. The cause of action is on a bottomry bond, and nothing else. The plaintiff might have sued in this court in the first instance. He would then have been in a court of competent jurisdiction, with an appeal to the Privy Council as of right. If this case proceeds, there will be no appeal except by leave of the court. This is a hardship on the defendants. [Sir R. PHILLIMORE.—I agree that the County Court, having no jurisdiction, could not give this court jurisdiction by transfer; but, as this court has jurisdiction in both bottomry and necessities, cannot the court entertain the cause on the plaintiff waiving the claim for bottomry, and proceeding on his claim for necessities?] The plaintiff has pleaded that the money was advanced on the security of this instrument. If he withdraws it from his petition, the defendant can give it in evidence to show that his claim was on a bond, and not on simple contract. Then it will appear that there was a merger, because if the ship had been lost the debt would have been extinguished. If there is an independent claim for necessities, that could not be so extinguished. The necessities claim must therefore be taken as merged in the bond, there being no claim on the loss of the ship. The proper course for the plaintiff is to abandon his suit, and recommence in this court.

Sir R. PHILLIMORE.—I have entertained very considerable doubt during the argument as to the course I should pursue in this case; but upon the whole I am inclined to think that my decision

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[ADM.]

must be adverse to the petition. Now, the case which was transferred to this court under the authority of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), sect. 8, is a case of necessities in a certain suit, entitled *Luigi Descaho and Vittorio Brosinovich v. the Owner or Owners unknown of the brig Elpis*. This being a case of necessities, the case disclosed on the petition of the plaintiffs, filed in this court, is a case of bottomry. The words in the petition which set forth the plaintiff's claim are as follows: (The learned judge then read the second paragraph of the petition as far as the instrument.) Then the petition sets out the instrument, which is as follows: (The learned judge then read the instrument, set out in paragraph two of the petition.) Now, it is clear to me that this is in substance and effect, having regard to the fact that maritime risk is there introduced, a bottomry bond; and, looking to the precedents in this court, it must be so considered. There is great force in the observation of Mr. Clarkson, that the rule of merger must be applied in this case, because it is admitted that the simple contract debt for necessities could not exist in case of the ship not reaching her destination, and therefore the only contract which the plaintiff could enforce was a contract arising out of a bottomry bond. It is quite clear that this petition cannot be sustained, and, although I am very reluctant in a question involving so small a sum to put the parties to further expense, I must not only refuse to allow the petition to be amended, as I suggested to Mr. Bruce in the course of the argument, but I think I must reject the petition, leaving the plaintiffs to bring a bottomry suit in this court, and to begin *de novo*. I am also afraid that I must reject it with costs. I shall make no order as to other costs in the cause, but only as to the costs incurred in respect of this petition. I do not interfere with this suit further than by rejecting the petition.

Solicitors for the plaintiff, *Hillyer, Fenwick, and Stibbard*.

Solicitors for the defendants, *Ingledew, Ince, and Greening*.

Monday, Dec. 2, 1872.

THE ADA; THE SAPPHO.

Collision—Crossing vessels—Taking pilot—Regulations for preventing collisions at sea—Arts. 14 and 19.

The fact that two steamers, upon crossing courses, are bearing down at the same time upon a well-known pilot station to take pilots on board, is not such a special circumstance within the meaning of Art. 19 of the Regulations for preventing Collisions at Sea, as will justify a departure from Art. 14 requiring the ship, which has the other on her own starboard hand, to keep out of the way of the other.

THESE were cross causes of collision, instituted respectively on behalf of the owners of the *Sappho*, against the owners of the *Ada*, and on behalf of the owners of the *Ada* and the owners of cargo laden therein against the *Sappho* and her owners intervening. The *Sappho* was a screw steamship of 895 tons register and 120 horse-power, manned by a crew of twenty-two hands all told, and at the time of the collision was bound on a voyage from Dantzic to Hull with a cargo of grain and shoddy. The *Ada* was a screw steamship of 560 tons

register, manned by a crew of twenty hands all told, and at the time of collision was bound from Ibraile to Hull with a cargo of barley. The collision occurred at the entrance to the river Humber, about a mile and a half S.S.W. of the Spurn Light vessel, between that light vessel and the *Sand Haile* hnoy. Near the place of collision a Hull pilot cutter was lying at anchor, waiting to supply vessels with pilots, this being a usual place for pilot cutters to be in fine weather. She lay with her head to the N.E. The tide at the time was running S.W. at the rate of about a knot and a half an hour, and the weather was clear and the sea calm.

The case on the part of the *Sappho* was that shortly before 5 p.m. on 11th Jan. 1872 she arrived about a quarter of a mile to the north-east of the Spurn Light vessel; she was then heading about south-west, with the light vessel on her starboard bow, and with her regulation lights burning brightly. As she generally got a pilot below the Spurn Light, when abreast of it her engines were eased and a blue light was burned as a signal for a pilot, and immediately after, in making out the pilot cutter, her engines were stopped. The pilot cutter was then about a mile off. The *Sappho's* engines were not set on ahead again until after the collision. About the same time that the *Sappho's* crew made out the pilot cutter, the mast-head and green light of the *Ada* were seen at the distance of about one or two miles from the *Sappho*, bearing three or four points on her port bow. The *Sappho* drifted down towards the pilot cutter, with the tide and the way she had on her. She had steerage way on her all the time. When she came abreast of the pilot cutter, a pilot boat, containing both the *Sappho's* and the *Ada's* pilots, came alongside of her to put a pilot on board, and made fast to her. According to the evidence of the senior pilot on board the cutter, the *Sappho* was going with the tide past the port side of the cutter, at the rate of three knots an hour; this speed was, as said by one of the pilots in the boat, such that he could easily have got on board. As the *Sappho* passed the stern of the pilot cutter her master ordered her engines to be reversed, which was done. The *Ada*, with her masthead and green lights only open to the *Sappho*, came on past the pilot cutter, and although the *Sappho's* engines were reversed full speed astern, and the *Ada* was hailed to go astern, the two vessels came into collision. The *Sappho's* stem struck the *Ada's* starboard-bow. The collision occurred about one hundred yards astern of the pilot cutter. The master of the *Sappho* said in his evidence that he acted upon the rule that the *Ada*, having the *Sappho* on her starboard hand, was bound to keep clear of the *Sappho*. The *Ada* was charged by the owners of the *Sappho* without neglecting "to take proper measures to go astern of the *Sappho*" and with neglecting "to stop and reverse in due time."

The case on the part of the *Ada* was, that at the time mentioned, she arrived at the mouth of the Humber, and was steaming slowly in the usual course for vessels entering the Humber from the S.E. till she got within a mile to the S. of the Spurn Light, and about two hundred yards from the pilot cutter. Her engines were then stopped to receive her pilot, and her head lay about N.W. by N. She had her lights burning brightly and also a signal light for a pilot. Those on board her then observed the three lights of the *Sappho*

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about three-quarters of a mile off on the starboard beam. At this time it was alleged that the *Ada* had no headway on her, but only going with the set of the tide, and the pilot cutter was also on her starboard beam. The *Ada* passed the cutter at right angles to the cutter's stern, and when she had got past about her own length, the *Sappho* struck her although the engines of the *Ada* were reversed full speed. The *Ada* sank about half an hour after. The *Sappho* was charged by the owners of the *Ada* with "proceeding at an improper rate of speed," with not complying "with the 16th and 19th articles of the regulations for preventing collisions at sea," and with improperly neglecting "to keep clear of the *Ada*."

The main question of fact in the case was as to which of the two vessels came up first to the pilot cutter, the *Ada* alleging that she was there at the time that she first saw the *Sappho* three-quarters of a mile off. Several pilots from the cutter were called by the defendants, and from their evidence it appeared that the two vessels arrived about the same time, but that as the *Sappho* was the vessel most inside the cutter, the pilot boat was first sent to her. The evidence of the senior pilot on board the cutter, which was relied upon in the judgment of the court, was as follows:

Q. To the best of your judgment, knowing the *Sappho* was coming down with the tide, bringing her straight to your cutter, must not the *Ada* have more headway through the water than the *Sappho* had?—A. At the first time we see her she must have been—I can't say at the time of the collision; she must have been coming faster.

Q. But the *Ada* must have had more headway than the *Sappho*; do you understand me?—A. Yes, I understand you.

Q. Must not the *Ada* have more headway on her than the *Sappho*?—A. The tide was in favour of the *Sappho*; the *Ada* was coming across it.

Q. That being so, and seeing they arrived at your cutter at nearly the same time, must not the *Ada* have more headway on her through the water than the *Sappho*?—A. I can't say what she had at first; she had very little at the last.

Q. You did mean to send the first pilot?—A. To the *Sappho*.

Q. Did you order the pilots into the boat, or what?—A. I said, "Hold on astern, to see which is first."

Q. What did you do next?—A. Ordered the boat to pull away to the *Sappho*; I did not know it was the *Sappho*—they were both *Sapphos* to me.

Q. Was that because the *Sappho* was up first?—A. The nearest.

Q. The *Sappho* was inside of your cutter, was not she?—A. Inside of her.

Q. When you ordered the boat away to the *Sappho*, which was inside your cutter; was the *Ada* then outside?—A. Outside—on our outside quarter.

Q. If the *Ada* had stopped where she was at that time, would there have been a collision?—A. No, that there would not.

Q. Now, I must put it to you: was it not this that caused the collision, the *Ada* coming on after that? now, to the best of your judgment?—A. I don't wish to have anything to do with that; if the *Ada* had stopped there she would not have been in collision.

Q. Was there anything to prevent the *Ada* stopping there?—A. No, nothing.

The cause was heard before the judge, assisted by Trinity Masters.

Butt, Q.C. (E. C. Clarkson with him) for the *Sappho*.—The vessels were crossing vessels, and therefore the *Ada*, having the *Sappho* on her starboard hand was bound to keep out of the *Sappho*'s way under Rule 14. The only ground on which this rule can be held not to apply is that both vessels were on the look-out for the pilot cutter,

and that the *Sappho* should have known that the *Ada* must take the course she did. If, however, the *Sappho* arrived first, this is no excuse, as the *Ada* would then have been bound to avoid her. The *Sappho* did arrive first; this is clear from the fact that the pilot boat containing both pilots went to the *Sappho* first. The *Ada* was bound to have ported and gone under the *Sappho*'s stern, or to have stopped till the *Sappho* had passed.

Milward, Q.C. (W. G. Phillimore with him) for the *Ada*.—The *Sappho* knowing that the *Ada* was stopped to get a pilot, had no right to attempt to run across the *Ada*'s bows. This case is not within rule 14, but rather within rule 19 which provides that, "in obeying and construing these rules due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger." Is it within the ordinary rules of prudence and navigation that a steamer, seeing another lying in wait for a pilot close to a pilot station well known to both, should cross the course of that other steamer? The necessity for taking a pilot at that place was a special circumstance rendering a departure from rule 14 necessary. The *Sappho* should have slackened speed and allowed the *Ada* to pass ahead of her.

Butt, Q.C., in reply.

Sir R. J. PHILLIMORE.—This is a disastrous case of collision between two screw steamers, the *Sappho* and the *Ada*. It took place on the 11th Jan. 1872, at about 5 p.m. near the Spurn Light at the entrance of the River Humber. The weather at the time was fine, it being according to the evidence of one of the witnesses a beautiful evening, the sea was smooth and lights were plainly visible. The collision was caused, therefore, by the misconduct or negligence of one of the two vessels or of both. The *Sappho* was heading S.W. with her Spurn Light on her starboard side, and the *Ada* was heading N.W. by W. a short distance off and southward of the Spurn Light. Close to that light was the pilot boat which both vessels were seeking for the purpose of taking on board a pilot. From this statement of the facts it will appear that the *Ada* had the *Sappho* on her starboard bow, and that the vessels were crossing vessels within the meaning of Rule 14 of the Sailing Regulation, and that it was therefore *prima facie* the duty of the *Ada* to get out of the way of the *Sappho*. It has, however, been submitted that the question which the court has to consider is whether any circumstances have been shown on the part of the *Ada* to take her out of the operation of this rule, and it was contended that the latter portion of the 19th rule which provides that "due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger," applies. It was contended that the circumstance that both vessels were bearing down upon a well-known pilot station in search of a pilot, made it right that the *Sappho* should have taken some step to avoid the *Ada*, and that the *Sappho* ought to have supposed that the *Ada* would stop at or near the place at which she did actually stop. Now it appears that the lights of the *Sappho* were first seen from the pilot boat, and she being the inside vessel, the senior pilot

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ordered that she should be the first vessel to which the pilot should be sent; and accordingly the boat was first sent to her. It may be observed here, with reference to another point in the case, that after the boat got alongside, and was being towed by the *Sappho*, her speed was such that she could easily have been boarded by the pilot. I may as well deal in passing with that part of the defence which was advanced for the purpose of showing that the 16th sailing rule as to slackening speed applied, and that the *Sappho* was to blame for not doing so, and that he was therefore, at least partly to blame. The court is satisfied that the speed of the *Sappho* was not more than three knots when the pilot boat got alongside of her. The effect of the tide would not be to bear the *Sappho* down upon the *Ada* but to carry the *Ada* away from the *Sappho*. The Elder Brethren are of opinion the speed of the *Sappho* was not an improper speed for her to be going at at the time, and that it was not such as to involve risk of collision if the *Ada* had fulfilled the duty imposed upon her by obligation of law. The evidence satisfies me that the *Sappho* was not to blame for the collision in this respect. It has not been very distinctly stated beyond this what the *Sappho* ought to have done. On the other hand, the best witnesses in this matter are from the pilot cutter, and the Elder Brethren think with me that no witnesses are so competent to give evidence on the point, more especially the senior pilot. There is no answer to a portion of the evidence. It is true that this witness was produced by the *Ada*, but he had no bias on behalf of either the *Ada* or the *Sappho*, and meant to give his evidence for the information of the court, as it was his duty to do. He was examined as follows: [His Lordship read the passage from his evidence before set out.] The last question and answer I have just read are very pertinent to the question at issue. I confess that from the time that evidence was brought to the notice of the court that the task to overcome it was too great even for the ability of the learned counsel for the *Ada*. Having given my best attention to the evidence, and consulted the Elder Brethren, I have arrived at the conclusion that there were no special circumstances requiring a departure from rule 14, and that the *Ada* is, therefore, alone to blame. There is a cross action, and the usual result will follow in that action.

Proctors for the *Ada*, Dyke and Stokes.

Proctors for the *Sappho*, Pritchard and Sons.

ADMIRALTY COURT OF THE CINQUE PORTS.

Reported by J. F. ASPIWALL, Esq., Barrister-at-Law.

Monday, Nov. 18, 1872.

THE ANTILOPE.

Salvage—Two suits in different courts—Amount in which suits are instituted—Evidence—Practice.

In a salvage suit evidence of the amount in which another suit has been instituted in another court for services rendered at the same time is not admissible.

THIS was a cause of salvage instituted on behalf of the owners and crews of three luggers and a smack against the French screw steamship the *Antelope*, and her cargo and freight, for services ren-

dered to that vessel whilst ashore in Dungeness Bay.

The case was heard before Sir R. Phillimore at Westminster, and, during the examination of one of the defendants' witnesses (one of the defendants' solicitors), it appeared that another suit had been instituted in the High Court of Admiralty on behalf of a steam tug called the *City of London* in respect of services rendered at the same time.

Phillimore, for the defendants, then asked the witness who were the plaintiffs in the High Court of Admiralty, the names of their solicitors (the same solicitors appearing for the plaintiffs in both suits), and then proposed to ask the amount in which the suit was instituted in the High Court.

R. E. Webster, for the plaintiffs, objected to the question.

Sir R. PHILLIMORE refused to allow the question to be put, upon the ground that the court would not allow the amount at which other persons value salvage services to be brought to its notice.

Solicitors for the plaintiffs, Lowless, Nelson, and Jones.

Proctors for the defendants, Dyke and Stokes.

VICE-ADMIRALTY COURTS.

Collected by JAMES F. ASPIWALL, Esq., Barrister-at-Law.

IN THE VICE-ADMIRALTY COURT OF NEW SOUTH WALES.(a)

(Before Sir ALFRED STEPHEN, Judge Commissary, and Mr. JUSTICE CHEEKE, Assistant Judge.)

Thursday, Sept. 12, 1872.

THE NEVADA.

Collision—Regulations for preventing collisions at sea applicable to English and United States vessels in the high seas—Rule as to not rendering assistance after collision not applicable—Merchant Shipping Amendment Act 1862 (25 & 26 Vict. c. 68, ss. 33), 58, 61.

The law administered by the Admiralty Courts of

(a.) Vice-Admiralty Courts have been in existence in the different British possessions from a very early date, and now there are Vice-Admiralty Courts in nearly all our principal colonies. Their jurisdiction was originally co-extensive with that of the High Court of Admiralty of England, but certain other powers were given from time to time by statute. Nor was their jurisdiction extended at the same time as that of the High Court; for in 1859 the Privy Council held that their powers were only those of the High Court before the passing of the 3 & 4 Vict. c. 65: (*The Australia*, 13 Moore P.C.C. 132; Swab, 480). There was even doubt as to this jurisdiction: for in 1832 an Act (2 & 3 Will. 4, c. 51) was passed to give power to the King in council to make regulations for the practice and fees in the Vice-Admiralty Courts, and to remove doubts as to the jurisdiction. By that Act, sect. 6, the Vice-Admiralty Courts were declared to have jurisdiction over suits for seaman's wages, pilotage, bottomry, damage to a ship by collision, contempt or breach of the regulations and instructions relating to his Majesty's service at sea, salvage, and droits of Admiralty. This was the same as the then existing Admiralty jurisdiction. As to prize matters there seems to have been no doubt. Rules for the courts were made by the Privy Council in the same year, and were printed and published by the Government in 1842. They will also be found at the end of Stuart's *Vice-Admiralty Decisions*, Lower Canada. The last-mentioned Act was repealed by the Vice-Admiralty Courts Act 1863 (26 & 27 Vict. c. 24) except as to the rules, which are still in force. This Act now regulates the jurisdiction of the Vice-Admiralty Courts (see sects. 10, 11, & 12). The appointment of vice-admirals and judges is made by commission issued

Great Britain and the United States, relating to all rules of navigation and rules concerning lights in case of collision on the high seas, is the same.

In British Admiralty Courts, decisions in cases of collision between British and American ships rest directly upon the rules, as accepted expressions of law; because her Majesty having, by the Merchant Shipping Amendment Act 1862 (25 & 26 Vict. c. 63), s. 58, the power, by order in council, to order, on it appearing that a foreign country is willing that the British rules should apply to the ships of that country when beyond British jurisdiction, that the rules shall so apply, did, on an Act of Congress of the United States being passed, enacting that identical rules should apply to United States ships order that the British rules should apply to United States ships beyond British jurisdiction, the Act of Congress being considered as the required consent; and because, by sect. 61, whenever such order in council is issued, foreign ships are to be treated in British Admiralty Courts, with respect to such rules, as if they were British ships. In the United States Admiralty Courts, the decisions are founded upon the general law and usage of the sea, as evidenced by written rules or statutes identical in the two countries, there being no such provision in the Act of Congress as sect. 61 of the Merchant Shipping Amendment Act 1862.

The steamer *Scotia* (20, L. T. Rep. N. S. 375; 3 Mar. Law Cas. O. S. 223), followed.

The rule contained in the Merchant Shipping Amendment Act 1862, sect. 33, that the omission by any ship, after a collision, to render all practicable assistance to another, shall be presumptive evidence against the former that she is in fault, does not apply to United States ships, because that rule has not been adopted by the United States.

A steamer is bound, both by British and United States law, to keep out of the way of a sailing vessel, and to keep a good look-out. The duty to keep a look-out is especially incumbent upon a steamer going at a rapid pace in hazy weather, in an ordinary track of vessels trading from one port to another.

This was a case of damage instigated by the owners of the English barque *A. H. Badger* against the American steamship *Nevada*. The facts and arguments are sufficiently set out in the judgment, which was a considered written judgment.

Sir ALFRED STEPHEN.—This is a case of collision on the high seas on the 15th Oct. last, occurring between this colony and New Zealand—the *Badger* (as I shall throughout call her) being on a voyage to Auckland from the port of Newcastle, in New South Wales, heavily laden with coals and maize,

out of the High Court of Admiralty of England; but the governor of a British possession is *ex-officio* Vice-Admiral, and the Chief Justice, or principal judicial officer, is *ex-officio* judge of the court, on a vacancy occurring, until a formal appointment is made. The form of the commissions will be seen by reference to the appendix of Stuart's Vice-Admiralty Decisions. Powers are given to appoint deputy and assistant judges by 30 & 31 Vict. c. 45, and provision is there made for the appointment by similar commissions of these courts in any possession already possessing legislative powers. The list of Vice-Admiralty Courts will be found in the schedule to the Vice-Admiralty Courts Act 1865; but, in addition to those there mentioned, there is a similar court at the Straits Settlements, and by their charters of 1866 the High Courts of the three Presidencies of India have vice-admiralty powers: (See *The Portugal*, 6 Bengal Law Rep. 323.)—ED.

and the *Nevada*, proceeding from Auckland to Sydney on her usual mail trip, with letters and passengers. The *Badger* was an English barque of 337 tons register, but had on board on that voyage about 480 tons. The *Nevada* is a steamship of 2400 tons, belonging to citizens of the United States. The wind, on the night in question, was from the north-west, or about N.N.W.—a seven or eight knot breeze; and the *Badger's* course was east half north true, or east by north half north, according to compass. Her spanker boom was over the quarter—she being on the starboard tack, with main and foresail set, and making about six knots an hour. The *Nevada* was steering nearly due west by compass, or west quarter south true; and her speed, at the time of the collision, was about ten knots—rather more than less. The night was confessedly dark and hazy; and the accident occurred between ten and eleven o'clock; somewhere about a quarter before eleven—although some of the witnesses say it was past that hour. According to the evidence on both sides, neither vessel was seen by any one on board the other until a very few minutes before the striking. The *Badger*, indeed, was seen scarcely a minute before it. There is the usual amount of conflicting testimony as to what then took place or was seen and heard on board the vessels respectively. It is certain however, that at or about the time named, in that dark night, the two vessels came in contact with each other; the *Badger*, with her helm recently put hard to port, and her head thus turned slightly to the south, being struck by the *Nevada's* bow violently on the port side, near the mizen chains, and thereby receiving fatal injuries, which the next day led to her destruction and abandonment. An attempt to reconcile the evidence to which I refer would, as in almost every case of the kind, be hopeless. But, on a careful review and consideration of the whole, assisted previously as we were by the able and elaborate comments of the counsel on both sides, Cheeke J. and myself—his Honour having been good enough to sit with me in the case—have satisfied ourselves as to the more material facts; and the following are our conclusions on them: We think that the *Badger* had lights at the time of the collision, but we doubt if they were properly placed; and we do not believe that the starboard light, considering its state and the probable state of the wick, although both lights appear to have been still burning, could have been seen by the *Nevada* except at a short distance—in the relative position of the two vessels. We do not find, consequently, that both lights of the *Badger* were in a proper condition at the time. On the other hand, it is proved that all the lights of the *Nevada* were burning, and we believe in perfectly good order. But we cannot resist the conclusion that there was an insufficient look-out on board that vessel; and that had there been a proper and vigilant watch kept by her, the collision would not have happened. We are unable to say, notwithstanding the imperfect state of the *Badger's* lights, that she contributed to her misfortune; within the rule, at all events, which would render the liability for the damage divisible between these vessels. It appears to us, that the *Nevada* would equally have run into her, whatever the state of the *Badger's* lights. The evidence satisfies us that the *Nevada's* people gave no thought whatever, or no sufficient thought,

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to the probability or the chances of meeting another vessel in that wide sea; and that, as no vessel was looked out for, so until too late for safety none was in fact seen. It was not until close upon the *Badger* that an order was given on board the *Nevada* to port her helm, or, as alleged by one witness, to stop her. But she certainly was not stopped; and, if the other order was obeyed (the collision being almost instantly afterwards), there is no evidence that she diverged from her course for a moment. It is a matter merely of opinion, not of deduction from evidence, whether in the state of the atmosphere, and at night, in that part of the ocean which she was traversing, the *Nevada* ought to have maintained so high a rate of speed. On that point our opinions differ. But we entirely agree in this—that, considering all those circumstances, and that she was in the ordinary track of vessels trading between this colony and New Zealand, the *Nevada*, steaming along at that rate, was bound to have observed an unusual degree—to have exhibited in short the highest degree of vigilance. And assuredly, as we conceive, had that degree of care and watchfulness been manifested, or even, we think, an ordinary amount of care, the *Nevada's* people, notwithstanding her speed and the state of the weather, might have discerned the *Badger* in sufficient time to avoid the catastrophe. According to the known and accepted rules, recognised almost universally among the nations for the guidance of vessels at sea, it was especially the duty of the *Nevada*, as a steamer, to keep out of the way of the *Badger*, and, if both had been sailing vessels, the *Nevada's* duty (the *Badger* being on the starboard tack) would have been the same. Lastly, we must express our regret that the striking ship did not stop after the collision to ascertain whether any and what injury had been done, and to render assistance if required. It is due to her captain to say that he could scarcely have been aware, if at all, of the violence which attended the collision; for he was not on deck at the time, although he came up immediately afterwards and saw the *Badger* at a short distance astern. He was told, it seems, that his ship had "come near running down a barque," and that it was thought they (the *Nevada*, as I understand it), had fouled her boom. It is very difficult to believe that the officers on deck really supposed this to have been the extent of the mischief; but if they did, the fact would strengthen our conclusion that their observation of the occurrence throughout was a most imperfect one. Tothill, a passenger on board the *Nevada*, though he calls the shock a slight one, was awakened from sleep by it; and Hinton, the engineer, heard "the crash," and thought that they "had run over" a schooner. Maddock, another passenger, was awakened by a noise as if all the machinery had got loose and fallen. Watson, another passenger (all these being called for the defence), described as a seafaring man, says that there was "certainly neglect somewhere"—which we understand to mean neglect on board the steamer—and that he thought the mate ought to have stopped her. But, however this may be, we do not found any inference on the fact of the *Nevada's* not stopping, in aid of our conclusion that she is to blame for the collision. The English enactment, indeed, that the omission shall be presumptive evidence against the striking vessel, appears not to have been yet adopted in the code of the United States. That presumption,

however wisely established in the interests of humanity, as well as for the preservation of property endangered by collision at sea, is clearly an artificial one, and cannot be made in the absence of express legislative provision. As matter of inference, or legitimate deduction naturally, the fact of pursuing her voyage without stopping to inquire or render assistance furnishes in itself no evidence, on the question of legal culpability, against the striking vessel. The evidence as to the *Badger's* lights is, that they were fastened to the mizen rigging, nearly 4ft. (or between 3ft. and 4ft.) above the rail; not projecting beyond the sides, but, on the contrary, a little distance in board—about 14in. or perhaps 16in. But there appear to have been side screens, sufficient probably to prevent the confusion of colours. The witnesses for the respondents, however, all declare that they saw no light whatever except on their own ship; whilst the chief mate, helmsman, and seaman (Thorop) on the look-out in the *Badger*, swear that they saw no light on the *Nevada*. Two other sailors of the *Badger*, Kennedy and Allaborn, say the same; and that, in fact, there was no light exhibited by the steamer. We nevertheless are persuaded, from the overwhelming testimony on the other side, that they are either perjured or mistaken. The *Badger's* lights would, of course, to a vessel approaching in nearly the same line, be considerably obscured by the sails. With respect to the look-out, and the circumstances at the time of and immediately preceding the collision, the evidence of the principal witnesses is in substance as follows: [The learned judge then set out this evidence, the effect of which was that the weather was very hazy, that those on board the *Badger* hailed the *Nevada* to stop before and after the collision, so as to be heard on board the *Nevada* by some persons, but not by the crew, who declared that they heard no cries from the *Badger*; that there was only one man on the look-out on the *Nevada*; that although the blow occasioned great injury to both vessels, the crew of the *Nevada*, as they declared, felt no shock; but it appeared that several persons on board the *Nevada*, the captain among the rest, were awakened by the collision.] Can we believe, on such testimony, that a proper look-out was kept that night—even if we could hold, that one man alone in such hazy weather, with a ship steaming along at such a rate, was enough for the duty. As to the loss, it remains only to say that after pumping great part of that night, throwing portions of the cargo overboard, and making sundry ineffectual efforts to patch over the hole, the captain and crew were fortunate enough, soon after daybreak, to fall in with the barque *Alice Cameron*, on her way from Auckland to Sydney. The master (Peter Carter) and the carpenter of that vessel state, that they carefully examined the *Badger's* injuries, and considered her state to be such that she could not possibly prosecute her voyage, or the crew remain in her with safety. They say that she could not in their opinion be repaired; that she was cut down to the water's edge, through eight or ten planks, which were splintered along about fifteen feet; that her mizen rigging was gone, her main topmast backstays were broken, one of the yards was hanging in two pieces, sundry chain plates and bolts were drawn, and there was a hole in her side two feet and a half square. The master and crew were accordingly taken on board the *Alice Cameron*; and afterwards

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the injured vessel was scuttled and sunk—that, as Captain Carter states, she might not by floating about do mischief to other vessels in that track. It is not our intention to comment on any of the numerous cases cited on the argument before us—or to mention others which we have consulted. But, as doubts were suggested at an early stage of this suit, respecting the adoption of the English (or, as we may legitimately call them, the European) Rules of the Road at Sea, by the United States, it may be well to show exactly how the law stands touching that matter. And we prefer to do this by citations from the exhaustive judgment of an American judge, Blatchford, J., presiding in the United States District Court at New York, in Admiralty, on the 8th May 1869. The judgment was originally reported by R. D. Benedict, a practitioner in that court, and will be found in 20 L. T. Rep. N. S. 375-380 (see also 3 Mar. Law Cas. O. S. 223). It was the case of the British steamer *Scotia*, sued by the owners of the American sailing ship *Berkshire*, for a collision in the Atlantic Ocean, whereby the latter vessel was wholly lost. The learned judge decided that the *Berkshire* was solely in fault, because of her not only not carrying the lights prescribed alike by the British and American law, but carrying solely the light appropriate (under those laws) to a steamer, and thus misleading the *Scotia*. In so deciding, he cites and reviews several recent English cases, particularizes the enactments of the two countries, and explains the principle on which he in effect applied them. He held, first, that as enactments merely, each binding separately the country in which it was passed, the laws in question could not govern the case; since they were not international, or mutually operative in both countries—our statute, or the rules made in pursuance of it, not (as such) affecting American subjects, nor any Act of Congress or rules under the latter affecting British subjects. But, secondly, inasmuch as the rules framed under each statute, embracing lights, fog signals, and navigation, and having for their object the preventing of collisions at sea, were in substance, if not in terms identical, and as rules to the same effect had been adopted by nearly every State (if not every State) in Europe, and by several States elsewhere, including the United States, he held that those rules constituted or had become, by the consent or recognition of the same States, the law maritime or general law of the sea. According to that law, therefore, so evidenced, in other words, according to “the rules of navigation and usages of the sea, usually prevailing and observed,” the learned judge adjudicated in the case. After reciting the English Act of 1862 (the Merchant Shipping Amendment Act, 25 & 26 Vict. c. 63), and the regulations for preventing collisions promulgated under it on the 9th Jan. 1863, Blatchford, J., specifies the Act of Congress, and the “steering and sailing rules” thereby established, as having been passed on the 29th April 1864. He then quotes sect. 58 of the English Act, by which, whenever it shall be made to appear to Her Majesty that the government of any foreign country is willing that the regulations for preventing collision for the time being in force under that Act, or any provision of the Act relating to collisions, shall apply to the ships of such country when beyond the limits of British jurisdiction, Her Majesty may, by order in Council, direct that such regulations, and all such other provisions as aforesaid, shall apply to the ships

of such foreign country, whether within British jurisdiction or not. The judge proceeds as follows:—“The Act of Congress of April 1864, was regarded, and properly, as an expression by the United States Government of a willingness that the British regulations made in Jan. 1863,—which were substantially identical with those contained in the Act,—should apply to ships of the United States when beyond the limits of British jurisdiction. Her Majesty, therefore, by an Order in Council published on the 30th Aug. 1864, directed that such regulations should apply to all sea-going ships of the United States, whether within British jurisdiction or not.” He then enumerates the countries which had, in the year 1863, signified a like willingness—proclaimed in like manner by order in council; and others which had acceded to the regulations subsequently. And finally he refers to sect. 61 of the English statute; by which it is enacted that whenever an Order in Council has been issued applying any such regulation, or any provision of the Act, to the ships of any foreign country, such ship shall in all cases arising in any British court be subject to such regulation or provision,—and for the purpose of such regulation or provision, be treated as if they were British ships. Practically, therefore, in respect of all rules of navigation, and rules concerning lights, the law administered in the Admiralty Courts of Great Britain and the United States, in cases of collision on the high seas, is the same. The simple difference is this: that in the United States, there being no clause in the Act of Congress corresponding with sect. 61 of our Act, the decisions are founded on the general law or usage of the sea, evidenced by written rules or statutes identical in both countries, whereas in the British courts the decisions rest directly on the rules, as the accepted expression of that law and usage. With respect, however, to sect. 33 of the English Act, enacting that the omission by any ship after a collision to render assistance to the other, as far as may be practicable, shall be presumptive evidence against the former that she is in fault, we do not find any adoption of it by the United States, or, indeed, any other foreign country. That provision, therefore, is clearly not applicable to foreign vessels. Even if adopted, however, the principle established by the case of the *Scotia*, and those there cited (*The Wild Ranger* more especially, in the High Court of Admiralty, Lush. 565), would seem to preclude its application to a British vessel in an American Court, although it might (under sects. 58 & 61 of the Act of 1862) be applied to an American ship in a British court. With one more citation, directly bearing on the case before us, we take our leave of Mr. Justice Blatchford’s elaborate and able judgment. He states the general law of navigation to be, as held by the Supreme Court of the United States irrespective of any statutory regulation, that when a steamer is meeting a sailing vessel, whether close hauled or having the wind free, the latter has a right to keep her course; and that it is the duty of the steamer to adopt such precautions as will avoid her. “When a steamer approaches a sailing vessel,” he says, “the former is required to exercise the necessary precaution to avoid a collision. If this be not done, the steamer is *prima facie* chargeable with fault; and the excuse, to exempt her, must be clearly established by strong circumstances.” He adds citing in proof the regulations

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of each country. "The duty thus imposed on a steamer is the same, in character and extent, with that prescribed by statute in both Great Britain and the United States." (a) Whatever difficulty may have been felt as to the law, therefore, in or before the year 1863, there can be none respecting any part of it now.

IN THE VICE ADMIRALTY COURT OF

VICTORIA (b).

Wednesday, Sept. 4, 1872.

(Before Sir W. F. STAWELL, Judge Commissary.)

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*Necessaries—Master's wages and disbursements—
Lien not destroyed by taking mortgage—Jurisdiction—24 Vict. c. 24, s. 10.*

A Vice-Admiralty court has no jurisdiction under

(a) This case was affirmed on appeal to the Circuit Court, but not on precisely the same grounds. (See 7 Blatchford's Circuit Court (3rd Circuit) Rep. 306.) The grounds of the decision in the District Court would, however, appear more in consonance with English decisions. Other American Admiralty Courts have held that the British law is not to be applied to a British ship meeting an American vessel on the high seas; (*The Brig Belle* 1 Benedict District Court (S. Dist. of N. Y.) Rep. 317. —Ed.)

(b) In addition to the rules regulating the practice of the Vice-Admiralty Courts mentioned in the foot-note to *The Nevada* (ante, p. 477), several rules amending and altering the former rules have been brought into operation mainly through the instrumentality of the present learned Registrar of the High Court of Admiralty, Mr. Rothery. By an order in council bearing date the 25th of June 1851, the 25th sect. of the rules and regulations of 1832, which related to "Prosecutions for a Breach of the Laws for the Abolition of the Slave Trade," was expunged, and new rules and regulations for that purpose were substituted, and were ordered to be observed in all such cases by all the Vice-Admiralty Courts then established; and a Vice-Admiralty Court having been established at St. Helena on the 24th Dec. 1840, the rules of 1832 as amended by this order were applied to the court at St. Helena, and tables of fees were also established for that court. By an order in council of 6th July 1859 additional rules and regulations were established for the several Vice-Admiralty Courts. These rules assimilated the practice of the Vice-Admiralty Courts to the practice of the High Court of Admiralty as established by Dr. Lushington in 1855. They provided for the bringing in of preliminary Acts in collision cases, and for pleading; they ordered that no witnesses should be examined till the pleadings were concluded; that witnesses might be examined *in loco* in court, by the registrar or an examiner in chambers, or by a specially appointed commissioner; that the proctors or their substitutes might be present at the examination before the registrar, &c., but not the parties except for the purposes of pointing out the several witnesses. In an examination before the registrar, examiner, or commissioner, the question must be put by the registrar, examiner, or commissioner. The rules further provided for the employment of a shorthand writer, for the production of witnesses on a reference before the registrar, and for the printing of pleadings and proofs. An order in council of the 11th Feb. 1852 applied the then existing rules and regulations to the Vice-Admiralty Court of Hong Kong, which was established on the 4th Feb. 1846, and provided for that court a table of fees, and also a table of fees for all Vice-Admiralty courts then existing in cases of prosecution against vessels captured on the ground of being engaged in the slave trade. By an order in council of the 22nd Oct. 1859 rules, orders, and regulations touching the practice to be observed in Vice-Admiralty courts in proceedings instituted on behalf of Her Majesty's ships came into force. These rules were passed to carry out the provisions of the Navy Pay and Prize Act 1854. By an order in council of the 9th Sept. 1865 these rules were

24 Vict. c. 24, s. 10, to entertain a suit for necessities supplied at a port out of the possession,

abolished, and new rules, which were rendered necessary by the passing of the Naval Agency and Distribution Act 1864 (27 & 28 Vict. c. 24), were made, under the powers conferred by the latter Act and by the Vice-Admiralty Courts Act 1863 (26 Vict. c. 24). This completes the list of rules applicable to the practice of these courts; but the rules are at present under revision, and will probably be materially altered.

It would appear that prohibition will lie to a Vice-Admiralty Court from the Superior Court of common law of the colony or dependency in which the Vice-Admiralty Court is established, to restrain the latter court from exceeding their jurisdiction in instance causes; (*Key and Hubbard v. Pearce* cited in *LeCaux v. Eden*, Dougl. 584, 606, 609; *Lindo v. Rodney*, Dougl. 613, 619). The power to grant prohibition seems to belong to the courts of common law of the colonies, because they, on their establishment, carry with them the common and statute law of the mother country, and by the law of England the Superior Courts may prohibit the Admiralty, and consequently the courts of the colonies have the same right: (*Lindo v. Rodney*, *ubi sup.*). No prohibition, however, can issue to the Vice-Admiralty Courts in prize matters: (*Key and Hubbard v. Pearce*, *ubi sup.*). That case was an appeal from a prohibition issued by the Court of King's Bench of the province of New York to the Vice-Admiralty Court of the province in a prize matter, and Chief Justice Lee, sitting in the Court of Delegates, expressly holds that no prohibition will go in such a case, the question being merely that of prize or no prize, which is purely for the prize court to determine. There are several instances in which prohibitions have issued to Vice-Admiralty Courts in instance causes: (See *Hamilton v. Fraser*, Stuart's Reports of Lower Canada Cases, 21, where the power to grant prohibition is discussed; *Ritchie v. Orkney*, 1b. 618; *The Margaret and Isabella*, Select Cases in the Supreme Court of Newfoundland, 548). The commissions by virtue of which the judges sit in prize cases are totally distinct from those by which their jurisdiction is conferred in instance matters.

In the case of a war between this country and any foreign State it may be a matter of importance to consider what Vice-Admiralty Courts have prize jurisdiction. This jurisdiction is not conferred on the High Court of Admiralty and each Vice-Admiralty Court by a separate commission, but a commission is issued under the Great Seal of the United Kingdom to the Lord Commissioners of the Admiralty at the commencement of each war authorising and enjoining them "to will and require the High Court of Admiralty of England and the Lieutenant and judge of the said court and his surrogate or surrogates, and also the several Courts of Admiralty within our dominions, possessions, or colonies, which shall be duly commissioned, and they are hereby authorised and required to take cognizance of and judicially to proceed upon all manners of captures, seizures, prizes, and reprisals of all ships, vessels, and goods already seized and taken, and which hereafter shall be seized and taken, and to hear and determine the same, and according to the Court of Admiralty and law of nations to adjudge and condemn all such ships, vessels, and goods as shall belong to "the Sovereign of the State against which war is declared or his subjects. The Lords of the Admiralty thereupon issue their warrants to the judges of the several courts requiring them to exercise the prize jurisdiction. Now owing to abuses of power by certain courts in the West India Islands, and in the American Colonies in the beginning of the present century, and owing also to the fact that these courts claimed to exercise the prize jurisdiction by virtue of their constitution, and without a warrant being issued at the commencement of a war, the prize jurisdiction was taken away (in A.D. 1801) from all these courts, except those of Martinique, Jamaica, and Halifax, Nova Scotia, and an Act (4 Geo. 3, c. 96) was passed providing salaries for the judges of those three courts, which were given power over all the West India Islands and the Continent of America in prize matters. Martinique being afterwards ceded to the French, a Vice-Admiralty Court with prize jurisdiction was established in Barbadoes: (see preface to Stewart's Vice-Admiralty Rep., Halifax, Nova Scotia).

that is the British possession, in which the court is established.

A master can only claim against his ship for disbursements from the date on which he is placed on the ship's register as master.

After the year 1801, nearly all commissions establishing Vice-Admiralty Courts in the different colonies were issued, empowering the Lords of the Admiralty to give other Vice-Admiralty jurisdiction, "but withholding, however, from the said court the usual authority to try prize causes." These commissions may be seen in the Admiralty Registry at Doctors' Commons in the Muniment Books. The first with that clause inserted is that of Trinidad on 26th June 1801. The Act 41 Geo. 3, is repealed by 27 & 28 Vict. c. 23; but by 27 & 28 Vict. c. 25, regulating the proceedings with respect to prize in time of war, the High Court, and every Court of Admiralty, or of Vice-Admiralty or other court exercising Admiralty jurisdiction in Her Majesty's dominions, "for the time being authorised to take cognisance of and judicially proceed in matters of prize, shall be a prize court within the meaning of that Act." Now the Lords of the Admiralty are empowered by the commission to require those Courts of Admiralty in the British possessions and colonies, "which shall be duly commissioned," to take prize jurisdiction, and as by the Act just quoted only those courts are prize courts which are duly authorised, it could seem that only those Vice-Admiralty Courts to which the Lords of the Admiralty may choose to issue their warrants would be duly commissioned to hear prize causes; and in practice the power to hear such causes is given only to a limited number of courts, a list of which is furnished to the commanders of Her Majesty's vessels in order that they may know where to take prizes for adjudication. It is clear that without the warrant of the Lords of the Admiralty no Vice-Admiralty Court would have jurisdiction in prize cases.

In addition to the Vice-Admiralty Courts mentioned in the note (ante p. 477), a Vice-Admiralty Court was established at Aden by a commission to the Lords of the Admiralty dated the 30th May 1861, but its powers were limited to the adjudication of slave trade cases. The first judge of this court was appointed by letters patent of 2nd July 1861, under the great seal of the High Court of Admiralty. On the 10th May 1865 a further commission was issued giving to this court all the powers conferred by statute upon Vice-Admiralty Courts in slave trade cases, and providing that the political resident for the time being should be vice-admiral and judge in default of a special appointment. The political resident for the time being has since exercised the powers, there having been no special appointment. By various orders in council Vice-Admiralty jurisdiction has been conferred upon Her Majesty's Consuls at Zanzibar, Muscat, and Madagascar. The order in council for Zanzibar is dated 9th Aug. 1866; for Muscat, 4th Nov. 1867; for Madagascar, let July 1869. The words conferring the jurisdiction are the same, *mutatis mutandis*, in each order, and are as follows: "And it is further ordered, that Her Majesty's Consul within the dominions of the Sultan of Muscat (Sultan of Zanzibar, or Queen of Madagascar) shall, for and within the said dominions, and for vessels and persons coming within those dominions, and in regard to vessels captured on suspicion of being engaged in the slave trade within those dominions have all such jurisdiction as for the time being ordinarily belongs to courts of Vice-Admiralty in Her Majesty's possessions abroad." These orders in council confer a very extended jurisdiction on the consuls, but it has been commonly supposed that the words above given confer only slave trade jurisdiction; they are, however, wide enough to confer all Vice-Admiralty jurisdiction. The propriety of instructing such an extended jurisdiction to consuls, not being lawyers, may be questioned. The restricted construction hitherto put upon these words probably arose from the fact that in 1869 an Act of Parliament (32 & 33 Vict. c. 75) was passed to remove difficulties which had arisen as to the granting slave bounties for vessels condemned at Zanzibar. No Act has been passed with reference to Muscat or Madagascar. In the case of Muscat the bounties could probably be granted under 11 & 12 Vict. c. 123, which confirmed the treaty with the Imam of Muscat as to the slave trade.—ED.

A master is not deprived of his lien for wages and disbursements by the fact that he has taken a mortgage on the ship for the balance of his wages and disbursements, more especially if the shipowner has concealed from him the fact that there was a prior mortgage. (a).

This was a suit in rem by the late master of the steamship *Albion*, to recover his wages and certain disbursements for necessities made on account of the ship. The case was heard in June 1872, and judgment was now given.

Webb and Purvis for the promotor.

The Attorney-General (Stephens) and Fellows for the respondent (the shipowner).

Sir WILLIAM STAWELL.—This was a suit by the master of the steamer *Albion* for wages, and for disbursements for necessities, on account of the ship. A question has been raised whether necessities can be recovered in this court. The jurisdiction of the court has been conferred by the Imperial Act 26 Vict. c. 24. That statute enacts, by sect. 10, that the courts shall have jurisdiction over claims for necessities supplied in the possession in which the court is established, to any ship of which no owner or part owner is domiciled within the possession at the time of the necessities

(a) If fraud and concealment had not been found by the learned judge it is, to say the least, doubtful whether the master could have retained his lien after taking a mortgage on the ship for the amount of his wages and disbursements. It is quite true that in the case of a seaman it is very difficult indeed to induce a court to hold that he has divested himself of his lien; but that is upon the ground that sailors, who are uneducated men, have to deal in respect of their wages with merchants who are much their intellectual superiors, and the Court of Admiralty will not allow any advantage to be taken of a sailor's act by which he gives up his lien, unless it clearly appears that the sailor understood at the time that he accepted any other security, that he was abandoning his right to claim against the ship. This, however, is scarcely applicable to a master, who is more able to look after his own interests. In *The Betsy and Rhoda* (Davies' Adm. (District of Maine) Rep. 112), it was held that the acceptance of a negotiable promissory note by a sailor in payment of his wages did not destroy his lien, unless it was so expressly agreed. This does not conflict with Lord Stowell's decision in *The William Money* (3 Hagg. Adm. Rep. 136), because the ground of the decision in that case was that the sailor, having taken the bill as an accommodation to himself, must abide by the risk. Another similar case is *The Eastern Star* (Ware's Adm. (Dist. of Maine) Rep. 194). Even a release under seal given by seamen is no absolute bar to a claim for wages against the ship, so long as it is proved that they have not been paid; (*The David Pratt*, li. 509; see also *Jackson v. White*, Peters Adm. (Pennsylvania Dist.) Decisions 179; *Whiteman v. The Neptune*, li. 180.) It seems to be a recognised rule that so long as a sailor does not alter the nature of his security, that is, say, so long as the additional security taken by him remains a simple contract, he does not lose his lien. It is, however, intimated in *The Betsy and Rhoda* (*ubi sup.*), that if a seaman were to take a higher security, such a deed under seal giving something in pledge for the debt, his simple contract debt would be merged in the deed, and he could no longer enforce his lien. This would appear to be the reasonable doctrine, and would accord with the doctrine that bottomry bonds given to secure advances for necessities put an end to the lien for necessities: (see *The Elpis*, ante, p. 472, and note thereto.) The only answer to this would be that, as a lien for wages takes precedence of a mortgage, the mortgage is not a better security than the lien, and, therefore, the master's lien would not be destroyed, but the mortgage treated as an additional security. This might be a good answer in the case of seamen, but could scarcely apply to a master who must know his own interests. An Admiralty Court would scarcely go so far as to say that the mortgage deed did not absorb the simple contract debt.—ED.

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THE ALBION.

[ADM.]

being supplied. "Possession" there means British possession; and as the necessities in this case were not supplied in a British possession, the suit, as merely one for necessities, cannot be entertained. The suit must therefore be limited to wages and disbursements. At the outset difficulty arises as to the time when the petitioner really became master. It is a singular circumstance that there should be a dispute upon such a point, but so it is; and there are peculiar circumstances on this point which bear on the whole of the suit. In Sep. 1868, the petitioner applied to be appointed master of the *Albion*, and, hearing that the vessel was for sale, he accompanied his offer with a proposal that he should be allowed to purchase an interest in the ship. That offer was entertained, and it was arranged that he should be master at 200 dols. per month; and that, as regards the purchase, he should pay a certain sum down, and the remainder should be secured. After the arrangement was made the owner declined to complete it, but at the same time expressed a wish that the petitioner should become master. Petitioner refused the offer unless his salary was raised to 250 dols. per month. According to his version it was then agreed that he should be master, and I agree with him, and for this reason, that afterwards and before he became formally master he advanced 5000 dols. to pay off the crew, and for that amount he merely got a note of hand. I do not think he would be so unwise as to advance 10000l. of our money, merely secured by a promissory note or piece of paper from a person who was not in particularly affluent circumstances, unless he had some other position than the prospect of his becoming master. It was in October that the petitioner became master by arrangement; but he was not placed on the registry until the December following. In the meantime another person was on the registry as master. Now, wages can only be paid by the master, and disbursements made by the master. There cannot be two masters to pay wages and make disbursements. Although I believe that there was an arrangement that the petitioner should be master, it does not follow that I have jurisdiction to recognise wages and disbursements by a person whose name does not appear on the registry. I am, therefore, obliged to limit the time from which the amount for disbursements is to be taken to Dec. 1868. I leave the wages an open question at present. I shall discuss it on the registrar's report coming up, for *prima facie* the petitioner is entitled to a reference to the registrar and merchants from Dec. 1868 to June 1870. It is said, however, that his maritime lien on which his rights are founded has been abandoned by him, in consequence of his taking a mortgage for the amount of the balance of wages and disbursements due to him, and the sum of 500 dols. which he had first advanced, and another sum of 2000 dols., which he had subsequently advanced. That argument is founded on the case of *The William Money* (2 Hagg. Ad. 136), where it was held that a seaman, who had elected to take at Calcutta a bill of exchange on the owners instead of cash, in payment of his wages, could not sue the ship on payment of the bill being refused, the owners having become bankrupt. That is the only case I can find directly bearing upon the subject, and upon careful examination it appears to be *swi generis*. I do not think that a maritime lien is disposed of because the holder pursues one of two courses that may be inconsistent with the lien.

In the case cited, the seaman was offered his wages, and refused to take them. Here the respondent swears he offered petitioner the money. The petitioner swears he did no such thing; that he would only have been too happy to receive it had it been tendered. After giving the matter my best attention, I believe the petitioner, and think that however glad he was to lend the money in the first instance, he was then willing to get it back. There is no doubt that the respondent would have been glad to get rid of the petitioner and take the steamer away; still I think that he did not tender him any money. In the case of *The Simlah* (15 Jur. 865) it was held that a master who took a bill of exchange was still entitled to sue for his wages. But there is another reason why I think that the master has not abandoned his lien. The master agreed to take a registered mortgage, it is true, and this mortgage was registered, but it was registered subsequently to another one given by the respondent. It is admitted that the existence of this last-mentioned mortgage was concealed from the petitioner; and not only was it concealed, but the respondent told an untruth about it. He was particularly asked if there was a mortgage to any other person, and he said there was not. I do not think that the respondent acted fairly in the matter; he granted another to a relative of his for a larger amount than to the petitioner, and he acted in such a way that that relative was able to register his mortgage before the petitioner. In my opinion there was fraud of such a character that even if the petitioner would have otherwise abandoned his lien on the vessel, the respondent is not entitled to take advantage of it. As to the 5000 dollars, it is said that although they are not disbursements made by a person in the position of master at the time, they are to be regarded in the light of necessities, because they were advanced to pay off the crew that was in a state of insubordination. I do not think, however, that the facts go so far as to justify me in regarding them as necessities. There remains, however, another view of the matter which has not been presented by counsel, but in which I think this case is to be regarded. The respondent has put in a counter claim to the master's, and I think that enables the master to go into the whole account current between him and the ship. The point was not taken during the argument, and I do not wish to decide it until the report of the registrar has been brought up, and counsel have had an opportunity of addressing themselves to it. I shall direct accounts to be taken in three different ways. Refer to Registrar and merchants to take an account; First, of all wages whether before or after, and of the disbursements between 4th Dec. 1868, and 15th June 1870; secondly, of payments made specifically on account of such wages or disbursements, or appropriated by the petitioner thereto; thirdly, of amount due to petitioner on account current between him and the steamship *Albion*, including wages, disbursements, and necessities on one side, and all payments on the other; with power to report special circumstances. (a)

Proctors; Malleon, England, and Stewart for the promotor.

Duffel for the respondent.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Reported by J. F. ASPIRALL, Esq., Barrister-at-Law.

Dec. 4 and 5, 1872.

(Present: Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, Sir ROBERT P. COLLIER.)

THE RANGER; THE COLOGNE.

Collision—Navigation of the River Thames—Practice of the river—Pleading.

There is a practice for steam vessels, going down Greenwich Reach in the river Thames on a flood tide, to keep the north side of the river in rounding the point.

Where a steamer is going up Greenwich Reach, and sights, two points on her starboard bow, the red lights of another vessel coming down the reach along the north shore, the vessel going up being further to the southward of the channel than the vessel coming down, the two vessels are not to be considered as crossing vessels, within the meaning of Art. 14 of the Regulations for Preventing Collisions at sea. The vessel going up the river has no right to suppose that the vessel coming down is crossing from one side of the river to the other, but is bound to suppose that the vessel coming down the river, will, in accordance with the practice of the river and her consequent right, keep along the north shore. The vessel going up should keep to the southward of the vessel going down; and if the former ports, so as to attempt to pass to the northward of the vessel coming down, and so brings about a collision, she is alone to blame (a). An allegation in a petition that the vessel proceeded against in a collision case was "considerably further out to the north side of the river than" the other vessel, and improperly ported, and so brought about a collision, is sufficiently proved, to entitle the owners of the vessel making the allegation to recover, by showing that the vessel proceeded against was further over to the south side of the river than the other, and improperly ported. The word "considerably" need not be proved to the full extent.

THESE were appeals from decree of the High Court of Admiralty of England, in cross causes of damage instituted in that court, the one on behalf of William Malcolmson and others, the owners of the steamship *Ranger*, against the steamship *Cologne*, and her owner intervening; the other on behalf of the General Steam Navigation Company, the owners of the steamship *Cologne*, against the steamship *Ranger*, and her owners intervening.

(a) It has been laid down in a long series of United States decisions that where there is a well ascertained usage in ascending or descending a river, the omission to comply with that usage, if such omission contribute to a collision, is a fault for which the offending vessel and her owners must be responsible: (See *The Vanderbilt*, 6 Wallace (U. S. Supreme Court) Rep. 225; *Goslee v. Shute*, 18 Howard (U. S. Supreme Court) Rep. 463; *The Relief*, Olcott's Adm. (S. Dist. of N. Y.) Rep. 104; *The St. John*, 7 Blatchford's Circuit Court (2d Circuit) Rep. 230). But these decisions apply only to steamers meeting; where a steamer, pursuing a usual course down or up the river, meets a sailing vessel, the fact that the steamer is in such a usual course does not alter the general rule that the steamer must get out of the way of the sailing vessel: (See *The E. C. Scranton*, 3 Blatchford's Circuit Court (2d Circuit) Rep. 230.)—Ed.

There were pleadings in the Admiralty Court in the latter suit only, and these pleadings contained the main facts of the case. The petition filed on behalf of the *Cologne* was as follows:—

1. Shortly before midnight on the 5th Jan. 1871, the paddle wheel steam vessel *Cologne*, 324 tons register, and 120 horse power, whilst on a voyage from London to Ostend, was proceeding down the river Thames, and rounding the Isle of Dogs on the north side of the said river.

2. The tide at such time was about one hour and a half before high water, the weather was fine and clear, and it was bright moonlight, and the *Cologne* was proceeding under steam at the rate of about from seven to eight miles an hour, with her proper regulation lights duly exhibited and burning brightly, and with a good look-out being kept.

3. The *Cologne*, under her starboard helm, proceeded to round the point, keeping over to the north side of the said river, and when a little below the lower end of the Millwall ironworks the above-named steam vessel *Ranger* was seen with her green lights open at the distance of about from one-half to three quarters of a mile from the *Cologne*, and slightly on her starboard bow.

4. The *Ranger* was considerably further over to the north side of the said river than the *Cologne*, and the *Cologne* was kept under a starboard helm along the north shore; and the *Ranger*, with her green and masthead lights only open, appeared for some time to be intending to pass to the southward of, and on the starboard side of the *Cologne*, as she could and ought to have done, but instead of so passing the *Cologne*, the *Ranger* improperly ported her helm, and caused immediate danger of collision, and although the helm of the *Cologne* was thereupon put hard a starboard, and her engine were ordered to be stopped and reversed, the *Ranger* with her stem struck the *Cologne* on her starboard paddlebox and sidechase, and did her a great deal of damage.

5. Those on board the *Ranger* did not keep a proper look-out.

6. Those on board the *Ranger* neglected to take proper measures for avoiding a collision with the *Cologne*.

7. The helm of the *Ranger* was improperly put to port.

8. The said collision was occasioned by the improper navigation of the *Ranger*.

9. The said collision was not in any way occasioned by the *Cologne*.

The answer on behalf of the *Ranger* was as follows:—

1. The screw steamship *Ranger*, of the burthen of 308 tons register, or thereabouts, propelled by engines of 40-horse power, being tight, staunch, strong, substantial, and well found, and navigated by her said master and crew of twenty-three hands, left the port of Waterford, in Ireland, on the 31st of Dec. 1870, laden with a general cargo, bound to the ports of Plymouth and London.

2. Shortly before 11.30 p.m. on the 5th Jan. following (1871), the wind was about N.W., and the tide was flood, and of the force of about two knots an hour. The weather was fine and clear, and it was moonlight; and the said steamship, in the prosecution of her said voyage, was proceeding up Greenwich Reach of the river Thames, upon the north shore, and steaming at the rate of about four and a half to five knots an hour. The *Ranger* had the Admiralty regulation lamps, to wit, a bright white lamp at the foremast head, a green lamp on the starboard side, and a red lamp on the port side, duly exhibited and burning well and brightly and a good look-out was being kept from on board her.

3. Whilst the *Ranger* was thus proceeding, a steamship (which afterwards proved to be the *Cologne*) was seen at a distance of about three-quarters of a mile, and bearing about one point and a half on the starboard bow. The *Cologne* came on down the river, exhibiting her masthead and port lights only to those on board the *Ranger*, and in a direction to pass the *Ranger* upon her port side, and the *Ranger* was kept on her course along the north shore. The *Cologne* kept on as if intending to pass the *Ranger* on her port side, until she neared the *Ranger*, and then suddenly altered her course and attempted to pass to the northward of the *Ranger*, and rendered a collision between the said two vessels inevitable, and although the

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helm of the *Ranger* was put hard a port, and her engines were stopped and reversed full speed, the *Cologne* ran into, and with her starboard fore sponson struck the *Ranger* upon her stem, and did her considerable damage, and forced the *Ranger* aground on the north side of the river.

4. Save as herein appears, the defendants deny the truth of the several averments in the plaintiff's petition.

5. The said collision was occasioned solely by the improper navigation of the *Cologne*.

6. The said collision was in no degree occasioned by the *Ranger*, or those on board of her.

The pleadings were thereupon concluded.

The collision occurred in Greenwich Reach, about 150 feet from the edge of a wharf belonging to the Thames Conservancy, and about 150 feet below a dumb barge, moored to the north shore, and used for the purposes of a ferry called Potter's Ferry. The tide at the time was last quarter's flood, end the barge, being moored to and from shore according to the tide, was in shore at the time.

According to the case set up on behalf of the *Cologne*, those on board that vessel first sighted the green light of the *Ranger* when the *Cologne* was opposite Deptford Creek. The *Cologne* at this time was to the northward of mid-channel, coming down the north side of the river under a starboard helm, and the green light of the *Ranger* bore about half a point on the *Cologne's* starboard bow. On seeing the *Ranger*, the master of the *Cologne* starboarded his helm about a point. Before passing Potter's Ferry no other light of the *Ranger* became visible to those on board the *Cologne*, but just before the collision the *Ranger* opened her red light. As the *Cologne* passed the ferry, her master noticed that the *Ranger* was porting, and hailed her to keep her helm to starboard, and ordered the *Cologne's* helm hard a starboard, and her engines to be stopped and reversed; his orders were obeyed. Before these orders the *Cologne* was heading straight down the north shore, but at the time of collision she was heading in towards the north shore. The master of the *Cologne*, who had been in the employ of the same owners for thirty years, and for ten years a master mariner, and constantly during that time navigating the river Thames, alleged that there was a practice for steamers coming down the Thames in a flood tide to keep along the north shore. As to this practice, Capt. James, the chief harbour master of the river Thames for twenty years, was called on behalf of the owners of the *Cologne*; his evidence was as follows:—

Your jurisdiction extends from where to where?—At present it extends from Greenwich to London Bridge.

Well, it was formerly from Yantlet Creek?—Yes, from Yantlet Creek. [The Court: Does that include the place of this collision?—Butt, Q.C.: Yes, my Lord.]

Butt, Q.C.—Where do you live?—I live at Greenwich.

You say from Greenwich to London Bridge. Where does it cease; at what part in the river—your jurisdiction, do you know exactly?—Opposite Child's Coal Wharf; you will find them at East Greenwich.

That is below the hospital?—Below the hospital.

How far below?—A short quarter of a mile.

You were in attendance here yesterday?—Yes.

Now you, I suppose, being harbour master, know this reach pretty well—Greenwich and Limehouse Reach both?—Yes.

Now, is there any practice as to which side of the river vessels coming down—steamers coming down are to keep in—coming down from Limehouse Reach into Greenwich Reach through Blackwall Reach with the flood tide?—They generally keep on the north shore.

The Court.—Vessels coming down with a flood tide generally keep on the north shore?—Keep on the north

shore out of the track of vessels coming up in the tide which would be on the south shore.

That would be the reason of the practice?—I suppose so.

Butt, Q.C.—Is there any practice for vessels coming up with the flood tide going on the south shore?—Yes; they generally keep in the tide; but this reach is a very circuitous reach, a form of horseshoe, so that there cannot be any absolute rule made for that reach.

When you speak of the practice, do you speak of an invariable practice, or a practice sometimes followed?—An invariable practice by all ships when they possibly can navigate upon the north shore going down with the flood tide.

Cross-examined.—That is to say they keep well over, according to your notions; keep well into the north shore?—Yes.

Not rather to the northward of mid-channel?—Well over to the north shore.

You say they keep well over to the northward of mid-channel?—Well over to the north shore, as close as they can go.

Not rather to the northward of mid-channel?—Over to the north shore.

Not over?—Not over, no; over to the north shore. There's only 900 feet of navigation there.

When you get out of Limehouse Reach; Limehouse is very circuitous, is it not?—No; that is straighter than in Greenwich Reach.

How far could two vessels see one another clear of the land in Greenwich Reach?—A ship at the lower part, where my office is, would see a ship coming out of Limehouse Reach.

How far off is that—what distance?—I should think about half a mile clear.

Examined by the Court.—You say vessels go down on the north shore when they can; what do you mean by when they can?—When there is nothing else working up on that shore.

Then vessels would not go down on the north shore if a vessel was working up on the north shore?—No, could not go down then; but at nearly high water no ship would be working there, there would be no tide for her.

The case set up on behalf of the *Ranger* was, that when she was off Cubitt's Town Church, a little below Greenwich Hospital, and well over on the north side of the river, the mast head and red light of the *Cologne* were sighted, the latter vessel being about opposite Deptford Creek. The *Cologne's* lights bore about two points on the *Ranger's* starboard bow. The *Ranger's* helm was then ported to round the point, and to bring her nearer in to the north shore. It was alleged that the *Cologne* was to the southward of mid-channel; that she starboarded, and so brought about the collision. The vessels came together about three minutes after they first sighted each other, and when there was actual danger of collision, the helm of the *Ranger* was put hard a port, and her engines stopped and reversed, so that by the action of her screw her head might be thrown to starboard, but it was then too late. Her master, who had had twenty years' experience, denied that there was any practice for vessels to come down on the north shore, and alleged that the ordinary rule of the road applied. Whilst he was under examination on this point, the learned judge of the Admiralty Court said; "As at present advised, I should not be influenced by this, as the Elder Brethren say there is no practice, no river regulation; it is no use pursuing it;" but he gave leave to the owners of the *Cologne* to produce evidence as to the practice of the river, which was afterwards done, and is before set out. The master of the *Ranger* said that it was his practice to keep along the north shore coming up the river, so as to pass vessels port side to port side.

The main fact in dispute between the parties was, as to which of the two vessels was farthest over to

the southward when they sighted each other. The causes were heard at the same time before Sir R. Phillimore, assisted by Trinity Masters, and he held that both vessels were navigating along the north shore, and that both were to blame. His judgment is set out in the judgment of the Judicial Committee. From these decrees the owners of the *Ranger* appealed, and the owners of the *Cologne* adhered to the appeal.

The appellants' reasons for appeal were (amongst others), as follow :—

3. Because the evidence proved that the *Cologne*, when she first saw the *Ranger*, must have seen that the *Ranger* was proceeding in her course up the river upon the north shore, and therefore the *Cologne* ought not to have starboarded her helm so as to place herself across the course of the *Ranger*.

4. Because the evidence proved that the *Ranger* followed the proper course of navigation by keeping along the north shore, and took all proper measures to avoid the collision.

Milward, Q.C. and Gainsford Bruce, for the appellants (the owners of the *Ranger*).—Both vessels ought to have ported their helms, according to the ordinary rule of navigation. This the *Ranger* did, and she is therefore not to blame. According to *The Esk and Niord* (ante, p. 1; 24 L. T. Rep. N. S. 167; L. Rep. 3 P. O. 436), vessels are free to navigate either side of the river so long as they take proper measures to avoid collision. The *Ranger* had a right therefore to be on the north side of the river, and the *Cologne* was wrong, according to the same case, in attempting to cross from south to north of mid-channel, if such crossing caused danger of collision. In *The Velocity* (21 L. T. Rep. N. S. 686; 3 Mar. Law Cas. O. S. 308; L. Rep. 3 P. O. 44), it was held that vessels navigating the river Thames are not to be treated as crossing vessels, when pursuing a course up or down the river, and in so doing rounding a point in the river; but, at the same time, it was held that they might navigate on either side. Since the decision in that case, there has been no settled rule of navigation in the river. There should be some rule laid down. The only known rule is that of port helm. It is not enough to say that one vessel must get out of the way of another; but it ought to be pointed out how this is to be done. In a reach of a river, vessels should be treated as meeting, not crossing, vessels, if they are following the course of the river. The reach ought to be considered for the purposes of the course they should pursue as straightened out. The Regulations for preventing collisions at sea do not apply (*The Velocity, ubi sup.*), and the only rule that can be applied is, that both should port their helms. The only ground that the *Cologne* had for starboarding was, that the *Ranger* was south of mid-channel when sighted; but the court below found that the *Ranger* was to north of mid-channel. The *Cologne*, even if her contention is right on other points, is not entitled to recover on the pleadings, as it is alleged in her petition that the *Ranger* "was considerably further over to the south side of the said river than the *Cologne*;" whereas, in fact, both vessels were on the north side. There is no allegation as to the practice of the river. The only allegation charging the *Ranger* with blame is, that she "improperly ported." The *Ranger* was right in porting, and therefore there is no allegation entitling the *Cologne* to recover, which is true in fact.

Butt, Q. C. and Clarkson, for the respondents (the owners of the *Cologne*).—The question is as to the duty of two vessels rounding a point in opposite directions. On this point the judgment of the court below does not find sufficient facts; it overlooks the question of the practice of the river. Since the case of *The Velocity* (*ubi sup.*), the Admiralty Court has declined to give effect to any practice in the navigation of the river. There is such a practice in the navigation of Greenwich Reach, viz., that vessels coming down should keep along to north shore, and others going up should keep to the southward. If there is a practice to that effect, then the presumption is against the vessel that violates it. In *The Velocity* (*ubi sup.*), such a practice was proved, and such a practice is reasonable, considering that sailing vessels coming up must keep over to the southward to keep in the tide, and that steamers must therefore keep over to the northward to keep out of their way. The case of *The Esk and Niord* (*ubi sup.*), is not applicable to the present facts, as there the points which the vessels were rounding was on the south side of the river, and not on the north, as here. The rule of port helm cannot apply, as these vessels were not in any way within the rule as to meeting vessels, as explained by the Order in Council of 30th July 1868. They were not meeting end on. The *Ranger* never ported for the *Cologne*, but to go round the point. If, then, the port helm rule does not apply, and the vessels are not to be treated as crossing vessels, that is, if none of the statutory rules apply, then the ordinary rules of navigation applicable in the particular place must be applied, and if there is a well ascertained course for vessels coming down the river and another for vessels going up, that course should be followed. The *Ranger* should have kept to the south, and the *Cologne* to the north; the *Cologne* did so, and is not to blame, if the *Ranger* had held on her original course there would have been no collision. On the question of pleading, we submit that the 4th and 7th articles of the petition substantially raise the issue in the case. The effect of these allegations is that the *Ranger* was further to the southward than the *Cologne*, and that she ported, and so brought about the collision, and this is supported in fact. We are not bound to show that she was "considerably further" to the south. Moreover, the duty of the *Ranger* to go to the southward is sufficiently alleged. Plaintiffs are not bound to do more in their allegations than to allege facts which, if found, will show the defendants' vessel to blame, and a mistake in a fact not material will not disentitle them to recover.

The East Lothian, Lush, 241; 4 L. T. Rep. N. S. 467; 1 Mar. Law Cas. O. S. 76;

The Alice and The Rosita, L. Rep. 2 P. C. 214 19 L. T. Rep. N. S. 755; 3 Mar. Law Cas. N. S. 193.

Milward, Q.C. in reply.

The judgment of the court was delivered by Sir BARNES PEACOCK.—This was a suit for collision between two steam vessels; the steamer *Cologne*, a vessel of 324 tons register and 120 horse-power, was one, and the other was the screw steamship *Ranger*, of 308 tons register and 40 horse-power. Each of the vessels complains of the other. Each says that the other was in fault, and each states that the other ran against her. The *Ranger* says that the *Cologne* ran with her starboard paddle box against her stem. It appears that the *Cologne* was going down the river, and the *Ranger* was going

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up. The accident happened on the 5th Jan. 1871, between half-past eleven and twelve o'clock. It was a fine night and moonlight. The tide was running up about the last quarter flood at the rate of about two knots an hour. It seems that the waterway in that part of the river was about 900 feet, and that the collision took place about 150 feet from the north shore, at a short distance from a barge called the dumb barge. The question to be considered is, whether both the vessels were in fault, and if not, whether either, and which of them, was in fault. The learned judge of the Admiralty Court found that they were both in fault, and divided the damages. Each of the vessels was a sloop in the Admiralty Court, each complains of the decision, and each appeals to this court. The *Cologne*, by adhering to the appeal of the *Ranger*, is substantially appealing. The learned judge says:—"The *Cologne* was proceeding down the river Thames, and the *Ranger* was proceeding up the river, and in my judgment there is no question of practice or usage as to the navigation of one side of the river or the other, which can govern or affect this question; nor is there any rule of the regulations for preventing collisions applicable to this case. I am bound to say that the Elder Brethren of the Trinity House do not themselves agree with each other as to the vessel which was to blame in this case. The opinion, therefore, I am about to deliver is the opinion of one of the Elder Brethren and myself; and I think it fair to make that statement to counsel. I will read the language of the Elder Brother whose opinion I am inclined to assent to, and I will read the words we have agreed to use. The words are these:—"These vessels were rounding the point between Greenwich and Limehouse Reaches in opposite directions, the one under a starboard helm and the other under a port helm, and rapidly altering their respective bearings from each other. They seem to have been both navigating on the north shore, and at about the same distance from the shore. The vessel coming down, the *Cologne*, would see the other vessel's green light, and might be induced to conclude that she intended to pass on her starboard side, and the *Cologne* would subsequently keep on under her starboard helm. As the vessels were approaching each other at the rate of about thirteen knots and only three minutes had elapsed from their first sighting each other, there was no time for the *Cologne* to have done anything to avoid a collision, after seeing the *Ranger's* light had changed from green to red. The vessel coming up, the *Ranger*, would see the other vessel's red light, and might also suppose that she intended to pass on her port side, and would therefore keep under a port helm. When the *Cologne's* light changed from red to green" (it is not stated at what time that change took place), "which it would naturally do, there was no time or room for clearing each other, even by the *Ranger* putting her helm hard up, which was done;" and then the learned judge says, "In these circumstances it seems most probable that both vessels were to blame for the collision." Now, let us consider, was the *Cologne* to blame according to this finding? The learned judge says, "The vessel coming down, the *Cologne*, would see the other vessel's green light, and might be induced to conclude that she intended to pass on her starboard side, and the *Cologne* would consequently keep on under her starboard helm." It appears to their Lordships

that the *Cologne* was not guilty of any negligence in so acting upon that conclusion. Then, was there any fault or negligence on the part of the *Ranger*? The learned judge says, "The vessel coming up, the *Ranger*, would see the other vessel's red light, and might also suppose that she intended to pass on her port side, and would therefore keep under a port helm." Now, when the *Ranger* saw the *Cologne's* red light, she saw it two points over her starboard bow, and therefore the *Cologne* must have been nearer to the north side at that time than the *Ranger*. If the *Cologne* was nearer to the north side than the *Ranger* at that time, the *Ranger*, if she thought that the *Cologne* would pass her on her port side, must have supposed that the *Cologne* would cross her path. Was she right in that supposition? It is stated that there is a practice for vessels going down to keep on the north side. If the *Cologne* had gone much to the south she would have got where the tide against her was the strongest. There was no good reason therefore for the *Ranger's* supposing that the *Cologne* would cross her path and pass on her port side. On the other hand, the *Cologne* saw the *Ranger's* green light, and she might naturally suppose that, looking to the practice of navigating that part of the river by vessels going down, the *Ranger* would pass her upon her starboard side, giving green light to green light. In the case of *The Velocity*, which has been referred to, it was held that vessels meeting under circumstances like these did not fall within the 14th rule of the regulations for preventing collisions. That rule is, "If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way." If the two vessels were within that rule, the *Ranger*, seeing the red light of the *Cologne* on her starboard side, was the one to keep out of the way. In the case of *The Velocity*, it was held that vessels under similar circumstances were not crossing vessels within the meaning of the 14th rule. But the very circumstances which prevent the vessels from being deemed crossing vessels within the meaning of the rule, ought to have led the *Ranger* to suppose that the *Cologne* was not about to cross from her starboard side, and to pass her on her port side. Lord Chelmsford, in giving judgment in the case of *The Velocity* (L. Rep. 3 P. O. 44), referring to the remarks of the Judge of the Admiralty Court in that case, said, "The learned judge in delivering his judgment, says: 'We' (that is, himself and the Elder Brethren of the Trinity House by whom he was assisted) 'think that the evidence establishes that the *Carbon* saw the masthead and port light of the *Velocity* alone.'" The case of the *Carbon* there is like the present case of the *Ranger*. "The vessels were therefore crossing under the rule to which I have referred" (the 14th), "and it was therefore the duty of the *Carbon* to get out of the way of the *Velocity*. The course which the *Carbon* adopted was to port, and the Elder Brethren think that this was the only mode of getting out of the way in the circumstances." But, said Lord Chelmsford, "the fact of the *Carbon* having seen the port light of the *Velocity* does not necessarily prove that the *Velocity* was crossing the river, as the learned judge and his assessors seem to have thought. The relative position of the two vessels when they first came in sight of each other must not alone be regarded, but also the band of the river in the part where the collision took place

A vessel rounding the curve of the north shore would necessarily, during some part of her course, have her head slightly inclined towards the south shore, so as to exhibit her port light to a vessel in mid-channel coming in a contrary direction, and in fact the *Velocity* was not crossing or intending to cross the river when she was seen by the *Carbon*, but was pursuing the regular course along the north shore, keeping as near to that shore as it was convenient under a starboard helm." The *Velocity* in that case was very much in the position of the *Cologne* in the present case. His Lordship proceeded, "The appellant alleged that this was the well-known customary track for vessels going down the river; and to establish their case in this respect they called Capt. James, the principal harbour master of the river, who said, 'It is the custom that vessels going down, whatever be their tonnage or their cargo, and whether at flood or ebb tide, invariably keep on the north side, and vessels coming up invariably keep on the south side.'" Then he referred to the statement of the quartermaster of the *Dreadnought*, who gave similar evidence, and said, "That there has been a practice for vessels going down the river to prefer the north to the south side is proved by the above evidence; but that there was any custom of this kind, in the strict sense of the word, to which all vessels would be bound to conform, is certainly not the fact." In another part, at page 51, he says, "But, putting the regulations aside, their Lordships are at a loss to discover what possible blame can be imputed to the *Velocity*. She had a perfect right to be where she was, and she was pursuing a usual course of navigation down the river, from which she never deviated until forced to do so by the peril of a collision, into which she was brought by the sudden change of course of the *Carbon*. On the other hand, the *Carbon* appears to their Lordships to be wholly to blame. She knew, or ought to have known, that a vessel coming down the river had a right to run down on the north shore; and in the position in which she was, the appearance to her of the red light of a vessel on that side of the mid-channel was no indication that the vessel was in the act of crossing the river; and yet, there being nothing else to justify the belief, she acts at once upon her hasty and erroneous conclusion, and so occasions the collision." Now, the *Ranger*, seeing the red light of the *Cologne* on her starboard bow, ported her helm and endeavoured to pass the *Cologne* on her port side, between her and the north side of the river. Was she right in doing that? If, as in the case of *The Velocity*, she ought not to have supposed that the *Cologne* was crossing, she ought to have kept to the south of the *Cologne*, and then the accident would not have occurred. But instead of that she endeavoured to pass the *Cologne* on her port side, and brought herself into that position in which the danger of a collision became imminent. It appears to their Lordships that the *Ranger* was wrong in porting and endeavouring to pass on the larboard side of the *Cologne*. Their Lordships think that the *Ranger* was going up the river to the north of the mid-channel where she would get the tide, not that when the vessels first sighted each other she was not so near to the north side of the river as the *Cologne*. It is clear that when the vessels first sighted, a collision was not inevitable. They were at least half a mile (some say three-quarters of a mile) distant from each other at that time; and according to

the rate at which the two vessels were approaching each other, taking the velocity of each, it took about two minutes and a half, or three minutes, before the vessels could reach each other. There was, therefore, ample time, and there was ample room in the river, for each to have kept clear of the other. There was no danger of a collision if the vessels had adopted a proper course when they first saw each other. No doubt the danger became imminent at last, but that was in consequence of the vessels being in a wrong position; and it appears to their Lordships that the danger arose from the *Ranger's* adopting a course which she ought not to have adopted. Then, again, did the *Ranger* act properly when the collision became imminent? Could she have done anything to avoid it? Was she right in porting her helm? At page 45 of the evidence the master is asked—"Q. Then what did she do?—A. Altered her helm." This is speaking of the *Cologne*. "Q. Which way?—A. To starboard, and I saw his green light, and I said to our pilot, 'Good God, he has got his helm to starboard.' Q. Which way was she going then, or trying to go then?—A. Trying to come to the northward of us when she starboarded. Q. You say she opened her green light: what became of her red?—A. Shut it in, and we lost sight of it. Q. Well, now, if she had kept on her course?—A. The collision would not have occurred. Q. If she had not starboarded?—A. If she had not starboarded. The Court. You ascribe the collision in fact to her starboarding?—The Witness. Entirely. By *Milward*. What did you do with your engines?—A. Helm to be put hard-a-port, and stopped and reversed the engines. Q. When did you do that?—A. As soon as we found the *Cologne* had starboarded." Well, now the pilot says, that in putting the helm hard to port he did not mean that the vessel should act as in the ordinary case of a helm being put hard a port, because he reversed the engines, and when he put the helm hard to port he meant it, by reversing the engines, to have the effect of starboarding. But it did not have that effect, because the way upon the vessel had not been taken off by reversing the engines, and it was proved that the *Ranger* altered her course two or three points to starboard under the port helm. If she had not altered her course under a port helm, in all probability she would have gone clear of the *Cologne*; so that the accident appears to have been caused by the fault of the *Ranger*, first in endeavouring to pass the *Cologne* on her port side, and, secondly, in putting her helm hard-a-port, when the vessels were in almost a state of collision. The 13th rule was not then applicable to the vessels: (See the case of *The Velocity*, above referred to.) It may be, as remarked by the learned judge, that when the *Cologne's* lights changed from red to green, there was no time for clearing each other. But it was by the fault of the *Ranger* that the vessels were in that position. Their Lordships, therefore, think that the accident was not caused by the fault of both, but solely from the fault of the *Ranger*. But it has been said that the *Cologne* is not entitled to recover against the *Ranger*, inasmuch as she must recover according to the allegation in her petition. Now, in the petition she says that "the *Ranger* was considerably further over to the south side of the said river than

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the *Cologne*." The word "considerably" is not necessarily to be proved to the full extent. When the vessels first came in sight, the *Ranger* was further over to the south side of the river than the *Cologne*; the master of the *Ranger* proved that he saw the *Cologne's* red light two points to his starboard bow. He certainly did say the port bow in the first instance, but he corrected himself afterwards, and it is not necessary now to inquire whether his first statement was made by mistake or not. The fact is that he saw her over the starboard bow. Then the *Ranger* was further over to the south side of the river than the *Cologne*. The allegation proceeds:—"The *Cologne* was kept under a starboard helm along the north shore, and the *Ranger*, with her green and masthead lights only open, appeared for some time to be intending to pass to the southward of and on the starboard side of the *Cologne*, as she could and ought to have done; but, instead of so passing the *Cologne*, the *Ranger* improperly ported her helm, and caused immediate danger of collision; and although the helm of the *Cologne* was thereupon put hard starboard, and her engines were ordered to be stopped and reversed, the *Ranger* with her stem struck the *Cologne* on her starboard paddle-box and side house, and did her a great deal of damage." Their Lordships think that the case really comes within this allegation, that the *Ranger* was more to the south than the *Cologne*, and that the damage arose from her porting her helm and attempting to pass the *Cologne* on her port side. Under these circumstances, their Lordships think that the decision ought to be reversed. They find that there was no fault on the part of the *Cologne*, and that the *Ranger* was wholly to blame; and they think it right to say that the sailing masters, of whose experience and assistance their Lordships have had the benefit, are both of that opinion. Their Lordships will, therefore, humbly advise Her Majesty that the decision be reversed, and that the *Ranger* be condemned in all the damages done to the *Cologne*, with costs of the court below and the costs of this appeal. *Appeal allowed.*

Solicitor for the appellants, Thomas Cooper.

Solicitors for the respondents, Cattarins and Co.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Dec. 5 and 6, 1872.

THE FRANKLAND; THE KESTREL.

(Present: The Right Hon. James W. COLVILLE, Sir BARNES PEACOCK, Sir M. E. SMITH, and Sir ROBERT P. COLLIER.)

Collision—Fog—Regulations for preventing collision at sea, article 16—Steamships.

A steamship going at a moderate speed in a fog, on hearing a steam whistle sounded many times, indicating that another steamer is approaching, and has come so near, that if the vessels then stopped they would be within hailing distance, is bound under the terms of Article 16 of the regulations for preventing collisions at sea, not only to stop, but to reverse her engines, and ought not to wait until the vessels sight each other, when such reversing would be too late.

THIS was an appeal in cross causes of collision instituted by the owners of the *Kestrel* against the *Frankland*, and by the owners of the *Frankland*

against the owners of the *Kestrel*. The appellants were the owners of the *Frankland*.

The collision occurred at about 9.30 p.m. on the 23rd April, off the Norfolk coast, near Cromer, Dudgeon light vessel. The tide at the time was flood, and was running to the southward at the rate of about two knots an hour. The *Kestrel* was an iron screw steamer of 362 tons register, manned by a crew of twenty hands, and was proceeding from Rotterdam to Hull with a general cargo and passengers. The *Frankland* was a screw steamer of 541 tons register, manned by a crew of eighteen hands, and was proceeding from Sunderland to London with a cargo of coal.

The case set up on behalf of the *Kestrel* was that she was heading N.N.W. against the tide, which was upon her starboard bow. The wind was light. It was the mate's watch, and he was on the bridge with an able seaman, who was on the look out, and also a Dutch pilot; a second man was on the look out forward. About 9 p.m. the weather became thick with fog, whereupon the mate ordered the engines to be eased and the master to be called. The master immediately came on deck, and ordered the engines to dead slow, so that the speed of the vessel was reduced to five and a-half knots through the water and about three or three and a-half knots over the ground, just enough to keep way on the vessel against the tide. The master and the mate remained on the bridge till after the collision. From the time when the fog came on until the collision the steam whistle of the *Kestrel* was regularly sounded about every half minute. About 9.30 p.m. two whistles were heard, one on the port bow and the other right ahead. The *Kestrel's* steam whistle was thereupon sounded and her helm ported until her head was about N., when the helm was steadied. After a short time the green and white lights of the *Frankland* were seen about three or four points on the *Kestrel's* bow, and distant about two ships' lengths. The *Kestrel's* engines were reversed full speed, and the *Frankland* was hailed, but the two vessels came into collision. The stem of the *Frankland* struck the port side of the *Kestrel* with such force as to penetrate into the middle of the ship, and to nearly cut the *Kestrel* in two. The *Kestrel* sank three hours after the collision.

The case on the part of the *Frankland*, was that she was steering S.S.E. in a dense fog, and was making about two knots an hour through the water, the tide running with her about two knots; that her steam whistle was sounded at intervals; that her lights were burning brightly, and a good look out was kept; that the steam whistle of another steamer was heard apparently on the starboard bow, and that the engines were stopped, and the steam whistle sounded. The following statement from the evidence given by the master of the *Frankland* before the receiver of wreck, set out the facts of the case:

12. That on Sunday, the 23rd April, at 7.40 p.m., the tide at the time being flood, the weather clear, and the wind in the N.E., blowing a light breeze, the said ship arrived off the Dudgeon light ship; the light ship bearing about S.S.E., three miles distant. At 7.45 p.m., a dense fog came on, which completely obscured all objects. Deponent, who was on deck and in charge of the vessel, ordered the engines to be slowed, and the steam whistle to be sounded, which was instantly done, placed two hands at the wheel, and proceeded at slow speed for about twenty minutes. (The regulation lights were burning

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brightly; they are attended to by the second officer.) After proceeding slowly for about twenty minutes, and passing several steamers on the port and starboard side—the steamers could not be seen, but deponent could hear their whistles—at 8.5 deponent ordered the engines to be put dead-alow, and so proceeded until about 9.25 p.m., moving very slowly with the tide through the water. At 9.25 deponent heard a steamer's whistle, which he judged to be about two points on the starboard bow, and hearing the whistle coming closer, ordered the engines to be stopped. Deponent's whistle was at this time kept going at intervals, and replied to the steamer's whistle, who also appeared to answer. Deponent's vessel was on her proper course, her head being S.E.E. At 9.30, deponent suddenly saw a steamer's masthead light, and immediately afterwards saw the red light, and estimated the steamer to be about a ship's length distant, and apparently crossing deponent's bow. Deponent seeing that a collision was inevitable, deponent ordered the engines to be put full speed astern, which was instantly done, but the collision took place, the coming steamer striking deponent's vessel across the stem with her port bow, and with considerable force.

In the Admiralty Court the owners of the *Kestrel* charged the *Frankland* with proceeding at an improper rate of speed, and with not stopping and reversing. The owners of the *Frankland* charged the *Kestrel* with improperly porting, with not complying with 16th article of the Regulations for Preventing Collisions at Sea, that is with not stopping and reversing.

The case came on for hearing before the learned judge of the Admiralty Court, assisted by Trinity Masters, on the 31st Jan. 1872, and he pronounced the *Kestrel* and the *Frankland* both to blame, saying that "the vessels were going at pretty much the same rate—that is two-and-a-half knots through the water. It was absolutely impossible to decide absolutely by the mere sound of the whistle the exact direction in which each vessel was proceeding, although the sound would help to decide the position of the vessels, as the vessels could not be seen at a greater distance than that which I have stated (200 or 300 feet); it is evident to me that the helm could not have been put one way or the other with any positive certainty of its being available at the time when the vessels were seen, to prevent the collision. Therefore I do not decide this case with reference to any alteration of the helm of the *Kestrel*." The learned judge then pronounced the vessels to blame on the ground that they did not stop and reverse. This part of his judgment is set out in the judgment of the Judicial Committee.

From this judgment the owner of the *Frankland* appealed, mainly on the grounds that the *Frankland* having stopped her engines as soon as she heard the whistle of the *Kestrel*, and reversed on seeing the lights on the *Kestrel*, so complying with the 16th Article of the Regulations for Preventing Collisions at sea; that the judgment of the Admiralty Court was wrong in holding, as they alleged, that the engines of the *Frankland* ought to have been reversed before those on board her had ascertained the position of the *Kestrel*, and further that the *Kestrel* improperly ported. The owners of the *Kestrel* did not adhere to the appeal.

Milward and *Clarkson* for the appellants.—Article 16 only applies when there is a continuous approaching of two steamships: (*The Earl of Elgin* and *The Desmond*, ante, p. 150; L. Rep. 4 P. C. 1; 25 L. T. Rep. N. S. 514). The *Frankland* had stopped, and therefore had taken measures to put an end to the continuous approaching. The *Kestrel* ported and held on. If one vessel does

enough on her part to avoid the risk of collision, taking for granted that the other vessel will obey the rules also, she has fulfilled the obligation imposed by those rules. The *Kestrel* ported, whereas if she had held on without porting there would have been no collision.

Butt, Q.C. and *Prichard* for the respondents.—The master of the *Frankland* heard the whistle of the *Kestrel* continuously approaching, but did not reverse till he saw the *Kestrel*. There was risk so long as the *Kestrel* was approaching, and he should have reversed sooner.

Milward, Q.C. in reply.

The judgment of the court was delivered by Sir ROBERT P. COLLIER.—This is a case of collision between two steamers, the *Kestrel* and the *Frankland*, somewhere off the coast of Norfolk. The judgment of the Admiralty Court found that both were to blame. From this judgment the *Frankland* appeals, but the *Kestrel* has not adhered to the appeal. The main facts—which appear not to be in dispute—are these: the *Kestrel* was steering about north-north-west, the *Frankland* in a precisely opposite direction, south-south-east. The weather was calm there being scarcely any wind. There was a dense fog, and the tide was flowing southward about two knots an hour. It has been contended that the judgment of the court below is vitiated by an erroneous finding on a question of fact as to the speed at which the *Kestrel* was going, and on the other side it has been said that the court was wrong in estimating the speed of the *Frankland*. Their Lordships, after carefully considering the evidence, are of opinion that, whatever opinion they might have been disposed to form as a court of first instance, there was sufficient evidence in the case upon which the judge of the Court of Admiralty, who had the advantage, which their Lordships have not, of hearing the witnesses, might reasonably find as he has done; namely, that the speed of both vessels was from two to two and a half knots through the water. It has been, indeed, suggested that the learned judge left out of consideration a difference well known to nautical persons, between the rate of a vessel going through the water and the rate of that vessel going over what is called the ground; but their Lordships see no reason to suppose that the learned judge can have overlooked a distinction which appears so clear and obvious. The finding of the court upon the question of negligence is in these terms: "Both vessels were going, in truth, in the most absolute uncertainty as to the proceedings of the other; and in such a state of circumstances I have had to ask myself this question,—Could anything have been done to avoid this collision which was not done? And the opinion of the court, fortified by that of its nautical assessors, is that upon hearing the whistles of each other so near and approaching each other, each vessel ought not only to have stopped but to have reversed until its way was stopped, when it could have hailed and ascertained with certainty which way the head of the other vessel was, and which way she was proceeding, and by that means the collision would or might have been avoided. And this being the opinion of the court it will enforce the application of Article 16 of the Regulations for preventing Collisions at Sea, which it is always the object of this court to see carried into due and proper execution, for the due and proper

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execution of that rule would tend very much to prevent both loss of life and property, of which there are so many melancholy instances every week in this court." Their Lordships entirely concur with the learned judge of the Court of Admiralty as to the importance of enforcing this rule. The rule is: "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, in a fog, go at a moderate speed." As far as the latter part of the rule is concerned, both vessels would appear to have obeyed it. The question is as to the application of the first part of the rule. The *Kestrel* not having adhered to the appeal must be assumed to have been in fault; and their Lordships do not think it necessary to determine the precise extent to which she was in fault. It has indeed been argued that part of her fault was in porting her helm. Their Lordships do not think it necessary to decide whether or not she was in fault in so doing, but the inclination of their opinion is that the porting of her helm under such circumstances cannot be properly considered as negligence on her part. The only question in the cause is whether or not there is sufficient evidence to justify the finding of the Court of Admiralty that there was negligence on the part of the *Frankland* materially contributing to the accident? It has been argued that the effect of the decision is that every steamship in a fog hearing the whistle of another steamship approaching her, ought immediately, without reference to the distance at which the ships may appear to be from each other, or to any other circumstances, to reverse her engines. But their Lordships do not understand the Court of Admiralty to have laid down any such general proposition. They understand the finding to have been confined to the circumstances of the case, and those circumstances they understand, in the opinion of the court, to have been these, as far as the *Frankland* is concerned: That she was navigating in a fog at a moderate speed, that she heard a whistle sounded many times, indicating that a steamer was approaching her, and had come very near to her—so near indeed that if the vessels had then stopped they would have been within hailing distance—that at that point of time it was necessary for the captain of the *Frankland*, under the terms of the rule, not only to stop the motion of the engines, but to reverse them, so as to stop the motion of his vessel, and that he ought not to have waited until the vessels sighted each other, when such a manoeuvre would have been too late. That being the view which their Lordships take of the decision of the Court of Admiralty, they are of opinion that it is right; and for these reasons they will humbly advise Her Majesty that that judgment be affirmed, and this appeal dismissed, with costs.

Appeal dismissed.

Solicitor for the appellants, *Thomas Cooper*.
Proctors for the respondents, *Pritchard and Sons*, agents for *J. and T. W. Hearfield*, Hull.

ON APPEAL FROM THE VICE ADMIRALTY COURT OF LOWER CANADA.

Dec. 3 and 17, 1872.

(Present—SIR JAMES W. COLVILLE, SIR R. J. PHILLIMORE, SIR BARNES PEACOCK, SIR MONTAGUE SMITH, SIR R. P. COLLIER.)

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Collision—Compulsory pilotage—What amounts to compulsion—Colonial statutes binding upon Admiralty courts—Power of selection—Canadian Statutes (27 & 28 Vict. c. 13, sect. 14; 27 & 28 Vict. c. 58, sects. 2 and 10).

Colonial statutes, imposing compulsory pilotage upon vessels navigating in the waters of the colony, and relieving owners from liability for the negligence of pilots taken under such compulsion, are binding equally upon the High Court of Admiralty and the Vice-Admiralty Courts (a).

A statute enacting that certain vessels "shall take on board" a pilot to conduct such vessels in certain waters "under a penalty equal in amount to the pilotage of the vessel," which penalty goes to a fund for the relief of decayed pilots, renders the taking of a pilot compulsory upon such vessels, on the ground that when a statute inflicts a penalty for not doing an act, the penalty implies that there is legal compulsion to do the act, whatever may be the destination of the penalty.

The two Canadian statutes enacting that (27 & 28 Vict. c. 58, sect. 10) masters of certain vessels leaving Montreal for a port out of the province "shall take on board a branch pilot for and above the harbour of Quebec, to conduct such vessel, under a penalty equal in amount to the pilotage of the vessel, which penalty shall go to the Decayed Pilots' Fund," and that (27 & 28 Vict. c. 13, sect. 14) "no owner, &c., shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any place where the employment of such pilot is compulsory by law," are to be read and construed as in pari materia, and the owner of a ship navigating the River St. Lawrence (Canadian waters) under the direction of a pilot taken on board under the provisions of those statutes, employs the pilot so taken on board by compulsion of law, and is, therefore, exonerated, according to the law of Canada, from all liability for damage inflicted upon another vessel by the pilot's negligence.

A power of selection given to shipmasters, &c., by a statute (27 & 28 Vict. c. 58, sect. 2, Canadian), by which they may choose "such pilot or pilots as they may think fit" from among certain licensed pilots, there called "branch pilots," gives only a restricted power of selection out of a particular class, and therefore does not create the relation of master and servant between the shipowner and pilot.

(a) Although the decisions of American courts cited in the arguments have been adverse to the English doctrine that compulsory pilotage exempts, even without express statutory exemption, from liability for the acts of a pilot, yet they have held that where an English statute renders pilotage compulsory and an American ship takes a pilot on board under that statute in English waters, she is entitled in a suit brought in an American court to the exemption given by English law: (*Smith v. Coultry*, 17 Peters (U. S. Supreme Court) Rep. 20; 1 Howards' Id. 28). See also *Camp v. The Ship Marceline*, 1 Clifford's U. S. Circuit Court (1st Circuit) Rep. 461; and *The Alabama*, 1 Benedict District Court (S. Dist. of N. Y.) Rep. 477.—Ed.

THIS was an appeal from a decree of the judge of the Vice-Admiralty Court of Lower Canada, now the province of Quebec, in action brought by the appellants, as promoters, against the respondents in that court to recover damages for the loss of certain sugar through a collision which took place on the river Lawrence, on the 16th June 1868. The Court of Vice-Admiralty of Canada was established, immediately after the cession of that country to England, by a commission issued out of the English Court of Admiralty, which has been renewed from time to time down to the present time (a). A Court of Vice-Admiralty had previously existed there when the province was under French rule. The river St. Lawrence at the place where the collision occurred is a large navigable river below bridges.

The action was commenced on the 19th June 1868 by an affidavit to base proceedings, and the defendants (the now-respondents) duly appeared and gave bail.

On the 6th Oct. 1868, the promoters (the now appellants) filed on their preliminary Act, and on the 20th Oct. they filed their libel, which in effect stated that on the 16th June 1868 they were the owners of 2237 bags of sugar, which were laden on board two barges named the *A. McFarren* and the *Dora*; that the barges were proceeding up the river St. Lawrence in tow of a steam tug called the *Canada*; that the steamship *Hibernian* was proceeding down the river, and instead of altering her course so as to keep her own side of the river and pass the barges, she ran into them and caused them to sink, and the sugar was wholly lost. The libel further alleged that the collision took place entirely through the want of proper care and through the unskillful management of the persons on board the *Hibernian*.

On the 27th Oct. the respondents filed their preliminary act, and on the 2nd March 1869 filed responsive allegations, which in effect alleged that on the 16th June 1868 the *Hibernian*, which was a mail steamship of 1391 tons burden, trading between Montreal and Liverpool, left the port of Montreal on her outward voyage bound for Liverpool; that "according to law she left Montreal under the charge of a duly licensed branch pilot for the river St. Lawrence, between Quebec and Montreal (one Adolphe Lisée), whose duty it was to pilot her to Quebec;" that "all orders of this pilot were instantly obeyed by the people of the *Hibernian*," and that the collision occurred through the *Canada* and the boats in tow keeping too much to the south side of the channel, and by the negligence of the persons on board the *Canada* and the barges in tow.

The promoters filed, on the 4th March 1869, a rejoinder, which alleged—

1. That if, on the said 16th June last, the said steamship, the *Hibernian*, left the port of Montreal under the charge of a duly licensed pilot for the river St. Lawrence, between Quebec and Montreal (as the respondents allege), one Adolphe Lisée, whose duty it was to pilot her to Quebec, the said pilot was and had been employed by the respondents for many years, and specially during the summer of 1868, as the pilot of the said steamship *Hibernian*, and that on the said occasion the said pilot was the special choice and selection of the said respondents.

2. That by law the said respondents were not bound to take the said Adolphe Lisée to pilot the said steamship from

Montreal to Quebec, but that they are, and were at the time of the collision, allowed to choose from amongst the duly licensed branch pilots their own pilots, to be exclusively employed by them in piloting the steamships forming the Montreal Ocean Steamship Line, belonging to the said respondents, of which the said *Hibernian* is one; and that the pilots employed by the said respondents are their own servants and employees, and the respondents are responsible for their acts.

3. That the accident and collision on the 16th June last, in question in this case, did not occur, nor do the respondents allege it to have occurred through the negligence or want of skill of the said licensed pilot, but was owing to the negligence and want of skill and fault exclusively of the said respondents.

6. That the said accident and collision was not the fault of the pilot alone.

On the same day the respondents filed a sur-rejoinder alleging—

2. That as owners of the *Hibernian* they were by law compelled, on the occasion in question in this case, to engage a branch pilot between Montreal and Quebec to pilot the vessel from the former to the latter port, and that Adolphe Lisée, who actually piloted the ship, was a duly licensed branch pilot.

3. That the collision in question was entirely owing to want of care and unskillfulness on the part of the *Canada* and her tow.

The pleadings were thereupon concluded, and evidence was produced by both parties, a great portion of which is immaterial to the present appeal, the sole question raised by the appeal being, whether the owners of the *Hibernian* were responsible for damage done by the fault of the pilot.

The facts proved with respect to the employment by the respondents of the pilot are as follows: The pilot, Adolphe Lisée, who was admitted by the appellant to be a duly licensed branch pilot between Quebec and Montreal, had been in the employment of the respondents since the year 1860, and took his turn with two other branch pilots, who were also in the respondents' employ, in piloting the mail steamers belonging to the Montreal Ocean Steamship Company, of which the respondents are owners, and of which the *Hibernian* is one, between Montreal and Quebec. The pilots so engaged were free from the duty imposed on other pilots for the part of the St. Lawrence between Montreal and Quebec, of piloting any vessels whose owners engaged them with the consent of the master, deputy master, or registrar of the Montreal Trinity House, but being duly qualified branch pilots, they occasionally piloted other vessels when not employed in piloting the mail steamers. For piloting the mail steamers these pilots received only the ordinary tariff rates; but as these steamers were of very large tonnage, and consequently of considerable draught of water, and they were paid in proportion to the draught, their employment was more lucrative than that of the other pilots. They were selected from among the other pilots for their superior skill.

By a Canadian statute (12 Vict. c. 117), entitled, "An Act to Repeal a certain Act and Ordinance therein mentioned, relating to the Trinity House at Montreal, and to Amend and Consolidate the Provisions thereof," the master, deputy master, and wardens of that Trinity House were empowered (sect 5) to make bye laws for certain purposes, and amongst others, "for the government and regulation of pilots for and above the harbour of Quebec, and the same to revoke, alter, and amend, &c." and to enforce the execution of the bye laws so made, provided that such bye laws

(a) As to the jurisdiction and powers of Vice-Admiralty Courts, see Notes ante pp. 477, 481.

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were sanctioned and confirmed by the Governor-General of the Province in Council. By sect. 14 of the above Act, no person can be appointed as a pilot for and above the harbour of Quebec until duly examined and certificated, as therein provided. By a bye law made under the provisions of the Act, on the 18th March, 1869, and afterwards approved by the Governor-General in Council, it was ordained that it should be lawful for the master, deputy master, and wardens of the Trinity House of Montreal to appoint by branch or warrant fit and proper persons to be branch pilots for and above the harbour of Quebec, provided that such persons had been duly examined and certificated under the 14th section.

Sect. 18 of the same Act provided for the annual publication by the registrar of the Trinity House of a list of the branch pilots for and above Quebec, and the number of pilots in the list for the year in which the collision happened was twenty-seven, among them being Adolphe Lisée, the pilot in question. By the 23rd section of the same Act, and by another Canadian statute (20 Vict. c. 127, s. 1), the Trinity House of Montreal are empowered to make a bye law establishing a tariff of rates to be paid for the pilotage of vessels between Quebec and Montreal, upwards and downwards, and penalties are imposed upon any person demanding, receiving, paying, or offering higher rates of pilotage. Such a bye law was made by the Trinity House, and approved by the Governor-General in Council on the 5th May 1866, and it was there provided that the tariff for sea-going steamers between Montreal and Quebec should be 2dols. 50c. for each foot of draught of water. By sect. 24 of the same (the former) Act, a fund known by the name of the "Montreal Decayed Pilots' Fund," which has for its object to assist pilots, and the widows and children of pilots who have fallen into distress, and which had been placed under the control of the Trinity House by a former Act (2 Vict. c. 19, s. 20), was continued in their hands.

By a Canadian statute (27 & 28 Vict. c. 13), entitled, "An Act to amend the Law respecting the Navigation of Canadian Waters," it is enacted:

Sect. 14:

No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any place where the employment of such pilot is compulsory by law.

By another Canadian statute (27 & 28 Vict. c. 58), entitled, "An Act to amend the Act passed in the twelfth year of Her Majesty's reign, relating to the Trinity House at Montreal," after reciting that doubts had arisen as to the construction of that Act (12 Vict. c. 117), it is enacted:

Sect. 2:

The registrar of the said Trinity House of Montreal shall record in a register, to be kept by him for that purpose, the name and residence in Montreal of all such branch pilots as shall report themselves, from amongst whom it shall be competent for all shipmasters and others requiring branch pilots to select such pilot or pilots as they may think fit, other than those actually engaged to pilot the ocean mail steamers, or any of them, and to indicate to the said registrar the name or names of such pilot or pilots as they may select; and on such selection being approved by the master, deputy master, or registrar of the said Trinity House of Montreal, it shall be the duty of the said registrar immediately to record such selection and approval in a register to be kept by him for that purpose, and thereupon and not otherwise, such

pilot or pilots shall be held and considered to all intents and purposes as engaged.

Sect. 3:

When so engaged, every branch pilot who shall refuse, decline, or neglect to take charge of any ship, steamer, or other vessel for which he shall have been so selected as aforesaid, upon being required so to do by the master, or any officer belonging to such ship, steamer, or vessel, or by any officer of the said Trinity House of Montreal, unless (in any of the cases in the said Act mentioned) it shall be enacts, &c., . . . shall forfeit for each such offence any sum not exceeding ten pounds currency, and shall be liable to be dismissed from being a branch pilot, or suspended from acting as such at the discretion of the master, deputy master, and wardens of the said Trinity House of Montreal, or any of them.

Sect. 10:

The master or person in charge of such vessel over 125 tons, leaving the port of Montreal for a port out of this province, shall take on board a branch pilot for and above the harbour of Quebec, to conduct such vessel, under a penalty equal in amount to the pilotage of such vessel, which penalty shall go to the Decayed Pilots' Fund.

By a Canadian statute (12 Vict. c. 14), entitled "An Act to consolidate the Laws relating to the Powers and Duties of the Trinity House of Quebec, and for other purposes," powers are given to that Trinity House to make bye laws for the regulation and government of pilots for the port of Quebec, which is there defined (sect. 11) to be all that part of the St. Lawrence between the basin of Portneuf and the Gulf of St. Lawrence, and that part of the Gulf which is in the province, and all rivers, &c., where the tide flows in that part (the harbour of Quebec being (sect. 12) that part of the river St. Lawrence between St. Patrick's Hole, inclusively, to the Cap Rouge River, inclusively, and that part of the rivers Montmorency, St. Charles Etchemin, Chaudière, Cap Rouge, and others, where the tide ebbs and flows); to license pilots (sect. 15); and (sect. 53) vessels going outwards to sea from the port are compelled to take a pilot under a penalty of the pilotage amount, which is to go to the Decayed Pilots' Fund; and (sects. 54 and 55) inward bound vessels must hoist a signal for a pilot, and must wait for a pilot boat if there is one within a reasonable distance; must take on board a pilot, and give him charge of the ship, without power of selection, under a penalty over and above the pilotage, which does not go to the Decayed Pilots' Fund.

The cause was heard before the Hon. Henry Black, C.B., the Judge of the Vice-Admiralty Court, assisted by nautical assessors, on 22nd Nov. 1872; and on 2nd Dec. 1870 the judge pronounced against the damage proceeded for, on the ground that the *Hibernian* was at the time of the collision under the charge of a duly licensed pilot. The judgment of the learned judge (after setting out the facts), and the questions put to the nautical assessors, and their answers (those which are material to the present appeal) are as follows:

"Each of the parties charges the other with negligence and with want of proper skill and care; and the owners of the *Hibernian* further allege that, even if there had been any fault on the part of that vessel, which they deny, yet that they would not be liable, inasmuch as she was in charge of a duly licensed branch pilot for and above the harbour of Quebec, as by law required, and whose orders were exactly obeyed and carried out by her officers and crew, who were sufficiently numerous and in every respect well qualified, the ship being in perfect order and thoroughly sound and equipped. In answer to this, the opposite par-

ties say, that the Montreal Ocean Steamship Company, owners of the *Hibernian*, were not at the time of the accident under any legal obligation to take the pilot, Adolphe Lisée, to conduct their vessel, but were by law allowed to choose from among the duly-licensed branch pilots their own pilots, to be exclusively employed by them in piloting the ships of the company, and that the pilots so employed by them are their servants, for whose acts they are responsible. The owners of the *Hibernian* deny the validity of their plea; at the same time that they allege that there was no fault on the part of the said Adolphe Lisée, and that the sole responsibility for the accident rests with the opposite parties, who might have avoided all risk of collision by proper care and precaution, and more especially by stopping below Eagle Island when they first saw the *Hibernian*, or by keeping further to the north or starboard side of the channel, or by passing on the other side of Eagle Island, any of which courses, they say, could easily have been taken.

"The liability or non-liability of the owners of the *Hibernian* for any fault on the part of Adolphe Lisée, under the circumstances of the present case, is a purely legal question for the court to determine, and it might have been determined at an earlier stage of the proceedings if the admission of the pleading by which the question is raised had been objected to. It is right that I should dispose of it in the first instance. The rule has always been that if it be compulsory on the vessel to take a pilot, and, *à fortiori*, if this obligation be enforced by a penalty, then neither the owner nor the master will be liable for injury occasioned by the fault or incapacity of the pilot, and this rule is and was at the time of the collision part of the statute law upon the subject. The question then is, whether this rule is affected by the fact of the pilot's having been selected by the owners of a vessel and constantly or frequently employed by them in piloting their vessels, and whether he may be on this account considered rather as a servant voluntarily engaged by them, than as an ordinary pilot taken under the compulsory provisions of the law.

"The question has, fortunately for us, arisen in England, and has been decided by the High Court of Admiralty in the case of *The Bataavier* (2 W. Rob. 407). In that case it was held that the exemption from liability under the Pilot Act was not taken away from the owner of the damaging vessel by the constant employment of the same pilot to pilot their vessel up and down the river Thames for a period of fifteen years. Dr. Lushington in pronouncing judgment said, that the contrary position would be highly detrimental to the interests of navigation, and be considered it highly advantageous not only to the owners of vessels but to the public at large, that the same pilot should be constantly employed on board a vessel, inasmuch as he becomes thereby well acquainted with the master and crew, and is consequently more likely to conduct the vessel amicably and properly. I not only feel bound by this decision as a precedent, but I agree perfectly in the opinion expressed in it. I may further remark that the Act of 1864 (27 & 28 Vict. c. 58) relating to the Trinity House of Montreal expressly recognises the right of shipmasters and others requiring branch pilots to select such of them as they may think fit, other than those engaged to pilot the

ocean mail steamers, or any of them. The master is bound to take a qualified pilot under a penalty, though he may select from such as are so qualified; the case would be different if it were optional with him to take or not to take a branch pilot at his pleasure.

"The question whether the accident was or was not occasioned solely and exclusively by the fault of the pilot, as well as the other questions of fact in the case, are of a purely nautical and technical character. The case is either one in which there is plainly no fault on either side, or in which there must have been fault which cannot be specifically ascertained and assigned, or in which the fault not only exists but can be ascertained; and this last head is subdivided into the cases in which both parties are to blame, and those in which the party inflicting the injury, or the suffering party, is alone in fault. These questions must be determined by reference to the rules of navigation and seamanship as applied to the facts disclosed in the evidence in the case. The questions submitted to the gentlemen by whom the court will be assisted will therefore be the following:—

"1. Whether the accident arose from unavoidable circumstances, without fault being attributable to any of the vessels or their people, or proceeded from the fault of any of the vessels or their people; and if so, then from the fault of which of them?

"4. If there was any fault on the part of the *Hibernian*, was it attributable solely and exclusively to the pilot Lisée, or did it arise from any neglect or want of skill on the part of her officers or crew?

"8. Did the collision arise from any other fault of the *Canada*, the barges, or their people, or any error on their part, by reason whereof they are not free from blame?

"Upon these points the nautical assessors, who have fully considered the evidence and the facts, are of opinion as follows: First, that the collision did not arise from unavoidable circumstances; it appears to us that the barges were sunk without any fault or defect attributable to them or their crews, or to the *Canada*, by which they were towed, and the blame rests with the *Hibernian* alone; fourthly, that the collision did not arise from any fault of the officers or crew of the *Hibernian*, but solely and exclusively from that of her pilot; eighthly, the *Canada*, her tows and their crews are not to blame for the collision, as it is known that a tug steamer with so many vessels in tow cannot alter course readily. The *Hibernian*, having seen her so far off, ought to have known this, and taken proper precautions in time to prevent collision.

"Captain Armstrong and Captain Ashe exempt the master and crew of the *Hibernian* from blame, and attribute the fault which gave occasion to the damage to the pilot. Concurring in this opinion, I must dismiss the owners of the *Hibernian* from this suit, solely upon the ground that the master was bound to take a pilot on board and place him in charge in conformity with the requirements of the law, and the collision having been occasioned entirely by the fault of that pilot, the owners are entitled to exemption from liability."

From this decree the appellants asserted an appeal; having failed to present a petition of appeal within six months, they filed a petition in the registry of the Privy Council for leave to appeal, and on Feb. 5, 1872, leave was given to

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prosecute the appeal. Their reasons for reversing the judgment are as follow :

1. Because the Vice-Admiralty Court of Canada should administer the law of the High Court of Admiralty of England, and not Canadian law, and the rights of suitors in that court cannot be taken away, or affected, by a Canadian statute.

2. Because the provisions of the Canadian statute 27 & 28 Vict. c. 13, s. 14, exempting the owners of vessels from liability for the acts of pilots compulsorily taken, if applicable at all, apply only to cases in which the particular pilot was necessarily taken on board under the provisions of the law, and not where the pilot is selected by the owner of the vessel.

3. Because by the law of nations a vessel wrongfully doing damage to property on the high seas is liable to be detained until the damage has been made good, and no sufficient grounds have been shown for exempting the *Hibernian* from this liability in the present case.

Sir J. Karslake, Q.C., and Bompas, for the appellants.—First, the Canadian statutes do not impose compulsory pilotage upon vessels navigating above Quebec. The 27 & 28 Vict. c. 58, s. 10, provides for the employment of pilots, but does not expressly make them compulsory; it requires the payment of a sum of money equal to the pilotage in case of the non-employment of a pilot, for the benefit of the Decayed Pilots' Fund. Such a provision does not amount to compulsion, it gives masters the option whether they will take a pilot or pay a fine. The Liverpool Pilot Act (37 Geo. 3, c. 78), s. 37 provided that any master of a ship proceeding to sea from that port, and refusing to employ a pilot, should "pay or cause to be paid to the pilot when first, or who only, shall offer his services as aforesaid, and shall be so refused, the full pilotage," &c., and it was held that this imposed no penalty, and therefore no obligation to take a pilot on board whilst proceeding to sea, as the consequence of refusing was only a liability to pay the same wages as if a pilot had been taken: (*Attorney-General v. Case*, 3 Price 302, 318, 321.) An Act of Assembly of Pennsylvania (the 29th March 1803), entitled, "An Act to establish a Board of Wardens for the Port of Philadelphia, and for the Regulation of Pilots and Pilotage," &c., provided (sect. 29) that certain vessels "shall be obliged to take a pilot; . . . and if the master of any ship or vessel shall refuse or neglect to take a pilot, the master, owner, or consignee shall forfeit and pay to the wardens aforesaid a sum equal to half pilotage of such ship or vessel to the use of the society for the Relief of Distressed or Decayed Pilots, their Widows and Children," &c.; and it was held that this did not compel owners to employ a pilot, but permitted them, if they pleased, to compound by paying half pilotage for the relief of decayed pilots; that it was an inducement, not a compulsion, to employ pilots; that pilots were provided for the benefit of the shipowners, and that the assessment of such a tax upon them did not create compulsion merely because it is called a penalty :

Flanigan v. The Washington Insurance Company, 7 Barr's (Pennsylvania) Rep. 306, 312, 314;
Bruce v. Donaldson, 4 Dallas' (Pennsylvania) Rep. 206.

Smith v. The Croale, and *The Sampson*, 2 Wallace, Jun. (U.S. Circuit Ct., 3rd Circuit) Rep. 486.

To make pilotage compulsory there must be a

penalty over and above the pilotage amount, as there is in the Canadian statute relating to pilotage below Quebec (12 Vict. c. 114, ss. 54, 55): (*The Lotus*, 11 Lower Canada Rep. 342.) The American authorities are in conflict with the case of *The Maria* (1 W. Rob. 95) as to what amounts to compulsion; but that case, even if rightly decided, turns upon a statute (41 Geo. 4, c. 86, s. 6) by which ships "shall and they are hereby obliged and required to receive, take on board, and employ in piloting, &c., such pilots," or pay the full pilotage to the pilots; whereas the Canadian Act only says "shall take on board," or pay a penalty to a charity: this cannot be called compulsion. *The Bataavier* (2 W. Rob. 407) was decided under the General Pilot Act (6 Geo. 4, c. 125), which clearly and positively rendered pilotage compulsory under the circumstances. Where a person is in the same position if he takes a pilot or not, there is no obligation imposed upon him; his taking a pilot is a voluntary act.

Secondly, even if pilotage should be held to be compulsory above Quebec, still that in itself does not exempt the owner from liability, apart from express statutory provision. In no English case, except *The Maria* (*ubi sup.*), has it been expressly decided that, on general principles, apart from a statutory provision, a shipowner is exempt from liability for the acts of a pilot taken under compulsion, and in that case it was unnecessary to base the decision on the ground that there was no relation of master and servant, as the General Pilot Act expressly exempted owners for the acts of pilots taken under the Act: (6 Geo. 4, c. 125, s. 55.) In all other English cases there has been an express statutory exemption. In America it has been held that where a statute compels pilotage, but does not expressly exempt from liability, the owners are liable for the neglect of the pilot, as his services are rendered for the benefit of the owners, and his being appointed by law cannot destroy the maritime lien which accrues to the owners of the vessel injured by the negligent act of the pilot: (*The China*, 7 Wallace U. S. Sup. Ct. Rep. 54.) That case reviews all the English decisions and disents from them, pointing out that Lord Stowell in *The Neptune the Second* (1 Dodson 467) held that the true rule, apart from statute, was that the owners were liable for the act of the pilot although compulsory. It has also been held that a pilot is the agent of the shipowner as much as any other person placed in charge of a ship, and that the shipowner is therefore liable for injuries caused by his ship when a pilot, who is appointed by the state, has the sole control, is on board: (*Yates v. Brown*, 8 Pickersing (25 Massachusetts), Rep. 23.) Moreover, the English Pilot Acts did not require pilotage to be compulsory as a condition precedent to giving exemption from liability for the acts of the pilots; so long as the statute gave exemption it did not signify how the pilot was taken on board. Even where a pilot's duty had ended and his services were no longer compulsory, the ship was held exempt from the consequences of his acts:

The Parma, 2 W. Rob. 184;

The Christians, 7 Moo. P.C.C. 160;

The Steffen, Bro. & Lush. 199; 6 L. T. Rep. N. S.

613; 1 Mar. Law Cas. O. S. 229.

It is submitted that Admiralty Courts are not bound by the rules of common law as to master and servant, and that the liens enforced in those

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courts cannot be set aside by anything less than express statutory enactment binding upon an Admiralty Court.

Thirdly, there is no express statutory exemption binding upon the Vice-Admiralty Court, because the 27 & 28 Vict. c. 13 is an Act of the Colonial Legislature, and although it may bind Canadian local and municipal courts, it cannot bind the Vice-Admiralty Court, which holds its power by virtue of a commission issued out of the High Court of Admiralty of England. A Vice-Admiralty Court is bound to administer the same law as the High Court. [Sir R. PHILLIMORE.—The common law of the two courts, so to speak, is the same; but can you say that, this question being governed by a Canadian statute, the Court of Vice-Admiralty of Lower Canada is not bound by that statute?] All British Admiralty Courts administer the same system of law, and it is immaterial whether this suit is instituted in the High Court of Admiralty or a Vice-Admiralty Court. Either court is affected by a local law precisely in the same way. The High Court of Admiralty will not take cognizance of colonial Acts without any proof (*The Peerless*, Lush 30, 103), but treats them rather as foreign laws that must be given in evidence, although perhaps not requiring the same strict proof as required by other courts. Where a foreign statute provides that pilotage shall be compulsory, but that such pilotage shall not exempt from liability for the acts of the pilot, this court or the Admiralty Court holds that although it must take into consideration the first part of the statute making the pilotage compulsory, it cannot hold that the second part, as to exemption, can be carried into effect in a suit in a British court, as it is against the rule of English law: (*The Halley*, L. Rep. 2 P. C. 193; 18 L. T. Rep. N. S. 879; 3 Mar. Law Cas., O. S., 131). The same rule should be applied to a Canadian statute. The Admiralty Court would examine the statute to see if there was compulsion, but would not hold that it was bound by the statute as to the effect of such compulsion. [Sir R. PHILLIMORE.—But the court would be bound to take notice of the statute.] But not of the whole of it. The Canadian law is to be disregarded in so far as it conflicts with the rule of maritime law, that a lien exists upon a ship for damage done by that ship. The High Court of Admiralty and, therefore, the Vice-Admiralty Courts, may be obliged to administer British statute law, but the High Court is not subject to the jurisdiction of Colonial Legislatures, and laws there made cannot bind the High Court, and therefore cannot bind the Vice-Admiralty Courts. [Sir BARNES PRADOCK.—Can their Lordships advise Her Majesty to refuse to give effect to a statute to which she has given her consent?] The Vice-Admiralty Judge in Canada holds his court not because he is in Canada and depends upon the Canadian Legislature for his jurisdiction, but because he has by the very nature of his appointment jurisdiction over all matters arising on the high seas and other places within Admiralty jurisdiction, and administer the same law in his court which is administered in the High Court of Admiralty. The Vice-Admiralty Court is not a Canadian court. [Sir R. PHILLIMORE.—Could you not, in answer to an action in the High Court, set up that the act complained of had been done by the law of Canada?] A British subject suffering injury abroad at the hands of another British

subject may sue in the English courts for the wrong, irrespective of the law of the foreign country: (*Scott v. Seymour*, 1 H. & C. 233). But such a case is distinguishable from the present, because here the act is unlawful by the law of every state, and it is the ordinary consequences of that act which the local law seeks to alter. Assuming that there was one statute only, the court would read it for the purpose of ascertaining whether there was compulsory pilotage and no further; and where there is one general statute and another local statute, the court will not, because one imposes pilotage, take the other into consideration to give exemption. A foreign or local law may be considered on the question of compulsion, but, as to the consequences of such compulsion, the governing law must be the law administered by Courts of Admiralty, which does not, as we submit, give exemption from liability from the acts of pilots, apart from express statutory enactments.

Fourthly, there was a selection by the owners or master of this particular pilot, and therefore, even if the pilotage was compulsory, there could be no exemption, as the relation of master and servant existed between the shipowners and the pilot. The pilot was a man selected by the owners without any compulsion or obligation out of a considerable number of pilots. To preclude liability there must be no power of selection, the limitation of a defendant's power of choice cannot deprive a plaintiff of his remedy if there is a power of selection: (*Martin v. Temperley*, 4 Q. B. 293.) The English Pilot Acts as a rule require the first pilot who offers to be taken; so also the Act as to pilotage below Quebec (12 Vict. c. 114). In such cases there is no power of selection.

Butt, Q.C. and Clarkson, for the respondents, were not called upon.

Cur. adv. vult.

Dec. 17.—The judgment of the court was delivered by Sir R. PHILLIMORE.—This is an appeal from a decree of the Judge of the Vice Admiralty Court of Lower Canada, in a case of damage brought by the owner of a certain cargo laden on board of two barges, against the steamship *Hibernian*. The collision happened in the River St. Lawrence, between Pointe aux Trembles and Varrennes, off Isle à l'Aigle. The *Hibernian* was a large mail steamer, proceeding with cargo and passengers down the St. Lawrence, on a voyage from Montreal to Liverpool; the barges were proceeding up the river, in tow of a steam tug. The *Hibernian* ran into the barges, and sank them. The court below found that the *Hibernian* was alone to blame for this collision, and the justice of this decision has not been controverted; but the court below also found that the *Hibernian* was at the time of the collision under the charge of a pilot, taken on board by compulsion of law; and that therefore her owners were exempt from the liability which the ship would otherwise have incurred. It is from this part of the decision that the appeal has been prosecuted. It is not disputed that a proper pilot was on board; that he took charge of the vessel; gave the orders for her navigation; that they were obeyed; and that the collision ensued in consequence. It has been contended by the appellants nevertheless that the *Hibernian* is not relieved from her liability. This contention is founded upon this position, that the general and maritime law is alone applicable to

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the case, by which law the wrong-doing vessel is bound to make full compensation to the suffering vessel for the damage inflicted upon her. In order to sustain this position, it has been asserted,—first, that the Canadian Statutes presently to be mentioned on which the learned Judge relied are without authority in the Vice-Admiralty Court. It has been said at the bar that this suit might, and so far this statement is correct, have been instituted in the High Court of Admiralty, which, it is also said, would not have taken cognisance of the statutes, and in support of this startling proposition the case of the *Halley* (*ubi sup.*), decided by this tribunal, was cited. Their Lordships are wholly unable to follow the reasoning of counsel upon this point. In the case of the *Halley* (*ubi sup.*) the judgment turned upon a question as to the partial or entire adoption or rejection of the law of a foreign country. In the present case, the law invoked is contained in an Act of the Legislature of a colony belonging to the Crown, and ratified by the express sanction of Her Majesty. Their Lordships have no doubt whatever that this law, in every case to which it is applicable, is of binding authority, equally in the Queen's High Court of Admiralty and in the Vice Admiralty Court of Canada, from which, it is to be observed, their Lordships are now sitting as a Court of Appeal. Secondly, it was argued that the Canadian statute (27 & 28 Vict. c. 58) did not make the taking of a pilot compulsory upon the *Hibernian*. The 10th section of that statute is as follows: (His Lordship then read the section as given above.) It is contended that, by the language of this section, no compulsion is put upon the master to take a pilot, but that for not doing so merely a penalty is imposed. That, though the term "penalty" is used, it is only meant in the sense of an order to contribute to a particular fund, the support of which is a matter of public policy. But their Lordships are of a different opinion; they hold that when a statute inflicts a penalty for not doing an act, the penalty implies that there is a legal compulsion to do the act in question, and that this principle is not affected by the fact that a penalty has a particular destination. Various decisions in the courts of the United States of North America, and especially one of very high authority in the Supreme Court, were cited for the purpose of showing that such an order, with respect to taking a pilot, as is contained in the section referred to, does not release the ship from the liability, the *obligatio ex delicto*, which, by the general maritime law, attaches to the wrong-doer; and it certainly does appear that upon this point the decisions of the American courts are at variance with the later decisions of the High Court of Admiralty, affirmed by the Judicial Committee of the Privy Council. This variance is certainly much to be regretted; but, if it were necessary to decide the present case upon this point alone, their Lordships would think themselves bound to follow the precedents of the English courts. It is to be observed, however, that no decision has yet been given by the American courts upon the effect of a statute releasing in express terms a wrong-doing vessel from liability upon the ground of compulsory pilotage. In the case of the *China*, decided by the Supreme Court, Swayne, J., observed: "The New York Statute creates a system of pilotage regulation. It does not attempt in terms to give immunity to a wrong-doing vessel. Such

a provision in a state law would present an important question, which in this case it is not necessary to consider." (7 Wallace's Rep. (Sup. Court), p. 87.) The other Canadian statute, to which reference must now be made, is 27 & 28 Vict. c. 13, entitled, "An Act to Amend the Law respecting the Navigation of Canadian Waters," in which waters, it is to be borne in mind, this collision took place. By the 14th section it is enacted that "no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any place where the employment of such pilot is compulsory by law." Their Lordships entertain no doubt that these two Canadian statutes are to be read and construed together as being *in pari materia*, and that the owner of a ship navigated in Canadian waters under the directions of a pilot taken on board in compliance with the provisions of these statutes, employs the pilot so taken on board by compulsion of law, and, therefore, except in circumstances of special exception, which it is not necessary to enumerate, is expressly exonerated, according to the law of Canada, from all liability to compensation for damage inflicted upon another vessel in consequence of obedience to such directions. It remains only to notice the argument that the pilot in this case was selected by the master, and therefore that the relation of master and servant subsisted between the pilot and the captain, representing the owners. We think this argument is unsound. The second section of the former Canadian Act enacts that "the registrar of the said Trinity House of Montreal shall record in a register, to be kept by him for that purpose, the names and residence in Montreal of all such branch pilots as shall so report themselves, from amongst whom it shall be competent for all shipmasters and others requiring branch pilots to select such pilot or pilots as they may think fit, other than those actually engaged to pilot the ocean mail steamers, or any of them, and to indicate to the said registrar the name or names of such pilot or pilots as they may select," &c. It is plain that the epithet "such," here applied to pilot, refers to the particular qualified class out of which the master is obliged to select one person, and their Lordships are of opinion that this restriction operates to destroy the relation of master and servant which would arise in the case of a free choice made by the master. Their Lordships will humbly recommend Her Majesty to affirm the decree of the Vice-Admiralty Court, and to dismiss this appeal with costs.

Appeal dismissed.

Solicitors for the appellants, *Bischoff, Bompas and Bischoff*.

Solicitors for the respondents, *Gellatly, Son and Warton*.

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[CHAN.]

COURT OF APPEAL IN CHANCERY.Reported by E. STUART BOOTH and H. FRAT, Esqrs.,
Barristers at Law.

Nov. 11, 12, 14, and 15, 1872.

(Before the LORD CHANCELLOR (Selborne).)

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Holders of bills of lading—Priority—Notice.

K., a miller in England, agreed with F. and Co., a firm in California, that they should send him cargoes of wheat, he accepting bills of exchange against the bills of lading. A cargo was sent, and bills of lading, with bills of exchange annexed, were sent to the agents in England of F. and Co., and by them the acceptance of K. to the bills of exchange was obtained. The bills of exchange had been negotiated, and bills of lading deposited by F. and Co. with a Californian bank as security for advances. It appeared that six bills of lading were drawn, and one of them was inadvertently, as F. and Co. alleged, sent to K., who deposited it with a bank at Exeter by way of security. K. failed, and a bill was filed by the English bank, claiming the cargo as against the holders of the other bills of lading.

Held (affirming the decision of the Master of the Rolls) that F. and Co. had full right to negotiate the bills of exchange with the bills of lading annexed, and that the English bank must at the time when they made an advance on the bill of lading have known that there would be several bills of lading, and that one could not be negotiated without the other. The English bank had therefore no priority.

This was an appeal by the plaintiffs from a decision of the Master of the Rolls.

A bill was filed by the representative of the West of England and South Wales Bank claiming to be entitled to a cargo of wheat under the following circumstances: Messrs. Forbes, Knight, and Co., carrying on business at Glasgow and San Francisco, received a large order from a miller in Devonshire named Kemp for wheat to be shipped from San Francisco. On the 11th Sept. 1868, 10,769 bags of wheat were shipped on board the *Theodor Ducos*, to Kemp's order, and six duplicate bills of lading were signed by the master, all bearing that date; six corresponding bills of lading each for the price of the cargo were drawn by Forbes, Knight, and Co. on Kemp; three of these bills were annexed to the same number of bills of lading, and were deposited on 12th Sept. 1868, with the bank of British Columbia as security for advances then made, and on the same day Forbes, Knight, and Co. sent Kemp a letter of advice enclosing, by mistake or inadvertence, an original bill of lading indorsed in blank. This was the first cargo shipped under the order. It appeared that the mode of dealing adopted between Forbes, Knight, and Co., and Kemp, was for Forbes, Knight, and Co. to draw on Kemp against shipments by bills at sixty days' sight, and that Kemp intended to deal with the cargoes before they arrived. The three bills of exchange deposited by Forbes, Knight, and Co., with the bank of British Columbia were on the 13th Oct. following presented by their agent in England to Kemp, who accepted them, but failed to pay them when they became due; and they were ultimately taken up by the drawers, Forbes, Knight, and Co. On the 13th Oct. 1868, Kemp assigned the bill of

lading, which had been sent to him by mistake, to the West of England and South Wales Bank as a security for advances. Kemp subsequently became bankrupt, and the cargo on its arrival was claimed by the plaintiffs' bank, as assignee of the bill of lading, and by the Bank of British Columbia as purchasers for value of the bill. Similar proceedings had taken place with reference to other cargoes, and in one case Kemp had objected to accept the bills of exchange unless the bills of lading were deposited with him, but Forbes, Knight, and Co., declined this, as if they did so their lien would have been of no avail. On 14th Dec. 1868, the bills of exchange on the first cargo were protested, and Forbes, Knight, and Co., then learning for the first time that Kemp had used the bill of lading, deposited the price of the cargo with the Bank of British Columbia, and that bank agreed to take proceedings in respect of the cargo on being indemnified by Forbes, Knight, and Co. The Bank of British Columbia obtained possession of the cargo on its arrival in this country. By an order of the court the cargo was sold, and the proceeds of the sale paid into court. It was held in the court below that Kemp was well aware of the mode of dealing pursued by Forbes, Knight, and Co. in their transactions with him, and that this mode was adopted with his consent, and the mistake of Forbes, Knight, and Co. in sending an original bill of lading, instead of a copy, had occasioned the suit. Lord Romilly was of opinion that the Bank of British Columbia was the first transferee of the bill of lading, and that the letter of advice of the 12th Sept. 1868, amounted to notice of the claim of the Bank of British Columbia, both to Kemp and to the plaintiffs' bank. The Bank of British Columbia had sold their claim to Forbes, Knight, and Co., who stood in the shoes of the bank, and were entitled to enforce all the legal rights and equities of the bank. Forbes, Knight, and Co., were held to be entitled to the proceeds of the sale of the cargo, and the bill was dismissed with costs as against all the defendants except Kemp.

Fry, Q.C. Ince, and Murel (of the Common Law Bar) for the appellants, contended that the words of the contract were controlled by the custom of merchants as shown by the ruling of Lord Cairns in *Bernadon v. Strang*, and that Kemp had a perfect right to deal with the cargoes. If Forbes and Co. did not intend Kemp to see the indorsed bill of lading, at all events, they had not given any satisfactory explanation of how they came to send it to him.

Sir R. Baggallay, Q.C. and Kekewick, for the Bank of British Columbia.

Benjamin, Q.C. and Bradford for Messrs. Forbes and Co., submitted that under the particular circumstance, Kemp had no right whatever to see the bill of lading. Where a man, holding a bill of lading under a promise not to use it, did part with it, his assignee would not thereby acquire any right against the person who entrusted him with the bill. It was also clear on the evidence that Kemp understood that Forbes and Co. were to raise money on the cargoes. The following cases were referred to:

Prase v. Gloster, The Maria Joseph, L. Rep. 1 P. C. 219; 15 L. T. Rep. N. S. 6; 2 Mar. Law Cas. O. S. 394;

Rice v. Rice, 22 L. T. Rep. 208; 2 Dru. 73;
Dracachi v. The Anglo-Egyptian Steam Navigation Company, L. Rep. 3 C. P. 190; 17 L. T. Rep. N. S. 472; Mar. Law Cas. O. S. 27;

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Shepherd v. Harrison, L. Rep. 5 H. of L. 116; 29 L. T. Rep. N. S. 24; 3 Mar. Law Cas. O. S. 210; *Berardson v. Strang*, L. Rep. 4 Eq. 481, 483; 19 L. T. Rep. N. S. 40; *Briggs v. Jones*, L. Rep. 10 Eq. 92; 23 L. T. Rep. N. S. 212.

THE LORD CHANCELLOR (Lord Selborne).—In this case I only called upon counsel for the defendants, Messrs. Forbes and Co., to address the court upon one branch of it, and after hearing the very able argument of Mr. Benjamin, and the light thrown upon the facts, and the evidence in the course of that argument, I have come to a very clear conclusion that the decision of the Master of the Rolls is right. The case made by the bill really and truly is that the plaintiffs have a legal priority by the first indorsement of one of a set of bills of lading, and that their right to that was in accordance with the contract between the vendor and purchaser of the cargo to which the bills of lading related. Now in the view I take of the case it is not really necessary to dwell much, if at all, upon the question of mercantile understanding in contracts of this kind, which occupies a considerable part of the bill, and which occupied a considerable part of the argument; but I think it well to say a very few words upon it by way of introduction to what I regard as the only question requiring serious consideration in the case. This contract for the purchase of wheat at San Francisco on the order of the miller in Devonshire was according to the original letter of 3rd May 1863, upon the terms that reimbursement was to be made by the purchaser's acceptance originally at ninety days' sight, afterwards altered to sixty, against the bill of lading; and it seems to have been argued that it was wrong for the unpaid vendor before acceptance of the bills of exchange, by means of which his reimbursement was to be paid, to negotiate those bills of exchange, and to document them in the usual manner by annexing the bills of lading, and so sending them forward in the hands of the person discounting the bills of exchange. I apprehend, on the contrary, that that course is perfectly regular and perfectly right and proper, unless indeed in a particular case where there is an express contract that the bills of exchange are not to be negotiated. In no other way can the vendor protect himself against the contingency, under these circumstances, of the acceptance even of the bills of exchange being refused. The contract that he is to be reimbursed by acceptances against bills of lading cannot possibly disable him from dealing in the ordinary course of mercantile business with the bills of lading for his own protection, and to protect himself against liabilities upon the bills that he draws, at all events before they are accepted. Therefore, in negotiating these bills of exchange with the Bank of British Columbia, or with those from whom the bank took them, it appears to me Forbes, Knight, and Company merely followed the proper and ordinary course of mercantile usage. It might be quite consistent with that, that the purchaser—in other words, Mr. Kemp—might have a right, when the bills of lading were presented to him for acceptance, to say he would not accept the bills under this contract unless the bills of lading were at the same time delivered up to him; and if they had been refused, and he offered acceptances according to his contract on those terms, it may be that he would have had a right to bring an action for breach of contract as against Forbes and Co. That

may be the case, though I apprehend, as to that, much would depend upon the particular course of dealing between the parties, which might vary the mode in which, as between themselves, the contract in that respect might be performed. But the real substance of the contract in such a case is this, that the purchaser is to be under the obligation to accept, only when the bills of lading come forward to and are seen by him in the proper course of the transaction; and if he, having the bills of exchange presented to him for acceptance with the bills of lading annexed to them, does not think fit to take measures to claim the delivery of the bills of lading to him, if he has a right to do it—if he is content that they should remain in the hands of the person who is the holder of the bills of exchange, and makes no objection to it, it is exactly the same thing as if he had previously and originally authorised that transaction, and himself adopted that mode, as it is expressed, of "financing the bills of exchange." And that, according to my view of the evidence, is what actually happened in the present case. There can be no doubt whatever that the bank of British Columbia sent forward these bills of exchange with the bills of lading—the three parts of the bills of lading annexed to the three parts of the bills of exchange—that these documents came, in the ordinary course of business, into the hands of their agents in London, Messrs. Smith, Payne, and Co., and then we have got from Mr. Johnson, a witness, who is the clerk of Messrs. Saunders, bankers of Exeter (which firm in Exeter are the agents of Smith, Payne, and Co.) this statement, which he positively swears to—that he received from his employers, Messrs. Saunders, this bill of exchange to be presented for acceptance with these documents annexed to them which are now annexed to them as the documents have been produced in court. If he speaks the truth nobody can for a moment doubt that Mr. Kemp knew and understood that he was accepting bills of exchange secured by bills of lading in the hands of the owners. Not only were the annexed documents so large that nobody could overlook them, but on the face of the bills of exchange which he accepted, it was expressed in words that they were secured by the deposit of the bills of lading. Now Mr. Kemp swears that that is not true; and that he did not know that they were annexed to the bills of exchange, and did not read the document which he signed. I simply disbelieve him, because in the ordinary course of business Messrs. Smith, Payne, and Co., who certainly received these documents would, as a matter of duty, send them forward for acceptance; and the clerk, doing his duty, would present them as he received them; and every man who signs a document must, in a court of justice, unless under very special circumstances of fraudulent means being used to deceive him, be taken to have read the document which he signs; and not the less so if it be relating to a transaction of business of some importance. Therefore, in my judgment, it is clearly and unquestionably established that Mr. Kemp, with perfect knowledge that the bills of lading were held by the Bank of British Columbia, assented to that, and not demanding that they should be delivered up, and not refusing acceptance, accepted the bill of exchange. In that state of things, of course there could be no possible doubt of the right of the Bank of British Columbia, or of the right of the vendors (in this sense unpaid,

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that when the hills of exchange came to maturity they were not paid by Kemp, on paying the Bank of British Columbia, to hold the cargo against Kemp or his assignees in bankruptcy. On that point I apprehend there can be no conceivable doubt whatever. Well, but then comes the competition with the present plaintiffs, which arises thus: It appears that on the 12th of Sept., contemporaneously, or nearly so, with the negotiation of the hills of exchange with these three parts of the hills of lading annexed to them, with the Bank of British Columbia, Forbes and Co., the Californian firm, wrote a letter of advice to them, and, as a matter of fact sent to them in that letter of advice another part of the bill of lading endorsed, and that bill of lading, under circumstances to which I shall presently have to advert, was deposited with the present plaintiffs, who are bankers at Exeter and at Bristol. It is admitted now, and cannot be controverted, that the legal right to the cargo passed by the prior endorsement for value to the Bank of British Columbia, in whose shoes Forbes and Co. now stand, unless the plaintiffs have an equity to take from them, the bank, the benefit of that right. Have the plaintiffs that equity? Now, what are the facts? In the first place, I think it is perfectly clear that Forbes and Co. speak the truth so far as this, that there must have been some inadvertence or error in substance in sending that endorsed part of the bill of lading to Mr. Kemp. I do not say that any such inadvertence or error would relieve them from equitable liabilities if circumstances raised those equitable liabilities; but, as a matter of fact, it must have been so, for this reason: that the contract, in any conceivable view of it, was only for acceptances against bills of lading, which of course means bills of lading against acceptances, and to send this endorsed bill of lading to Mr. Kemp when he had not given any acceptance at all was manifestly an inadvertence, and, beyond all question, could not entitle him, or be meant to entitle him, to deal with the bill of lading when he had not actually accepted the bills of exchange and performed the condition upon which alone it was to be dealt with. Now, if I thought it material to determine the question whether that was the error of some copying clerk, or the substantial error of the firm in California, I should say that I am by no means satisfied that it was a clerk's error; and upon the evidence I should come to the conclusion that it was the act of the firm; but I have no doubt it was an act done through some confusion of thought or temporary inadvertence—perhaps in the hurry of business—and certainly not intended to lead to any fraud whatever. Still if a fraud upon a third party dealing *bona fide*, without any notice whatever of the facts, was committed by reason of the signature of the firm of Forbes and Co. to a bill of lading, which they ought not to have signed, and which they sent forward to a person to whom they ought not to have sent it forward in the ordinary course of business, and who was so enabled to deceive somebody else. It would take a long time to convince me that the principles of this court would not, in the circumstances of the case, oblige me to hold them bound. But then in order to establish such an equity the case must really be a case of that nature upon the facts; and here I must observe that I find no such case in the present bill. The plaintiffs do not allege that they are the holders for valuable con-

sideration without notice of the transactions with other people, or of the real state of the facts, and that they have been misled into believing that this was what I may call a clear bill of lading with which Kemp was entitled, as against all the world to deal, by the signature of Forbes and Co., which they found upon it. That case, if it is to be made at all, must be collected only by inferences from facts which appear in the bill, and here I must say that I cannot agree with Mr. Fry that it is a technical thing to examine how the bill states the substance of the plaintiff's case. Here the bill was twice amended, and the whole case of the defendants was open and known before these amendments, or at least the last of them, was made. I must take it that the party knows very well what case he makes in substance; why he makes it; what case he omits to make in substance; and why he omits to make it. And to the last these plaintiffs have chosen to adhere to their original position; that they have legal priority; and that there was some sort of concert between the defendants to deprive them of that priority. The equitable case of an equitable estoppel as against the prior legal owner, or the original vendor taking part in it, is not really at all to be found in this bill. That perhaps might be enough to dispose of the case, but it is always more satisfactory when one is enabled to say that one finds in the state of the evidence a good and consistent explanation of the reason why a case not distinctly pleaded in the bill is not there. I conclude from the evidence that the agents of the bank, the plaintiffs in this case, could not truly and honestly have said that they had not knowledge of the real facts, whatever they were. What is this particular transaction, and how do the bankers bring it forward? They had an account with this miller, Kemp. It is said he was in very good credit, though he failed not very long afterwards; and I assume that as far as the external world was concerned his credit at that time had not been impeached. It is quite plain that he had considerably exceeded the margin of overdraft allowed to him by the bank in his account; but the manager of the bank at Exeter, Mr. Marshall, was so anxious as to the state of that account, that he pressed him to have it reduced, and it was then considered of so much importance—Mr. Marshall and Mr. Kemp knowing probably much better than anybody else where the shoe pinched—to deal with this matter, that the whole of Sunday the 11th of Oct. was devoted apparently to this business as between the bank manager and Mr. Kemp. The bank manager opens his letters on a Sunday morning, and finds various pressing liabilities on Kemp coming forward which should be provided for. He goes to Kemp at his house and talks it over, and I have not the smallest doubt that Kemp showed him that letter of advice which says (whether it was delivered over or not), "We have drawn on you our draft, No. 294, in favour of the Bank of British Columbia in accordance with your instructions through Messrs. Knight and Co." The bank manager no doubt asked him what he had got, and I assume that Kemp, not intending fraud, told him, "I have received this letter of advice. It covers this bill of lading and this invoice, and that is what I will give you." Well; but I shall assume more. I shall assume that Marshall, as a man of business,

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and an honest man, went on to inquire, "What are the instructions? Have you accepted these bills of exchange? Is this bill of lading conditional on the acceptance?" And I shall assume that he is told the whole truth—namely, that Kemp had not accepted the bill of exchange; that the bill of exchange had not come forward because it was not until the next day that it did, and that Marshall knew perfectly well that on the day when he took that bill of lading Kemp had no right to negotiate or deal with it. Marshall does not say one word inconsistent with that, because both Marshall and Gilbert in their affidavits, deny notice, which had only been denied in the bill argumentatively and, so as to mix up assumptions of law with questions of fact in a manner inexplicable, and making it wholly impossible to assign perjury upon an indictment if they knew the facts, but misapprehended the law. But it does not rest there, because Marshall admits that he knew there were six parts of the bill of lading, and that that was an unusual thing. It had been stated expressly and sworn to in the answer of Forbes and Co., which they had made evidence long before, that that number of parts of bills of lading is only drawn when it is intended to "document" the bills of exchange with the bills of lading. The bills of exchange being drawn in several parts it is necessary to have so many parts of the bill of lading that each part of the bill of exchange may be documented with the corresponding part of the bill of lading. That is said to be known mercantile usage in the evidence of the defendants, and not a word of evidence is there to the contrary. The fact was also alleged in the concise statement upon which these gentlemen were examined, and although I do not see that there was an interrogatory upon that point of mercantile usage expressly, yet, of course, they had their attention called to it, and they had an opportunity of saying that it was not a mercantile usage, or that they did not know that it was. But the matter does not rest there. I am not at all inclined to use hard words where they are not necessary; to speak especially as against gentlemen in the position of the agents of this bank of "conspiracy, perjury, and spoliation;" words a little stronger even than used by Mr. Benjamin in his argument. I do not enter into those points at all, but I am bound to give Forbes and Co. the benefit of every reasonable presumption, consistent with the other evidence in the cause, as to the contents of documents which have been and ought now to be in the possession of the plaintiffs, and which it was the plaintiff's duty to preserve and to produce. On the Sunday when this transaction took place, and when I assume that Kemp told Marshall everything which it was his duty to tell him, Marshall writes to the manager, Mr. Gilbert, at Bristol, to know whether he may make the advance desired; and I assume that in the letter which he then wrote he also did his duty, and told everything which he ought to have, and had ascertained by inquiry from Kemp; and Mr. Gilbert receiving this letter, writes back from Bristol to Exeter to Marshall, expressing his opinion of the transaction, and authorising the advance. Those two letters passed between Bristol and Exeter within three months of this dispute, and of this bill being filed; but neither of them is produced, and no account of a satisfactory kind given of their kind. I assume that the proper inquiries were made, that they were truly an-

swered, and that the whole of the facts as they really stood at the time were within the knowledge of the plaintiffs when they made this advance. That being so, it is quite plain that they could not have been and were not deceived by reason of the inadvertent endorsement of the bill of lading on the part of Forbes and Co., and that the Master of the Rolls has come to a perfectly just and right conclusion in dismissing the bill with costs.

Solicitors: Clark, Woodcock, and Co.; Freshfields; Book, Kenrick, and Harston.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING and H. F. POOLEY, Esqrs.,
Barristers-at-Law.

Saturday, Nov. 23, 1872.

TAPSCOTT AND OTHERS v. BALFOUR AND OTHERS.

Charter-party—"Load in the usual and customary manner"—*Demurrage*—*Commencement of lay days*.

By a *charter-party* a vessel was to proceed direct to any Liverpool or Birkenhead dock as ordered by the charterers, and there load in the usual and customary manner a full and complete cargo of coal. The vessel was ready to enter the dock named by the charterers some days before her actual admission into that dock, and a particular coal agent was selected by them to load her. Owing, however, to his having other vessels waiting to load, a considerable delay took place before, in accordance with the dock regulations, her turn came for admission into the dock, and after she had entered the dock there was a further delay before she could get under the tips.

Held, that, there being no evidence that the charterers had acted unreasonably in selecting the particular coal agent, the charterer was not liable for demurrage before the ship entered the dock, as this was caused by the dock regulations, over which he had no control, and that the lay days commenced at the time of the arrival of the vessel in the dock, and not at the time of her arrival at the particular berth or tip where she was to load.

THIS was an action for demurrage brought in the Court of Passage, Liverpool. By a charter-party dated the 11th June 1872 the plaintiffs, Messrs. Tapscott and Co., as shipowners, agreed with the defendants, Messrs. Balfour, Williamson and Co., as charterers, that their ship, the *Emerald Isle*, "should with all possible dispatch proceed direct to any Liverpool or Birkenhead dock as ordered by the charterers, and there load in the usual and customary manner a full and complete cargo of coal. The vessel to load at the rate of 100 tons per working day, and the loading not to commence until the 1st July. Demurrage to be at the rate of 4d. per ton register per diem." The defendants accordingly named the Wellington dock; and on the 3rd July the plaintiffs gave notice that the *Emerald Isle* was ready for loading. At this time she was lying in the Sandon dock, not being able to enter the Wellington dock for the reason that Messrs. Brancker, who had been selected by the defendants as the coal-agents who were to load the vessel, had already three vessels loading at the tips or spouts in the Wellington dock, and two more waiting outside, and by the dock regulations the *Emerald Isle* had to wait until her turn came for admission.

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The following are extracts from the dock regulations:

2. No vessel to be allowed to enter the Bramley Moore or Wellington docks to load coals from the High Level Railway, except upon the production of a jerque note or a certificate from the master of the dock in which the vessel is lying at the time, showing that she is ready to commence loading, and also a certificate from the coal agent that she is to load coal at the High Level. No coal agent to be allowed to load more than two flats at the cranes at the same time, nor to have more than three vessels in the Bramley Moore or Wellington docks (both inclusive) loading, and to load coal at the crane at one time. No flat to be admitted until a certificate is produced from the coal agent that she is to load coal at the High Level.

4. No vessel to be entered in the application or berthing book before she is either in the Bramley Moore dock or the Wellington dock; each vessel to be berthed in regular turn as entered, if the specified quantity of coal is at the Sandhills station, if not the next vessel on turn having sufficient coal ready to take the berth; any vessel losing her turn in consequence of coal for her not being at the Sandhills station to be considered first on turn when the coal is ready. Flats and vessels to follow the same order as to turn for loading, whether entered for the cranes or the shoot.

5. When a crane is idle from want of coal, and a vessel not in dock has the whole of her cargo of coal ready at Sandhills (as proved by a certificate from the coal agent and the agent for the vessel) such vessel may at the discretion of the dock master be admitted into dock out of the regular turn, as shown in the application book.

On the 9th July the *Emerald Isle* took on board 100 tons of coal at the Sandon dock, and on the 11th July she went into the Wellington dock. No further coal was loaded until the 18th or 19th July, when a small quantity was taken on board. Between the 29th July and the 2nd Aug. a considerable quantity was loaded at Messrs. Branker's tips; and on the 6th Aug. in order to avoid being "neaped," the *Emerald Isle* went out into the river, where the loading was completed by lighterage on the 15th Aug. The plaintiffs at the trial contended that the lay days commenced on the 3rd July when the ship was ready to go into the dock named. A verdict was entered for the defendants, leave being reserved by the learned assessor to the plaintiffs to move to enter the verdict for the plaintiffs on the ground that there was evidence of the defendants' liability. The court to have power to draw inferences of fact.

A rule having been obtained accordingly,

Holker, Q.C. and Gully showed cause.—The words "load in the usual and customary manner" showed that the shipowners contemplated the probability of their having to wait their turn, according to the ordinary rules and regulations of the docks. The lay days, therefore, did not commence until the vessel was actually under the tips. It is the same as if the custom had been incorporated in the charter-party. The stipulation is similar to "in regular turn."

Robertson v. Jackson, 2 C. B., N. S., 412.

Herschell, Q.C. and Myburgh, for the plaintiffs.—We submit that the lay days commenced on the 3rd July, that being the day when the plaintiffs were ready to go into the Wellington dock, and when they would have entered it but for the selection by the defendants of the particular coal agent. It is more reasonable that the delay caused by the selection of a particular coal agent, who may have say twenty vessels waiting for their turn to enter the dock, should fall on the charterer, than on the shipowner who has not the selection.

Lawson v. Burness, 1 H. & C. 396.

At all events the lay days commenced on the 11th

July, when the vessel got into the Wellington dock.

Brown v. Jackson, 10 M. & W. 331.

Then it is argued that if we had remained in the dock we should have completed the loading by the 8th August. The answer is that we went out of dock and completed our loading at Birkenhead by lighterage for the benefit of both parties. If we had not gone out we might have been detained till the next spring tides.

BOVILL, C.J.—The question in the present case really turns upon the construction of the charter-party. Its material clauses were to the effect that the vessel should with all possible dispatch proceed direct to any Liverpool or Birkenhead dock as ordered by the charterers, and there load in the usual and customary manner a full and complete cargo of coal. The vessel was to load at the rate of 100 tons per working day, and the loading was not to commence until the 1st July. Demurrage was to be at the rate of 4d. per ton register per diem. The question then arises when were the working days to commence. The charter-party contains no stipulation as to when the lay days are to commence; and therefore, according to the ordinary rule, we should endeavour to ascertain the meaning of the charter-party as to the place to which the vessel is to proceed. Here no place is distinctly named. Where the port is mentioned, the rule is that the lay days commence at the time of the vessel arriving at the usual place of loading, by which is meant, not the actual berth but the dock or roadstead. The shipowner has done all that is required when the vessel is at the port, and at the usual place of loading in the port. Here the agreement is that the vessel shall proceed direct to any Liverpool or Birkenhead dock as ordered by the charterers. The charterers had the selection of the dock, and they accordingly selected the Wellington docks. After notice to the shipowners of this selection, I think it was exactly the same as if the stipulation had been that the vessel should proceed direct to the Wellington dock. Great stress has been laid on the words "load in the usual and customary manner." But these are ordinary words occurring in every charter-party, and apply, I think, to the mode of loading, and not to the place of loading. In *Lawson v. Burness* (1 H. & C. 400) Pollock, C.B. said: "It appears to me that the word 'customary manner' means the mode of loading, whether by a lighter or at the wharf, and whatever was the customary manner was to be pursued on this occasion." We should be giving a very extended construction to them if we were to say that these words imposed a greater liability on the shipowner. The cases relied on by the defendants are distinguishable from the present, because in each of them there was a clear and express stipulation in the charter-party beyond the words "ordinary and customary manner." In *Robertson v. Jackson* (2 C. B. 412) the stipulation was that the lay days "should reckon from the time of the vessel being ready to unload and in turn to deliver," and the whole stress of the argument was on those express words. So in *Leidemann v. Schuts* (23 L. J. 17, C. P.) the express words were "taking on board coal and coke in regular turns of loading;" and in *Lawson v. Burness* "to be loaded in regular turn," so that in these cases, where responsibility was eventually cast on the shipowner, it depended on the express terms of the

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charter-party. In the present charter-party there are no such words. If the stipulation had been that the ship should proceed to the Wellington Dock, at Liverpool, and there load, then the difficulty arising from the state of things at the dock would affect the charterer and not the shipowner. In this view of the case, therefore, the lay days would not commence till the vessel was in the Wellington Dock. The right of selection was in the charterers, and they having selected the Wellington Dock, if the regulations of the dock did not allow the vessel to have access to the dock at once, that was no fault of the charterer, and he is not to be made responsible for it. On this point this case is not very dissimilar to *Kell v. Anderson* [(10 M. & W. 498)]. Then it is further contended that whatever was the right of selection of the dock, the charterers had no right to select the particular agent. But who is to determine what agent is to be employed? The usual course is to employ a coal agent, and the charterer did what was usual. In *Leidenmann v. Schultz*, a question much the same as the present was raised as to whether the vessel might not have loaded earlier, had she been allowed to go to another spot, and *Jervis, C.J.* said, "Yes, but with different coals, and at a higher price. If the captain may choose at what spot he will load, he may next choose what articles he will load with. It was not left to the jury to say whether the charterer had sent the ship improperly to an enumbered spot." So here, if the plaintiffs wished to contend that the agent was improperly chosen, that should have been left to the jury. There was no evidence that the agent was unreasonably selected, and, therefore, the claim for demurrage from the 3rd to the 11th July cannot be sustained. There is no subordinate question whether the defendants are responsible for the time which elapsed between the vessel's leaving the Wellington Dock for Birkenhead, and completing her loading at the latter place. If the shipowner took this course for his own convenience he could not make any claim for it. But, drawing inferences, I think it was done for the convenience of both parties, in order to prevent a more serious loss, and, therefore, the shipowners are entitled to demurrage for the whole period. The rule must be absolute to enter a verdict for the plaintiffs for 339l. 4s., the amount due for twelve days' demurrage, the lay days being calculated to commence on the 11th July.

DENMAN, J.—I am of the same opinion. This case turns on the proper construction of the words of the charter-party, and I think that on the 11th July the plaintiffs, according to that construction, had done all that lay on them and in them to do. I was at first disposed to think that the words "usual and customary manner" had a larger construction than I think, after argument, they can bear. It was argued that they gave a different interpretation to that part of the contract by importing that the loading could only be done at a particular spot, and that no liability could attach to the defendants until the vessel arrived at the particular spot. But there is evidence that the loading might have been done in another way, and it was not found unusual to do it in another way. I think it within the terms of the charter-party that the loading should be effected by lighterage: and, if so, the words are not so specific that they need be construed to mean that no liability should attach to the defendants until the vessel got to a

particular spot. The verdict must be for the plaintiffs for twelve days' demurrage.

Rule absolute.

Attorney for plaintiff, Wynne, for Forsham and Hawkins, Liverpool.

Attorneys for defendants, Chester, Urquhart, Bushby, and Mayhew, for Norris and Sons, Liverpool.

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs.,
Barristers-at-Law.

Feb. 4, 6, 7, and 8, 1872.

MORRISON v. THE UNIVERSAL MARINE INSURANCE COMPANY (LIMITED).

Marine insurance—Initiating of "slip"—Concealment of material fact—Subsequent execution of policy by underwriters with knowledge of concealment—Election—Lloyd's List—Underwriters' knowledge of—Misdirection.

The plaintiff, the owner of the ship *C.*, effected, on the 12th Oct., through P., his broker, an assurance upon the chartered freight of the ship, with underwriters, the defendants, who thereupon initiated the slip, and debited the plaintiff's broker with the premium, the defendants being at the time in ignorance of the fact, known to the plaintiff and to P., that a telegram had arrived from which it appeared probable that the *C.* was lost. On the 13th Oct. the defendants became aware of the telegram, and mentioned it to P., the broker, but raised no objection to the insurance on account of it; and on the following day (the 14th) a stamped policy, in accordance with the terms of the slip, was drawn out by the defendants, without protest of qualification of any sort. On the 19th Oct. news arrived confirming the total loss of the *C.*, and the defendants thereupon repudiated their liability, upon the ground of the concealment from them of the above-mentioned telegram; and the plaintiff at once brought this action against them upon the policy.

It was admitted that the plaintiff's broker, P., acted honestly and in good faith, and refrained from communicating the fact of the telegram, because of his conviction, after inquiry, that the *C.* was not the ship referred to. It was conceded also, that in effecting marine insurance, until the slip is initiated, the matter is considered merely in negotiation, and that when it is initiated, the matter is considered concluded; and it was proved to be the custom of underwriters to issue a stamped policy in accordance with the slip, no matter what may happen after the slip is initiated.

Blackburn, J. directed the jury that, when the underwriters became aware of the concealment, they were bound, within a reasonable time after its coming to their knowledge, to elect whether they would adopt and go on with the contract, or repudiate it on that ground, and the question was left to the jury, without the expression of any opinion on the part of the judge, whether the defendants had after knowledge of the concealment elected to treat this policy as a subsisting one, to which the jury replied in the negative. The verdict was entered for the defendants.

Hold (Cleary, B., dissenting), by Martin and Bramwell, B.B., making absolute a rule for a new trial, that this was a misdirection.

Per Martin, B.—The proper direction would be, that if what the underwriters did, or did not do, would naturally lead the broker to suppose that the policy was delivered to him as a binding contract, then it was a binding contract, and the defendants were stopped from denying it.

Per Bramwell, B.—The proper direction would be that the act of the defendants in delivering out the policy without protest, after the concealed fact had come to their knowledge, was conduct which, unexplained, showed that they were treating the contract as subsisting, and was *prima facie* evidence of an election on their part not to avoid it, and that it was for them to show, by some accompanying circumstances, that the broker had no right so to understand their conduct in the matter.

Per Martin and Bramwell, BB.—There is no rule or presumption of law, either in principle or upon authority, that underwriters are acquainted with the contents of Lloyd's List so as to relieve a person proposing to insure from the duty of communicating to them a material fact known to him before the completion of the insurance, and published in Lloyd's Lists.

Sed contra, per Cleasby, B.—There was no misdirection. The effect of giving out the policy ought not to be regarded of itself as in the nature of an election at all. The only contract is made by the ship, and no fresh one is made by the policy, which, whenever it is given out, whether an hour, a day, or two days after the ship, must be taken as made, *uno flatu*, at the time the contract is entered into, and is nothing more than the formal conclusion and completion of the contract. The doctrine of election, therefore, does not apply.

Xenos v. Wickman, in the House of Lords (16 L. T. Rep. N. S. 800; L. Rep. 2 Eng. & Ir. App. 296; 2 Mar. Law Cas. O. S. 527), and *Oory v. Patton* (26 L. T. Rep. N. S. 161; L. Rep. 7 Q. B. 304; ante, p. 225) discussed and acted upon.

This was an action by a shipowner against underwriters upon a policy of marine insurance upon chartered freights.

The declaration was in the usual form, setting forth the policy effected by the plaintiff through his brokers, Messrs. Previt & Greig, with the defendant company on the 12th Oct. 1870, upon chartered freight of the plaintiff's ship *Cambria*, at a premium of 8 guineas per cent., and averring the total loss of the said ship and freight insured as aforesaid; and assigning as breach the nonpayment by the defendants of the sum insured or any part thereof.

The defendants pleaded—first, that they were induced to subscribe the said policy by the fraud of the plaintiff; secondly, that at the time the defendants became such insurers to the plaintiff, and subscribed and executed the said policy, the plaintiff and his agents misrepresented to the defendants, a fact then material to be known to the defendants, and material to the risk of the said policy; thirdly, that at the time of the defendants subscribing and executing the said policy, and becoming such insurers to the plaintiff, the plaintiff wrongfully concealed from the defendants certain facts then known to the plaintiff and unknown to the defendants, and material to the risk of the policy.

The particulars of the fraud and concealment relied on by the defendants under the above pleas were that the ship had met with a disaster on the coast of America, and that the plaintiff and his agent had received news relating to the accident,

and that the plaintiff and his agents represented that the *Cambria* was not the ship to which the accident had happened, and concealed from the defendants the news they had received relating, or supposed to relate, to the said accident.

At the trial at the winter assizes, 1871, at Liverpool, before Blackburn, J., and a special jury, the following were the facts proved:

The plaintiff was a merchant trading at Liverpool under the firm of Charles Morrison and Co., and the defendants were an assurance company, carrying on business in London. The plaintiff was the sole owner of the ship *Cambria*, which sailed from Bahia on the 18th Aug. 1870, for New Orleans, with the intention of stopping, in pursuance of directions, at the South West Pass, for orders. On 9th Sept. 1870, the plaintiff entered into a charter-party with McMahon and Co., of Galveston, by which the ship *Cambria*, John Owen master, and described as then on a voyage to the South West Pass, was to proceed to the South West Pass for charterers' orders, and thence to Galveston, in Texas, or to New Orleans, or Mobile, and there take a full cargo of cotton for Liverpool. The South West Pass is one of the passes into the Mississippi river, and is some distance below New Orleans, and is an usual place of call for orders by vessels going to load cotton at any of the ports in the Gulf of Mexico. Galveston in Texas and Mobile are, as well as New Orleans, ports in the Gulf of Mexico, from which cotton is exported.

On 3rd Oct. 1870, the *Cambria* arrived at the South West Pass aforesaid, where the master received orders from the charterers to proceed to Galveston for a cargo of cotton, and on the next day he sailed for that port, and on the 6th Oct. the vessel arrived off the harbour of Galveston, and got ashore on the North Breaker, off the entrance of the harbour, and there was totally lost. On the same day, to wit, 6th Oct. 1870, the master went ashore, and dispatched a telegram to the plaintiff as follows: "To C. Morrison and Co., Liverpool.—Ship *Cambria* ashore near here, full of water, lost."

On 6th Oct., E. P. Hunt, the agent at Galveston of Lloyd's Liverpool and London underwriters' Association, despatched a telegram from Galveston to the agent for Lloyd's at New York, in the following words: "Ship *Cambria*, Owen master, of Jersey, from Bahia, South America, ballast, ashore North Breaker, probably lost."

On 7th Oct. 1870, the above telegram from Owen to the plaintiff was received in London, at 3.40 p.m. A telegram was also received at an earlier hour on the same day, addressed to Lloyd's, London, from the agent for Lloyd's at New York, in consequence of which an announcement was made in Lloyd's List, that the *Cambria* (probably *Cameo*) from New Orleans, was grounded on North Breaker.

As soon as the aforesaid telegram addressed to the plaintiff was received in London, it was handed over to the post office for transmission to the plaintiff at Liverpool, where it was received at 5.30 p.m. The plaintiff denied having received this telegram, and the issue, tendered by the defendants on this point, was decided by the jury in favour of the plaintiff. The telegram from Lloyd's agent at New York was received by Lloyd's in London, in time for transmission and receipt of the news at Liverpool at 33 minutes past noon on the 7th Oct., and was entered on the loss-book at

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the rooms of the Underwriters' Association at Liverpool, at 39 minutes past noon on the same day. The telegram as received at Liverpool was as follows: "Cambria, query Callao, from New Orleans, aground North Breaker." The plaintiff was not a member of, or a subscriber to, the Underwriters' rooms, to which only subscribers or members were admitted.

After making the above entry in the loss book, the secretary to the Liverpool Lloyd's Association searched Lloyd's List, and about one hour after making the entry be added at the foot of it, in the loss book aforesaid, the following words in parenthesis: ("memorandum, *Cambria*, Owen, 1177 tons, left Bahia 18th Aug. for New Orleans.") The said secretary was not able to find anything about a ship named *Callao*, telegraphed to the London Lloyd's on the same 7th Oct. to inquire into the meaning of the words "qy. *Callao*," and received an answer the same day at 5.50 p.m., after the rooms were closed, in the following words, "Cameo, from New Orleans, is supposed to be the name of the ship aground on the North Breaker." On the evening of the 7th Oct., at the hour for closing the room to subscribers, the secretary, according to his custom, sent for publication to the *Liverpool Mercury*, a daily journal published in Liverpool, a copy of the despatch first received from Lloyd's, but added the word "qy." after the words "New Orleans," so that in the *Mercury* of Saturday, 8th Oct. the publication among the shipping news was in these words "*Cambria* (qy.), *Callao* from New Orleans (qy.), aground North Breaker." After the above telegram had been sent to the *Mercury* for publication, the secretary having received the telegram from London Lloyd's in answer above mentioned, searched Lloyd's List, in order to ascertain something about the ship *Cameo*, and then made the following entry in the loss-book:

"The vessel on the North Breaker, reported yesterday as the *Cambria* is stated to be the *Cameo*, from New Orleans. Memorandum—The ship *Cameo* from Antwerp, arrived at New Orleans on the 26th Sept." and this entry was also sent to the *Mercury* on the morning of Saturday, the 8th, and was published in the paper on Monday, 10th Oct.

The secretary stated in his evidence, on cross-examination, that he added the above memorandum, relative to the ship *Cameo* from Antwerp, as being, in his opinion, tantamount to a statement that the ship on the North Breaker could not be the *Cameo*, because "the *Cameo*, having arrived on the 26th Sept., could not have got her cargo discharged and loaded, and came out again to be lost on the 6th." He did not however communicate with Lloyd's, in London, that he had come to this conclusion.

On Saturday, 8th Oct. the plaintiff, who up to that time had no insurance on the *Cambria* or her freight, wrote from Liverpool orders to Previt6 and Greig, London insurance brokers, to effect insurance for 5000*l.* on the ship, and 5000*l.* on chartered freight. The plaintiff bought a copy of the *Liverpool Mercury* of 8th Oct. but he swore that he did not see the entry above mentioned until his attention was called to it at his own house, late in that afternoon, after the letter of the 8th had been posted. The 8th Oct. was a Saturday. The plaintiff also bought a copy of the *Liverpool Mercury* of 10th Oct., on his way to his office, where he went earlier than usual in consequence

of the announcement in the *Mercury* of the 8th. Immediately on his arrival at his office, on the 10th Oct., the plaintiff telegraphed to his brokers, Previt6 and Greig, as follows: "Since writing Saturday, paragraph in *Mercury*, *Cambria*, query *Callao*, from New Orleans, grounded on North Breaker. To-day's *Mercury* says, The vessel on North Breaker reported yesterday as the *Cambria* is stated to be the *Cameo* from New Orleans. Can you find out at Lloyd's and let me know by wire before acting;" and later on the same day he also wrote to them a letter stating that he did not think it could be the *Cambria*, as the master "would certainly have telegraphed," and he had received none, but that, if the *Cambria* were not lost, he should wish her to be insured. No information was given to the underwriters of the memorandum published in the *Mercury* of 10th Oct. at the end of the telegram as above stated. The letter of the plaintiff of 8th Oct., and the telegram of the plaintiff of the 10th Oct., were received together, on Monday, 10th Oct., by the brokers when they reached their office in the city on that morning, and Previt6, a member of the firm, went to Lloyd's for the purpose of searching the books, and endeavouring to ascertain whether the vessel reported to be lost was the *Cambria* or the *Cameo*.

At the London Lloyd's there are in an inner room, known as the reading room, to which brokers and underwriters have free access, index-books, which are very heavy volumes, containing an index to the entries in Lloyd's List. In these index-books, the said Previt6 discovered an entry relating to the *Cambria*, and this entry referred him to Lloyd's List of Saturday, 8th Oct., where he looked and found the announcement of the *Cambria* (probably *Cameo*), from New Orleans, grounded on North Breaker, published as having been received from New York as above-mentioned. Lloyd's List, to which the broker was referred by the said index-books, is a daily shipping gazette, containing several hundreds of entries, giving shipping news from all parts of the world, and these gazettes are received every morning by underwriters, and were actually received by the defendants. The entries in Lloyd's List are indexed by clerks at Lloyd's into the index-book above described. The said broker also searched at Lloyd's for information about the ship *Cameo*, and found that there was news of her arrival at New Orleans on the 26th Sept., and not finding any news of the arrival of the *Cambria* at New Orleans, or at the South West Pass, as was to be expected if she had arrived there, he concluded that the vessel reported to be ashore on the breakers must be the *Cameo* and not the *Cambria*. Upon cross-examination by the defendants' counsel, he admitted that, when coming to that conclusion, it did not occur to him to think how a ship that had arrived at New Orleans on the 26th Sept. could have loaded there and been lost on the North Breaker on the 6th Oct.

The said broker, however, having come, in good faith to a conclusion, as above stated, that the vessel reported ashore on the North Breaker could not be the *Cambria*, applied on behalf of the plaintiff to various underwriters on the 10th, 11th, and 12th Oct. for insurance as directed by the plaintiff in his letter of the 8th Oct. He stated to them when, and from where the vessel

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sailed, and what was the voyage, but, beyond this he gave no information to the underwriters, and made no communication to any of them of the telegrams relative to a ship ashore on the North Breaker, or of his searches and the inference which he had drawn in his own mind that the vessel reported ashore was not the *Cambria*. He admitted, on cross-examination by the defendants' counsel, that he did not intend to insure the *Cambria*, if it should turn out that she was the vessel that was on the North Breaker, and that he refrained from communicating anything on that subject to the underwriters, because of his conviction that the vessel ashore was the *Cameo* and not the *Cambria*. It was not suggested, by either party, that the broker was acting otherwise than in good faith, and it was conceded that, in making the insurance hereinafter mentioned, he had no dishonest intention.

On the 10th Oct., after making the examination above described, the said broker applied for insurance, by making out a slip in the ordinary form used by insurance brokers, and he effected, on that day, with underwriters other than the defendants' insurance on the freight for 1350*l.* at a premium of 6*l.* 6*s.* per cent.; and on the same day he exhibited to the defendants' underwriter, Mr. J. L. Fisk, the slip, initiated at a premium of 6*l.* 6*s.* per cent., and proposed that the defendants' company should take a line on the freight at the same rate. Fisk, after hearing from the said broker that insurance on the vessel was also desired, declined to insure the ship at all, but offered to take a line on the freight at 8 guineas premium. On Tuesday, 11th Oct. the said broker effected further insurance, on behalf of the plaintiff, on the freight of the *Cambria*, at 8 guineas per cent., and on Wednesday, 12th Oct., plaintiff proposed to the defendants' assistant underwriter, H. T. Pritchett (Fisk being then away for a short holiday), to take a line on the freight at 8 guineas per cent., stating that Fisk had given him a quotation at that rate; and Pritchett, without asking for or receiving any information from the broker, beyond the date of the sailing of the vessel, and the facts stated in the slip, initiated the slip, on behalf of the defendants, for a line of 500*l.* on the chartered freight. The same day, and soon after having initiated the slip, the said Pritchett had occasion to visit Lloyd's rooms, and there saw, on entering the room, the loss-book, lying open on the stand on which it is always kept open for the information of all visitors to the rooms. In it there had been entered that morning, for the first time, the announcement from the agent at New York, above mentioned, that is to say, "The *Cambria*, probably *Cameo*, from New Orleans, had grounded on North Breaker." This entry should, in ordinary course, have been made in the loss-book on the same day as it appeared in Lloyd's List, namely, on the 8th Oct., but owing to some negligence at Lloyd's, it had been omitted. Immediately on seeing this entry in the loss-book, Pritchett saw the broker Prévité in the room, and drew his attention to the loss-book, saying, "This looks uncommonly like the *Cambria* which I have just written for you." To which, according to Pritchett's evidence, Prévité replied, "I know all about this; this is the *Cameo*," or words to that effect. Prévité, however, said his reply was, "I have known about that some for some days. I don't think anything of it." Pritchett then went with

Prévité, and was shown by him the entries which he (Prévité) had previously examined.

It was conceded that, in effecting marine insurances, until the slip is initiated, the matter is considered as merely in negotiation. When initiated, the contract is considered concluded. It was proved to be the usage of underwriters to issue a stamped policy in accordance with the slip, no matter what might happen after the slip was initiated.

On 13th Oct. Fisk returned to London, and was immediately informed by Pritchett of all that had taken place between himself and Prévité. Fisk stated that he was the person whose duty it would be to determine, on ascertaining that there had been a concealment, whether the defendants would carry out the insurance.

The course of business as to issuing policies in the defendants' office is as follows:—The business of the office is conducted in two departments, one of which is the underwriting department, and the other that of the Secretary and Adjuster of claims. After slips are initiated in the underwriter's department, they are passed into the secretary's department, and thenceforward the underwriter's department has nothing further to do with them. All the slips taken are forthwith given to the policy-writers, and the head of the policy-writers obtains the necessary stamps, and the policies are then filled up on the proper stamped forms. This work usually occupies about two days; that is to say, on the day but one after the slips are initiated, the policies are signed by the directors, and are then placed in pigeon holes, under the letters of the alphabet, in the outer office for delivery. The policies are always dated as of the day of the date of the slip, no matter what delay may occur in filling up the policies.

In this case a policy was filled up according to the terms of the initiated slip. It was dated on the 12th Oct. 1870, but was not executed by the directors until the 14th or 15th, and, having been deposited in the pigeon holes, was taken away by a clerk of Prévité, the broker, on the 14th or 15th of that month. On the 19th Oct. 1870, a telegram was received and posted on the loss-book at Lloyd's, showing, unquestionably, that the vessel lost on the North Breaker was the *Cambria*. The defendants made no objection nor protest, in respect of the insurance effected with them as aforesaid, between the date of initiating the slip and the 20th Oct., when notice was given by them to the plaintiff that they declined to be bound by the policy. No premium for insurance had been received by the defendants, prior to the 20th Oct.; the premium, though debited at once to the broker, would only become payable on the 8th Nov. It was tendered by the broker, on behalf of the plaintiff, to the defendants in due time after the 20th Oct., but the defendants refused to receive it.

At the trial, various defences were set up, a principal contention being that the plaintiff had received a telegram from his captain, announcing the loss before directing his brokers to insure on the 8th Oct.

The learned judge directed the jury in his summing up as follows: "When he hears that there has been concealment, the underwriter is not bound to say, 'I will put an end to the policy,' but he has a right at his election to say, 'You have been guilty of a concealment which would

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entitle me to determine the policy, but I prefer to go on with it; he has what lawyers call the right of election, but he cannot say, 'I elect to go on,' and then when he hears that there is a loss say, 'Now I hear there is a loss I will not recognise the policy.' . . . Then comes the third and last question which I pointed out to you before. I told you that when a man discovers that there has been misrepresentation of that sort, he cannot keep the contract and get rid of it too. He has a right to say, 'Take back your premium and make the contract a nullity.' He has also a right to say, 'You have done what has entitled me to get rid of the contract, but I will keep the premium and go on.' He has a perfect right to do either of those things, and when he has got notice of the concealment he is bound to make his election within a reasonable time; he is not bound to do it with desperately hot speed. A man cannot wait to take his chance, he must elect within a reasonable time."

The learned judge then reviewed the evidence, and proceeded: "Now Mr. Fisk is the man who determines on these returns of premiums. He knows on the 13th Oct. of all this, as far as this non-disclosure goes. He was aware of the fact, and that he might have returned the premium; and returning the premium would say he was not liable. No doubt if he had offered to return the premium Mr. Previté's answer would be, 'I will not take it,' but still Mr. Fisk had no right to continue to hold the premium; he could not play fast and loose; he must either adopt it or refuse it. A great deal has been said about the slip and the stamped policy. I think as regards this part of the case it makes no difference whatever. I believe (you know better than I do) it has been correctly stated that the putting it on the slip is considered in fair dealing and mercantile understanding, as being the contract, as if it were made on that day. This would equally apply if the contract had actually issued as a stamped policy. . . . The defendants knew the fact, and did not do anything or take any step, until news of the loss came. Then the third question of this defence comes to be, do you think that they, having this opportunity (taking into account that they should make an election within a reasonable time) had elected to go on with the contract? If so, that puts an end to the defence. On this I express no opinion at all. I leave this entirely to you."

Four questions were left to the jury by the learned judge, which were answered by them as follows:—First, whether the plaintiff had received the telegram addressed to himself from Galveston by the master, John Owen, and to this the jury answered, No; secondly, whether it was material to the underwriters in calculating the premiums or determining whether to take the risk, to know of the telegram which arrived, and was in Lloyd's List and the *Mercury*, and to this the jury answered, Yes; thirdly, whether the broker had a right to suppose that the underwriters were acquainted with the contents of Lloyd's List, and to this the jury answered, No; fourthly, did the defendant company, after knowledge that the broker had not disclosed this fact, elect to treat the policy as subsisting, and to this the jury answered, No. The learned judge thereupon directed the verdict to be entered for the defendants upon all the pleas except that of fraud.

A rule nisi was subsequently obtained by *Holker, Q.C.*, on behalf of the plaintiff for a new trial on the ground of misdirection, in that the learned judge ought to have told the jury that the defendants were to be presumed to know the contents of Lloyd's List, and the plaintiff was not bound to communicate information contained in them; and also that, on the facts proved with reference to the execution of the policy without protest, after knowledge of the alleged concealment, the learned judge ought to have directed the jury to find for the plaintiff; and that on the question of election, the verdict was against the weight of evidence; and against this rule.

Feb. 4, 6, and 7.—*Butt, Q.C., J. R. Mellor*, and *Benjamin*, for the defendants, showed cause, and contended in substance, that the intialling of the slip was, in fact, the contract, and that the policy when executed, had reference to the date of the slip, and that the policy ought to be considered as having been executed at that time, and that it was avoided by any concealment prior to that date. The memorandum in the *Liverpool Mercury* was a material fact within the knowledge of the plaintiff, which he ought to have communicated to his broker, and that the broker himself concealed facts within his knowledge from the underwriters. They urged also that the underwriters merely issued the stamped policy as a formal act, because they were bound in honour to place the assured in a position to bring an action, in which the question of liability or non-liability might be determined, and also that the underwriters were not bound to be acquainted with the contents of Lloyd's List, and that in all cases it was a question for the jury whether they were or not. Neither party intended to inure the *Cambria* if she was lost at the time of the insurance. They cited and relied on the following cases and authorities:

- McAndrew v. Bell*, 1 Esp. 373;
Court v. Martinens, 3 Doug. 161;
Proudford v. Montefiore, 2 Mar. Law Cas. O. S. 512;
 16 L. R. N. S. 585; L. Rep. 2 Q. B. 511;
 36 L. J. 225, Q. B.;
Clough v. London and North Western Railway Company (in error), 25 L. T. Rep. N. S. 708; L. Rep. 7 Ex. 26; 41 L. J. 17, Ex.;
Fraser v. Wolchouse, 1 Holt's Rep. N. P. 272;
Ellon v. Larkins, 5 Ca. & P. 385;
Mackintosh and another v. Marshall, 11 M. & W. 116; 12 L. J. N. S., 337, Ex.;
Bates v. Hewitt, 2 Mar. Law Cas. O. S. 432, at Nisi Prius; 15 L. T. Rep. N. S. 396; 36 L. J. 282, Q. B.; L. Rep. 2 Q. B. 595;
Cory v. Patton, ante, p. 225; 26 L. T. Rep. N. S. 161; 41 L. J. 195, Q. B.; L. Rep. 7 Q. B. 304;
Ionides and another v. The Pacific Fire and Marine Insurance Company, ante, p. 141; 25 L. T. Rep. N. S. 490; L. Rep. 6 Q. B. 674; 41 L. J. 33, Q. B.; a. c. in error, ante, p. 330; 26 L. T. Rep. N. S. 738; 41 L. J. 190, Q. B.; L. Rep. 7 Q. B. 517;
Xewes v. Wickham in the House of Lords, 2 Mar. Law Cas. O. S. 527; 16 L. T. Rep. N. S. 800; L. Rep. 2 Eog. & Ir. App. 256; 36 L. J. 313, C. P.;
Leigh v. Adams, ante, p. 147; 35 L. T. Rep. N. S. 566;
Arnould on Marine Insurance, 4th ed., p. 530;
Phillips on Insurance, par. 603;
 2 Duer on Insurance, pp. 480, 481, 555.

Holker, Q.C., Herschell, and *McConnell* for the defendant contra, supported their rule, and contended that the underwriters would be presumed to be possessed of all the information which they could have obtained from Lloyd's List, if they had chosen to resort to that usual and ordinary source of information. That even if the plaintiff's broker, Previté, ought to have informed the defen-

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dants of the facts which had come to his knowledge, still, if the defendants were fully informed of these facts *abunde*, before they issued the policy, they must be taken, by issuing it with such knowledge without any protest, to have elected to go on with the insurance, and they could not afterwards resist the claim of the assured on the ground of the concealment of the facts referred to. They cited and commented on the various authorities referred to on the other side, and cited also

Carter v. Boehm, 3 Burr. 1905; 1 W. Bl. 503;
Lee and another v. Jones, 12 L. T. Rep. N. S. 122;
 17 C. B. N. S., 482; 34 L. J. 131, C. P.;
Gandy v. The Adelaide Marine Insurance Company,
ante, p. 188; 25 L. T. Rep. N. S. 742; 41 L. J. 239,
 Q. B.; L. Rep. 6 Q. B. 746;
Harbour and others v. Hutchinson, in error from
 the Q. B., 22 L. T. Rep. N. S. 634; L. Rep. 5 Q. B.
 584; 10 H. & S. 469; 3 Mar. Law Cas. O. S. 434;
Mackenzie v. Coulson, L. Rep. 8 Eq. Cas. 568;
Kingsford v. Merry, in error, 1 H. & N. 503; 26 L. J.
 83, Ex.;
 1 *Arnould on Marine Insurance* (4th edit.) pp.
 510, 528;
 30 & 31 Vict. c. 23, ss. 4, 7, 9.

Cur. adv. vult.

Feb. 8.—There being a difference in opinion amongst the members of the court the following judgments were delivered:—

MARTIN, B.—In this case, the majority of the court are of opinion that there should be a new trial. Three points were made in answer to this action, the principal one being that there was a material concealment made by the plaintiff (the assured) himself, namely, the concealment of a memorandum or notice which appeared in the *Liverpool Mercury*, of Monday, the 19th Oct. 1870; and my impression is that, if established, that was a material concealment; but I do not think it was fully or distinctly brought before the jury. It seems, I think, to have been considered at first, both by the learned judge and the counsel on both sides, as rather of a secondary character to the other defence to the action. But, upon consideration, both my brother Bramwell and I think that it is clearly a serious matter, and that it is not right to allow an obviously momentous question to be determined unless it be quite clear that the real point has been distinctly brought to the consideration of the jury. There is strong reason to believe that the jury did themselves take this into their consideration; but it was certainly not laid before them by the learned judge; nor was their attention called to it in the way in which it is desirable that such an important question should be determined. Upon that point, therefore, my brother Bramwell and I think that the verdict was at least doubtful. The concealment next alleged was a concealment by the broker, and the plaintiff's counsel admitted that, no doubt, that was a concealment; but it was said that, inasmuch as the fact which was alleged to be concealed appeared in Lloyd's Register, or some book or publication at Lloyd's, the underwriter was not in a condition to take advantage of the concealment. That I think was disposed of in the course of the argument by our being satisfied that it was a question of fact; and that it could not be assumed, as a matter of law, that the underwriter saw every notice that appeared in the paper (which was handed up to us), a copy of which it was alleged, was on a desk in his room. It must necessarily be a question of fact, and upon that, as I have already stated, the question was, in the

opinion of the majority of the court, left rightly to the jury, and, were it the only question left in the case, we should feel bound by it. But there is a serious question behind. The facts were as follows: There were certain telegrams published at Lloyd's. The brokers who effected the policy knew of them; and, as already stated, we think, and, indeed, it is admitted, that it was material that they should have been, though they were not, communicated to the underwriters; and the reason given by the broker at the trial is probably true, that he really had satisfied himself that the ship which was stated to be ashore was not the *Cambria*, and that he honestly believed that it was a different ship. However, that fact became known to the underwriter shortly afterwards, who was then possessed of exactly the same knowledge as the broker, and he then, without any intimation to the broker of an intention to dispute his liability, delivered a signed policy, stamped, to the broker, or to the plaintiff; and the question is whether or not he is now at liberty, after the loss has occurred a few days afterwards, to say he is not bound by that policy on the ground of concealment. I confess that my impression is that, having thought fit without notice to give out a policy as if it were binding on him, and which would induce anyone to suppose that he so considered it, and especially after having received the premium, he is, to use an intelligible but much misused expression, estopped, and cannot be allowed to wait until the loss has occurred, and then elect to return the premium or to rescind the contract for its payment, and put the assured in the position of being prevented from insuring elsewhere in the interval between the payment of the premiums and the discovery of the loss. I cannot but think that the manner in which this question was viewed by the Lord Chief Baron at the former trial in the summer of 1871, as read to us from the shorthand writer's notes, is the more correct mode of dealing with the case (a). My own impression is that the proper direction to the jury would be that if the underwriter did deliver the policy, and if the delivery of the policy and the retention of the premium, or the non-rescinding of the contract for the premium, would naturally lead the plaintiff to suppose that it was delivered to him as a binding contract, then it was a binding contract, and the underwriter is estopped from now denying it. That is my view of this case, and therefore, in my opinion, there must be a new trial.

BRAMWELL, B.—I think that there must be a new trial in this case, although I come to that conclusion with great reluctance, as I cannot help thinking that substantial justice has been done by the verdict of the jury. I agree with my brother Martin, that we cannot rely upon what may be called the plaintiff's concealment, that is to say, the suppression of that memorandum. I will not go over the ground that he has gone over, but may mention that I

(a) On that occasion the Lord Chief Baron told the jury that the ship constituted the contract; but that having after signing it, and before issuing the policy, become aware of the undisclosed telegram, the defendants ought immediately to have declined to issue the policy. The jury, being unable to agree, were discharged without giving any verdict; see *ante*, p. 100, where the case is reported at Nisi Prius.

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have spoken to my brother Blackburn upon the subject, and that his view is the same as that expressed by my brother Martin, namely, that that matter was not left to the jury, nor can they be taken to have expressed an opinion upon it. Therefore the verdict cannot be supported on that ground. Then the remaining questions arise upon the broker's concealment. Now, the broker did conceal that which, undoubtedly, was material, and which should have been communicated to the underwriter (the defendants), and it is certain that the underwriter did not know it. The plaintiff's first point was that there was no occasion to communicate it, upon the ground that the underwriter was, in some way or another, bound to take notice of Lloyd's List. I do not know exactly how it should be phrased, but it was suggested either that the underwriter was to be assumed to know what was in Lloyd's List, or at all events that there was no duty on the broker to communicate a matter upon which the underwriter could inform himself, if he thought fit. I do not agree with that. It is impossible to say that there is any rule of law, either on principle or upon authority, which binds the underwriter, and affects him, as it were, with notice of whatever may be in Lloyd's List. I can well understand that there are certain things which they must take notice of. I am not going to attempt to define or describe them; but I concur in the opinion indicated by my brother Cleasby, that what the underwriters must notice, as well as the assured, may be described somewhat thus: those things which are matters of general knowledge, and which are not applicable to the particular ship. But, to hold that the underwriter is bound to carry in his head all that has appeared in Lloyd's List for an indefinite period of time, he not being particularly interested to remember more of one ship than another, rather than to hold that the owner of the ship shall inform him of the particulars, which relate, or which may relate to that ship, or affect ships of a similar name, seems to me to be a monstrous proposition; and would put a difficult and endless burden on the underwriter, when there would be no difficulty at all in the shipowner's making the communication. I think, therefore, that this was material to be known; that the defendants (the underwriters), did not know it; that it was the duty of the broker to state it; and that therefore there was concealment. The next question was this: The underwriters became aware of the existence of this fact, and consequently of this concealment after the ship had been initialled, and before the policy was issued, and the question was whether we could look to the time of the initialling of the slip as the time at which the rights of the parties were fixed. Independently of authority I should entertain a strong opinion that we could do so. I confess I am strongly inclined to think that we could do so whatever might be the condition of the Stamp Laws, because we are not talking of any particular document, but of the time, viz., the time when the document was initialled. There seems to me to be no repugnance to the actual contract in holding this to be the case, for, without using the doubtful term condition, it is certain that the obligation of the underwriters on the policy is affected by something which does not appear in the policy; that is to say, if there had been a concealment at some time or another of a material

matter not known to him, he may elect to avoid the policy. That is not mentioned in the policy in any way, and therefore the written obligation contained in the policy is controlled by something not appearing on its face. That being once admitted to be the case, the time of epoch at which the parties are to date their rights may, as it appears to me, be put at two, twenty, or any other number of days before, or at the instant of the policy. There is no contradiction of the policy or adding to it terms in one case more than in another. But independently of these considerations of principle it seems to me that the case of *Cory v. Patton* in the Queen's Bench (*ubi sup.*) is decidedly in point. It was there held that the assured was not bound to communicate material that came to his knowledge after the initialling of the slip. The grounds upon which the court so held were, that the initialling of the slip was the time at which the rights of the parties in relation to this matter were fixed. If that were true in that case, it is equally true in the present case, and consequently the defendants here were at liberty to show that, although before the execution of the policy they knew of this matter, they did not know of it before the slip was initialled, at which time their rights and obligations were fixed. There is no difficulty upon that point, as far as I can see, either upon principle or upon authority. But now comes a matter upon which I have a great difficulty, and as to which I cannot concur with the ruling of my brother Blackburn at the trial. After the slip had been initialled, I believe on the same day, the underwriters became aware of the concealment, that is to say, they became aware of the two telegrams in Lloyd's List; they became aware that those telegrams were known to the broker, and they were also aware that they were not previously known to themselves. In my judgment they then had a right (and in that I am confirmed by my brother Blackburn's opinion, for he has told me that he so said at the trial), even if the policy had been delivered at the moment the slip was initialled, to say, "Here is a material concealment." But they would have had a duty also cast upon them, if they chose to avail themselves of that material concealment for the purpose of avoiding the contract of saying within a reasonable time after they became aware of the circumstance that the contract was not binding upon them, although they had executed the policy. They then had a right to say to the assured, "We have found out a material concealment; we elect to avoid the policy and not be bound by it; we return the premium, or we release you from any obligation to pay it, and we give you notice that we shall treat it as a non-enforceable insurance." That is what they would have had a right to say and to do if they had delivered out the policy. If they had not so done within a reasonable time, the policy would have been binding upon them. It seems to me to be clear that this is the law. It is consistent with reason, common sense, justice and authority that, where a man has notice of any matter which gives him the right to continue a contract between himself and another, or (it being voidable) to treat it as void, for the reason that has come to his knowledge, he must within a reasonable time intimate that he determines not to go on with the contract. That would have been the state of things if the policy had been given out. It is, of course, equally the

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state of things if the policy had not been given. If it be true, supposing the policy to have been given out, that the underwriter must have decided to avoid it within a reasonable time after notice of the circumstances that warrant him in so electing, it must equally be the law that he must do so within a reasonable time, although the policy was not given out. If it were not so, a man would, as was forcibly argued by Mr. Herschell, have greater power under an innocent concealment of this sort than under a fraudulent concealment. It appears to me that, when the time arrives for the next step in furtherance of the contract, then is the time for the party who is to take the next step to declare his election; thus, when the time arrived for the second step to be taken by the underwriter in the present case in furtherance of the engagement which he had entered into upon the initialing of the slip, he should then have declared his election, and that if he took a step in furtherance of the contract without at the same time intimating to the assured, "You are not to understand that I waive or that I elect not to exercise the right to declare this contract void;" if he took that step in silence it seems to me that the assured is entitled to treat it as a notification that the underwriter has elected not to avoid the contract, but to go on with it. In my judgment, therefore, at the time when this policy was given out, the underwriter ought to have said, "I will not give you a policy; I elect to avoid this contract on the ground of concealment." If the assured (the plaintiff) had said to him, "Well, but that is not fair, because I deny the materiality of the concealment;" or, "I propose to contest the question with you;" then I think the underwriter might have said, "Well, I give you the policy, but I will give it to you with a protest that it is subject to my right to avoid the contract, on the ground of concealment." If he did not do that, and did not refuse to give the policy, or did not give it in those terms, I think that it was such an election by him, or such an act done by him, that the assured would be entitled to treat it as an election not to avoid the contract on the ground of concealment. But it is said in answer to that, that the giving out the policy was a thing which the underwriter could not avoid, because the case of *Xenos v. Wickham* (*ubi sup.*), in the House of Lords, shows that the policy is the property of the assured from the time it is executed. In the first place *Xenos v. Wickham* did not show that the policy was the property of the assured if it was voidable on the ground of concealment. In the next place, it only alters the form of the objection, because instead of saying that the policy ought not to have been given out, it only comes to this, that it ought not to have been executed. It is in fact the same thing. I know it has been said, "Well, those who prepared and executed this policy had no authority so to do." It appears to me that that is not so. No doubt they were clerks in the office who had nothing to do with underwriting, and had not of themselves, power to elect not to rely upon this objection; but they were clerks who were told to make out the policies in accordance with the slips, and therefore had authority given them by virtue of their office and duty so to make them out; and if it was intended to revoke that authority, the clerks should have been told not to make out the policies in

conformity with the particular slips. Therefore I say that they had authority to make out these policies. But, farther than that, the policy was signed by the directors, and surely they would have had authority, or a sufficient number of them. It comes in truth to this: if the underwriting officials of the establishment below had the power to elect to avoid this insurance, and had been inclined to do so, they should have told the clerk not to make out the policy, or the directors not to sign it; and if, by the effect of the case of *Xenos v. Wickham* (*ubi sup.*) the policy vested in the assured from the time it was executed, then, as I have said, precisely the same question presents itself in a different form. It should either not have been executed without a protest to the assured, or it should not have been executed at all. Then it is said, and this I understand (though I am not sure I am right) to be my brother Cleasby's difficulty, and it is one therefore which I approach with great respect, not only because he entertains a doubt upon the question, but also on account of its own intrinsic difficulty, namely, that the delivering out the policy was a thing which the underwriters could not help doing in the sense that they had engaged to do it, and how can a man exercise any election in a matter which he does under compulsion? A proposition so stated is no doubt a difficult one to deal with; but in truth, in one sense, it is not done under compulsion, though in another sense no doubt it is. As men of honour they must do it. But as men of honour they must do it with a qualification. They may either say "Understand, we refuse to deliver this out to you in furtherance of the contract unless you insist upon it with a view to try the question between us, and then we will deliver it with a protest." And another answer to that argument seems to me to be this: that it is not binding upon them in point of law, and that therefore if they do it as a matter of honour, they may do so, but doing it as a matter of honour under such circumstances will not cause them to lose any right which they may have. It seems to me, therefore, that when the time arrives for the giving out the policy, or if it be so, as in *Xenos v. Wickham*, for the execution of the policy, it ought either to have been refused, or if, upon the refusal, the assured had insisted upon his right against them for the purpose of trying the question, and had called upon them as honourable men to give him the policy, it should then have been given with an intimation that they elected to avoid the contract. I think, therefore, that there was a misdirection in that respect. But I do not feel so confident upon that point as that I would either myself, or would advise any other judge, to rule in that way. What I should prefer would be to give the defendant leave to move, and to put the question to the jury in this way: "Here is an act which unexplained shows that the defendant was treating the contract as a subsisting one; but if in the surrounding circumstances, or in any way, you can come to the conclusion that the assured was not warranted in so treating it, then you may find for the defendant. But *prima facie* it is an election by the defendant not to avoid the contract, and it is for him to show some accompanying circumstances making out that the plaintiff had no right so to understand it, or to give some evidence to show that the plaintiff had no

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such right. I deprecate the notion of being hypercritical in dealing with a summing up at Nisi Prius. I make that remark because it might be said that it is nearly what my brother Blackburn did. But it is, in truth, not quite what he did. I think that the proper thing to have done would have been to leave it to the jury as a case in which the burden of proof was upon the defendant, for the purpose of showing that the plaintiff did not understand that as an affirmation of the contract. I really cannot help saying that I am in this case impressed with the feeling of a sort of hardship on the plaintiff (without saying anything to indicate that I view his case very favourably), and that I would grant a new trial upon the ground of the verdict being against evidence. I cannot but think that the underwriters intended to go on with this insurance. I do not think that they cared for the telegrams of which they had notice, and I doubt extremely whether the verdict was not against the evidence upon that score. However, that is not a matter which is strictly before us now, and the only reason for which I mention it is for the purpose of showing the reasonableness of the proposition for which I have been contending, because if the underwriters entertained the notion, which I think they did, how reasonable it is to suppose that the plaintiff's broker might have entertained it also, and how hard it is upon the assured that reasonably, and under the circumstances probably, entertaining that notion, he should be deprived of the power which otherwise would have existed, or be induced not to exercise the power which he had of going elsewhere and making an insurance in lieu of this one which the defendants have sought to declare to be void; for that he could have done so is abundantly manifest upon the evidence. I think, therefore, upon that ground, that there was a misdirection, and that there ought to be a new trial.

CLEARY, B.—If the only question in this case was whether there was a sufficient finding of the jury that there was a material concealment in the matter of the memorandum, which has been referred to, I think that if my learned brothers were of opinion that it was not sufficiently put before the jury, it would not be a matter upon which I should differ from them. It is, I think, to ascertain exactly a matter of opinion, and one in which I might well be influenced by their opinion and judgment to the extent of not insisting upon my own. But as there is another question of vast general importance, namely the effect of giving out the policy by the underwriters, when the slip has been executed and the risk taken, I feel myself bound, having regard to the general importance of that question, to differ from them in that matter, and equally bound to state my real opinion on the matter. Now it appears to me that the finding of the jury that there was a material concealment is warranted by the evidence, and not only so, but there is sufficient to satisfy me that the jury came to that conclusion upon the evidence of the memorandum being concealed, I do not think that any opinion expressed by my brother Blackburn on the matter ought to influence me, seeing what took place before and after, for I should implicitly take his opinion as to what he left to the jury if it bears upon what took place in reality, and the jury entertained it, although the opposite party might suppose that

the learned judge had not left it to the jury. The question is, is there a finding upon sufficient evidence of this materiality applied to this particular matter? I have looked carefully through what took place at the trial, and the conclusion produced upon my mind is that the learned judge attributed very little importance to the slip; that the learned counsel attributed great importance to it, in considering whether there was a material concealment; and that the jury took up and acted upon this very matter of material concealment in the verdict which they gave. Now it is plain from what took place, that the learned counsel intended to put this forward as a matter involving very material consideration; and although the learned judge did not so put it to the jury, yet he had the matter brought before him because he expressed his opinion distinctly, with regard to this memorandum, that "the difference between Lloyd's List and the *Mercury* was rather light and shadowy." That was his opinion of it as a matter of fact. Therefore it was brought before him and entertained by him, and the whole question of concealment went to the jury. What influences me is the question asked by the jury after the conclusion of the summing up, "Did Mr. Morrison know; and secondly, did the underwriters know?" The learned judge appears to have supposed that this referred to the private telegram, which was the principal question in the case, and with which we have nothing to do, because there was no evidence of it, or that the underwriters knew of it. The jury may have said, that Mr. Morrison was bound to give all the information which he actually had. That satisfies me that what was passing in the juror's mind was what had been pressed upon him before, the fact that the plaintiff had not communicated this information. The plaintiff might not have had the private telegram; but this information he did have, namely, the memorandum which tended directly to show that the alternative case of the *Cameo* being upon the rock did not arise at all; and, therefore, if one of the other vessels was there it must have been the *Cambria*. That is the view which I take of the result of the whole matter, and it certainly leaves me at this conclusion, that the jury found the materiality of the concealment, and founded their judgment upon that concealment of this memorandum which seems to be considered now by everybody as material. That being so, I do not think that, because the matter was not distinctly left by the learned judge to the jury, it is a case in which we ought to interfere. If I am not wrong in supposing that to be the case, I should be quite satisfied that the jury did deal with this evidence, and did find that it was material, and so arrived at their verdict, which is a conclusive verdict upon the matter, and that we ought not to interfere, whatever may have taken place as regards the dealing with that matter by the learned judge. The only thing which we have to see is this: Is there a finding in the matter? If there is, does it lead to the conclusion that the defendants are entitled to defend the action? I think that there is a finding of the materiality of this. But, however, the great question of importance in this case is the question of allocation, namely, as to the effect of delivering out the policy without saying anything. Does that, as a matter of law, operate as a waiver of a matter of defence which was in the knowledge of the underwriter, or to be

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assumed to be within his knowledge? I quite agree that a man may elect to waive any objection which there may be to a voidable contract by agreement or by his conduct. If he does it by his conduct in any way he cannot afterwards set up that defence. Now the contract here is, as I understand, the giving out the policy without at the time giving any intimation or indication that he reserved any right to insist upon the objection which he now raises. That depends upon what the effect of giving out the policy is. I think myself that its effect ought not to be regarded of itself as in the nature of an act of election at all. But before I re-examine that I wish to draw attention to what appears to me to be the real position of the parties when that information was communicated, because I cannot bring myself for a moment to think that there was any intention or idea of insisting against the contingency of the *Cambria* being the vessel on the rock. That was entirely out of the question. I think what the plaintiff's broker, Mr. Previte stated afterwards in his letter, and the whole nature of the case, show that that must be so. This insurance had been taken before there was the least idea of the state of things existing at all of any vessel being on the rock. The premium of 8 guineas was attributed to the class of vessel, its character, which could be easily ascertained, and to the fact of a very considerable period having elapsed. The sum of 8 guineas was fixed upon that footing; and not as a sort of wager upon the ambiguity and effect of the telegram, and it cannot be supposed that this policy was to be regarded as directed to the contingency of the *Cambria* or the *Cameo* being upon the rock. I do not think that the conversation which took place between Mr. Previte and the underwriter in the room on the 12th Oct., after the slip had been initialised, is a matter which can influence in the least degree the slip which had then been executed. The transaction, it appears to me, goes on upon the old footing; and if that be so, it is conclusive against anything which took place afterwards operating as an election, which would introduce a new idea altogether, namely that of the *Cambria* being the vessel upon the rock. That seems to me to throw the case out of the area of election altogether. But, supposing it to come within the area of election, and supposing it to be a real disclosure of something which, in the ordinary way, becomes a material fact if concealed, then what is the effect of giving out the policy? The contract, and the only contract, is made by the slip. It may be said, of course, that a written contract is afterwards made out by the policy; but there is no fresh contract thereby made, and as was said by Lord Chief Justice Tindal, a contract is the concurrence of intention in two parties, one promising something to the other, who, on his part, accepts such promise, and the contract itself is made, and is, in one sense, binding at the time the parties separate with the idea in the mind of each, come to conclusively; the one says, "I promise to do a thing," and the other, "I promise to do such and such a thing," or "I accept your promise." Thus the Statute of Frauds in requiring a note in writing says, "No contract for a sale shall be binding, or shall be allowed to be good, except it be in writing." What has taken place by word of mouth is spoken of as the contract. When it comes to the question, is it good

in point of law? or, is it capable of being enforced? then it is a different matter altogether. This contract was made, and was binding in this sense. I rather object to the word "honour" which was made use of in the argument. That seems to me to be a word applicable to a different class of thing. It is a matter of right and conscience, and is equally binding everywhere. It is not a matter in which it can be supposed that there is one law in one country and another law in another. It is universal, and exercises an influence upon all the transactions of life; as, for instance, where there may be acts which may be consecutive, which are intended and supposed to be contemporaneous, for which we use the expression that they are taken as being done *uno flatu*, as indicative of what the effect of the transaction is. It appears to me, and I cannot divest my mind of that conclusion, that, if the slip be taken, and the promise made, and the premium be paid or engaged to be paid, then what took place is within it; and whenever the policy is given out, whether it be an hour afterwards or the next day, or the day after again, and whether given out to the assured or placed in some place of deposit, it is as between the parties to be taken as done *uno flatu* at the time when the contract was entered into, and it will operate in that way. It might be done by merely going from one room to another, when everyone would say it was one act. This seems to me to be agreeable to the view taken of this matter both by the Court of Queen's Bench in *Cory v. Patton* (*ubi sup.*), and by the House of Lords in *Xenos v. Wickham* (*ubi sup.*) The Court of Queen's Bench in the former case regarded the policy as given out, I may say, *uno flatu* with the slip, because, although something remained to be done between the execution of the slip, and the giving out of the policy, and the assured ought to have communicated it, yet it was held that he was entitled to consider the matter as concluded and fixed by the slip, and was under no obligation whatever to communicate it, so as to place the underwriters in the position of making an election, or anything of the sort; and therefore they held that, although the assured were unaware of a material fact between the slip and the giving out of the policy, yet it was a perfectly immaterial matter, and that the policy and the slip must be taken to be one and the same document, so far as regards the time when they were agreed to. The House of Lords in *Xenos v. Wickham* dealt with the question in a manner which I think justifies the conclusion which I have arrived at, because they treated the giving out of the policy as quite an exceptional matter when considered with reference to the effect of delivering such a deed. It was obviously considered by them as really not requiring the actual delivery, but the exercise of the mind or the intention to deliver. They thought that if the policy were placed in a pigeon hole it would have the same effect, being nothing more than the formal conclusion and completion of the contract entered into previously. That being so, considering that the contract is the whole matter, and that what follows is merely an act done, and having reference to the time of the contract, it does not appear to me that it is a case in which the doctrine of election applies at all. I think that the mind is not at that time directed to any other idea whatever than giving the formal document for the purpose of carrying out the

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previous contract. That is the idea to which the mind ought to be, and I believe it is the only one to which it is, directed and drawn, and the doctrine of election has no application to this case. The evidence in this case warrants this conclusion, because there is no contradiction of it. The policy is delivered out as a matter of course; but that which is done as a matter of course cannot be regarded as an act which is to operate as an election, whether the contract is good or not. That is the difficulty which I have. That being so, it appears to me that the learned judge was quite right in the direction that he gave to the jury upon this part of the case, in not telling them, which he did not (and I suppose he was of that opinion) that the giving out of the policy was not of itself an election, under the new state of things, to keep the contract going; that is, not to avoid it: but leaving the question generally to the jury whether the contract had been adopted within a reasonable time by taking the proper course; and upon that the verdict of the jury was right. There is another matter upon this question of election which appears to me to be by no means an unimportant one—namely, that when we are dealing with an act which is to operate in this way as an election not to avoid a contract which is voidable, we ought to take into consideration the position in which the person supposed to make the election is, with regard to the knowledge of all the facts. Now, independently of the ground which I first referred to, as to which I unfortunately differ from my learned brothers—namely, the materiality of this memorandum as a concealment, which, it is said, was not left to the jury, and would have been a defence if it had been left to and found by them, I consider there is a material matter, which if this question were to be gone into fully, ought to have been put forward as a matter influencing the consideration of the question, whether the defendants did or not elect; because they might have elected under the impression that there was nothing known to the persons effecting the insurance. But upon the fact of their being barred by an election, I should doubt whether there had been a concealment by the assured which would have entirely influenced and changed any election which they might have been disposed to make, if they were disposed to make any. This would be going into the matter rather more fully than it was necessary to do. I believe that other reasons might be given in favour of the conclusion at which I have arrived, which is that the delivery of the policy by itself is a formal act, and operates not in the slightest degree as an election, and I think that the objection taken to the summing-up upon that ground fails. I think therefore that there should not be a new trial.

Rule absolute for a new trial.

Attorneys for the plaintiffs, *Sharps, Parkers, Pritchard, and Sharpe*, agents for *Laces, Banner, Newton, Bushby, and Richardson*, Liverpool; for defendants, *Thomas and Hollams*.

COURT OF ADMIRALTY.

Reported by J. F. ANTILL, Esq., Barrister-at-Law.

Jan. 14 and 16, 1873.

THE ANTILOPE.

Salvage—Pleading—Amount awarded to other salvors in another court—Labour in shifting cargo to lighten a ship salvage service.

Where two suits of salvage were instituted by different sets of salvors in respect of salvage services rendered to the same property on the same occasion, the one suit in the Admiralty Court of the Cinque Ports, the other in the High Court of Admiralty, and the salvors in the former suit recovered salvage reward, the High Court allowed the amount of such reward recovered to be pleaded by the defendants in their answer in that Court for the purpose of informing the Court of the value of the property against which it would have to make its award: that value being the net value less all proper deductions, and an award previously made by a competent court being a proper deduction.

Work done by labourers in shifting the cargo of a vessel that has been damaged by collision and so forced to run ashore, for the purpose of lightening her and of enabling her to be sufficiently repaired to get to the nearest port, is in the nature of salvage service and entitles the labourers to salvage reward; such a service is, however, of a small character, and does not merit large reward. A sum of 570*l.* awarded on a value of 4500*l.* to several sets of salvors.

THIS was a cause of salvage instituted on behalf of the owners, master, and crew of the steam-tug *City of London*, against the French screw steamer the *Antilope*, her cargo and freight, and against the respective owners intervening. The petition filed on behalf of the plaintiffs alleged that the *Antilope* was damaged by collision off the East Bay of Dungeness, and with the assistance of the *City of London* was got ashore in that bay to prevent her sinking; that part of her cargo was landed by the *City of London*, and certain luggers and smacks, and various other services were rendered by the tug. The answer of the defendants admitted some and denied others of the allegations in the petitions, alleged services by the chief boatmen and crews of the coastguard and by labourers, and further pleaded:

5. A small portion of the cargo of the *Antilopes* was placed on board the *City of London*. The *City of London* was unable to take any more cargo on board, and such of the rest of the cargo as was taken out of the *Antilopes* was placed in certain smacks or luggers named *The Galatea*, *Friend of All Nations*, *Three Sisters*, and *General Blucher*, whose owners, masters and crews instituted suits to obtain rewards for their services in the Court of Admiralty of the Cinque Ports.

12. The defendants in this suit have been decreed by the judge of the Court of Admiralty of the Cinque Ports, to pay to the plaintiffs in the suits in the 5th Article mentioned the sum of 940*l.*, and they are further under liability to the said chief boatmen of the coastguard and their crews, and to the labourers in the 6th Article mentioned for their services, as hereinbefore stated.

The defendants in the cause instituted in the Admiralty Court of the Cinque Ports, and in the present cause were the same (see *The Antilope*, ante p. 477; 27 L. T. Rep. N. S. 863). The cause now came on upon motion to the court "to direct that the 12th Article of the answer filed herein may be struck out."

Jan. 14.—*R. E. Webster*, for the plaintiff, in support

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of the motion. In the *Dus Cheechi* (as reported in L. Rep., Weekly Notes, May 4th, 1872, p. 100), the court refused to allow the plaintiffs in a cause of salvage against cargo to plead in their petition the amount they had been paid in settlement of their claim against the ship and freight, holding that it was bound to fix the amount of salvage reward payable by the owners of the cargo without reference to the terms of the settlement made between them and the owners of the ship. In the present case the judgment of the court should proceed without reference to the decision of any court, and as the 12th article is pleaded for the purpose of affecting its decision, it should be struck out. If this sort of allegation is allowed it will let in inquiries as to what was the nature of the suit in which the sum was awarded, and what the nature of the services. Facts only should be stated, and on those facts this court only should judge of the quantum of reward. Such an article will lead to a counter plea as to what is the nature of the services. [Sir R. PHILLIMORE.—Then you only ask for the amount recovered to be struck out, leaving the fact that an award has been made?] That is all.

W. G. F. PHILLIMORE, for the defendants, *contra*. The only question is whether this pleading is good. Whatever result the 12th article may have cannot affect that question. The *Dus Cheechi* (as reported in 1 Asp. Mar. Law Cas. 293; also 26 L. T. Rep. N. S. 593), proceeded upon the ground that the court would not allow itself to be governed by what other persons, not a court, may think proper remuneration for salvage services; and moreover, in that case the settlement out of court was in respect of ship and freight only, and the same salvors were proceeding against the cargo, so that the reason for pleading the amount there was to suggest to the court the amount is ought to award. The reason for the pleading in this case is different. Here the question is whether the court has, without such a plea, the means of knowing the value of the property against which it has to make its award. In the case cited, the plaintiffs were the same, but the defendants were different, whereas in the present case the plaintiffs are not the same as in the case in the Cinque Ports Court, whilst the defendants are the same and the property proceeded against is the same as in that court. The plea is for the purpose of pointing out to the court that all the salvors are not before the court and that, one set of salvors having already taken proceedings and recovered against the property, the salvors against which this court will have to give its award is thereby reduced in value. The property against which the court will make its award, is the net value of the ship freight and cargo, less all proper deductions; and a proper deduction is the amount already recovered by other salvors.

R. E. Webster in reply.—The fact that the salvors are not the same is an additional reason for rejecting the amount, because the court should give its award against the whole of the property irrespective of what others have recovered.

Sir R. PHILLIMORE.—I cannot accede to this application to strike out the 12th article of the answer, nor do I think that in retaining it I shall run counter to my decision in the *Dus Cheechi* (*ubi sup.*) In that case it was pleaded that a certain sum had been paid to the salvors out of court, in respect of the ship and freight

only. In this case, some of the salvors have instituted a suit in another court, and have recovered salvage reward in that court. I think it has been correctly stated by Mr. Phillimore in the course of his argument, that when the time comes for me to consider what award I must make to the salvors, if any, I must take into account only the net value of the property saved, after all proper deductions have been made from that value; and it is therefore quite proper, and I must hold, that I ought to know that a certain sum which has been awarded, not by arbitration, but by a competent court, is to be deducted from that net value. On that ground I must allow the article, which I consider as pleaded for the purpose of informing the court out of what sum of money the salvage remuneration is to be paid. The motion will be dismissed with costs.

Jan. 16th.—The cause now came on for hearing. Another cause had been instituted on behalf of a Captain Groves and a diver and some laborers in his employ for services rendered at the same time. This cause had been ordered by the court to be heard without pleadings immediately after the cause instituted by the *City of London*. The *City of London* was a large steam tug of 140-horse power nominal of the value of 8000*l.*, and manned by a crew of eight hands. After the collision before mentioned, which occurred about 1 a.m. of Sept. 30 1872, the *City of London* went alongside the *Antelope* and found she was making water fast, and that her screw was nearly out of water. The *City of London* then accompanied the *Antelope* towards the shore, and the *Antelope* was put ashore on the west end of the Roar Bank in the east Bay of Dungeness, and the master of the *City of London* went on board the *Antelope*, and at the request of the master and pilot of the *Antelope* agreed to stow her. About 5 a.m. it was discovered that the bows of the *Antelope* were crushed in below the water-line. The master of the *City of London* advised that the cargo should be shifted aft and part transferred to the *City of London*, and to some luggers which had come up. About 6 a.m. a clerk to the French Consular agents at Dover, came on board, and also the plaintiffs in the second suit mentioned. There were some coastguard men and the crews of the luggers already on board. The cargo was thereupon taken from the forehold and partly shifted aft and partly transferred to the *City of London*, and to the lugger. When this had been done, the *City of London* was made fast to the *Antelope*, the tug's rope being fast forward and the *Antelope's* rope fast aft. The *City of London* then forced the *Antelope* over the Roar Bank on to the Swathway, dividing the bank from the main land, and steamed with her across the Swathway towards the main land. When the *Antelope* touched the main land her rope broke, and the flood tide swung the tug round and the head of the *Antelope* to the eastward. The tug again made fast, but the rope again broke. They made fast a third time, and got the *Antelope's* head round to the northward, and the engines of the *Antelope* forced that vessel into the main land. The tug thereupon left and went to Dover for cement, which she obtained and brought back about four o'clock. The cement was used to stop the leak, and at 7 p.m. the *City of London* made fast to the *Antelope* and towed her off the shore. Having got clear, the two vessels bore away for Dover, where they arrived in safety soon after midnight. The master and crews' efforts had

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been removed on board the tug, and a portion of the crew also went on board the tug, being in fear of the *Antelope* sinking. It was admitted that it would have been dangerous for the *Antelope* to have gone to Dover by herself whilst newly cemented.

The plaintiffs in the second suit came on board the *Antelope* about 6 A.M., whilst the vessel was on the Roar Bank. They had been employed by Captain Groves, who was acting on behalf of the Salvage Association, to recover the wreck of another vessel in Dungeness Bay, but he brought them down to the *Antelope* on learning her danger. He did nothing himself, and left as soon as he had got alongside. The men were ordered by the clerk to the French Consular agents to assist in shifting the cargo, which they did. They also took out an anchor in their own boat to hold the ship up against the tide. The clerk took down the names, but made no arrangement with any of them as to the manner in which they were to be paid. These plaintiffs were twenty in number. It appeared that the labourers were paid by Captain Groves at the rate of 5s. a tide for their work in the wreck, and that the diver was paid at a higher rate. The clerk said that the ordinary pay for men for such work as they did on board the *Antelope* was 4s. 2d. a tide, and that he had paid that amount to other men who had been on board that vessel. He offered this sum to these plaintiffs, but they refused to take it. They were at work from about 7 A.M. till noon. The weather throughout the services was fine.

The Admiralty Advocate (Dr. Deane, Q.C.) and B. E. Webster for the City of London.

R. E. Webster for the other plaintiffs.

W. G. F. Phillimore for the defendants.—There is a customary rate at which such services are paid, and there was a tacit agreement between the parties that this customary rate should be paid. If there is such a custom the court will find that these plaintiffs can recover only on their agreement. This agreement was for work and labour only, and not for salvage services, and the suit should, therefore, be dismissed. There were no circumstances to make this labour salvage, which is the real test of the way in which they are to be paid.

Sir B. PHILLIMORE.—In the case on behalf of the City of London, considerable salvage services have been shown to have been performed. I must bear in mind that the sum of 240l. has already been awarded to other salvors in the Court of Admiralty of the Cinque Ports. The agreed value of the property salvaged was 4500l. I shall award 300l. to the City of London with costs. In the case on behalf of Captain Groves and the labourers the court has to consider two questions; first, whether their services can be considered as in the nature of salvage services; second, the amount to be awarded in respect of those services. Whilst considering the first question the court must bear in mind the nature of the damage sustained by the *Antelope* in the collision, in consequence of which the work of these men was required. There is no doubt that the ship was in need of salvage service. These men went on board to do an act which contributed to the salvage of the ship. They were employed in shifting the cargo aft, and also in taking out an anchor for the purpose of holding the ship against the tide.

Such services undoubtedly came within the category of salvage services. It was suggested that there was an agreement made with these men as to the mode in which they were to be paid which deprived them of the character of salvors, but the evidence failed to support any such agreement. However, their salvage services were of a very slight character. I do not see how Captain Groves is entitled to any reward himself as he apparently did nothing but take the men on board the *Antelope*, and I therefore exclude him. I shall award to the others the sum of 30l. As there have been no separate pleadings in this case, and it was not prudent, perhaps, to consolidate this latter case with the others whilst it was right that it should be heard in this court, the other case being here, I consider that the plaintiffs are entitled to their costs.

Solicitors for the City of London, Lovell, Nelson, and Jones.

Solicitors for the other salvors, Wattons, Bubb, and Walton.

Proctors for the defendants, Dykes and Stokes.

Tuesday, Jan. 21, 1873.

THE MELPOMENE.

Salvage—Consolidation of causes—Application by plaintiffs.

The Court of Admiralty will consolidate causes of salvage instituted on behalf of several sets of salvors on the application of the plaintiffs.

THIS was an application to the court to set aside an order of the Registrar of the Liverpool District Registrar, made at the instance of the plaintiffs, consolidating two causes of salvage instituted respectively on behalf of the owners, masters, and crew of the steam tug *Fiery Cross*, and on behalf of the owners, master, and crew of the steam tug *Resolute*. The owners of the two tugs were the same persons. The suit on behalf of the *Fiery Cross* was first instituted, and from affidavits filed by the plaintiff's solicitors, it appeared that when that suit was instituted, the owners were not aware that services had been rendered by the *Resolute*, but that as soon as this fact became known to them, they instituted the second suit, but did not re-arrest the *Melpomene*, nor require any further bail than that already given in the first suit. The plaintiff's solicitors thereupon applied to the District Registrar to consolidate the two suits, and the Registrar, after hearing the solicitors on both sides, made an order that the suits should be consolidated, or that the plaintiffs should be at liberty to amend the *præcipe* in the first suit by increasing the amount in which that suit was instituted. Affidavits filed on behalf of the defendants alleged that the second suit was not a *bond fide* suit, no services having been rendered by the *Resolute*, and that the plaintiffs had applied for consolidation only for the purpose of enabling them to make a salvage claim under the protection of the first suit without running the risk of being condemned in costs.

Clarkson, for the defendants, in support of the application.—It is wholly unusual to consolidate causes at the instance of plaintiffs, and when defendants object to consolidation it should not be done. If the cause of the *Resolute* is *bond fide* no harm can come to the plaintiffs, as they will re-

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cover their costs without consolidation, whilst if the consolidation takes place and the cause is not *bond fide* costs will be incurred in respect of the *Resolute*, which the defendants will be compelled to pay under cover of the cause of the *Fiery Cross*, and it will be impossible to discover accurately in which cause these costs have been incurred. The suit on behalf of the *Resolute* was afterthought, and not *bond fide*. The proper course for the plaintiffs to have taken would have been to have applied to amend their *præcipe* at once.

Butt, Q.C., for the plaintiffs, *contra*.—The court will not inquire now into the merits. The registrar's order only has the effect of placing the defendants in the same position as if one suit had been instituted on behalf of the two tugs by their owners, which might have been done, the owners being the same. If the *Resolute* should turn out not entitled to recover there can be no difficulty in separating the costs in the two suits when they come before the taxing officer of the court.

Clarkson in reply.

Sir R. Phillimore.—This is an application to the court to reverse an order of the Registrar of the Liverpool district. The order is that two causes of salvage should be consolidated or that the plaintiffs should be at liberty to amend the *præcipe*. It is the recognised practice of the court to encourage and enforce consolidation of salvage causes. It is quite true, as stated by Mr. Clarkson, that applications for consolidation are usually made on the part of defendants, whilst in the present case the application is on behalf of the plaintiffs. I consider, however, that it is a reasonable application from whatever motive it may be induced, as it has for its effect to secure the defendants from the payment of the larger costs that might be incurred if both suits were prosecuted separately. The reason stated for reversing the order is that the second suit is a trumpsty suit, which will be sheltered behind the substantial suit, and costs will be so incurred in the second suit that the defendants will have no remedy. Now, I am informed by the registrar that there is no difficulty in revising costs in such a suit and in making the second set of salvors pay the costs incurred in respect of their suit if it should be necessary. It is a thing that happens every day, and the registrar can easily separate the different sets of costs. Moreover, it is competent to the court to sever the claims and award a *sum nomine expensarum* if there is any difficulty. I shall, therefore, allow the consolidation and affirm the registrar's order.

Solicitors for the plaintiffs, *Simpson and North*.
Solicitors for the defendants, *Hull, Stone, and Fletcher*.

Jan. 17 and 21, 1873.

THE *ÆOLUS*.

Salvage—Taking out anchor and chain to a vessel in distress—Pilot claiming as salvor—Waterman acting as pilot.

*Taking out during bad weather an anchor and chain to a vessel, which is compelled to slip her cable to get away from a dangerous position and run for a place of safety, is, although the anchor and chain in the result are not needed, a salvage service; 280*l.* awarded to two luggers and their crews on a value of 40,000*l.**

A waterman acting as a pilot is subject to the same disabilities as a licensed pilot in respect of claiming salvage reward against a vessel which he has been engaged to pilot.

A pilot entering into an engagement to pilot a vessel undertakes to supply local knowledge and the peculiar skill of his class, and will not be allowed, even though he contributes to the safety of the vessel, to change the character of his service from pilotage to salvage, except where the vessel was in distress before he went on board to render the service, or where such circumstances of extreme danger and personal exertion supervene, which exalt his service into a salvage service.(a)

THIS was a cause of salvage instituted on behalf of Henry Caspell and George Porter, of Deal, mariners, and others, the owners and crews of the luggers *Seaman's Glory* and *Tiger*, against the Dutch barque *Æolus*, her cargo and freight, and the owners intervening. The salvage services consisted in carrying a letter to the Dutch consul at

(a) The principle which would seem to be laid down in this case is that where a person not a pilot enters into an agreement to render pilotage services, he can only claim salvage reward where a duly licensed pilot could claim such reward: (See *The Jonge Andries*, Swab. Adm. Rep. 226, 303.) Where, however, a person without such an agreement renders pilotage service in a place where there are no licensed pilots, it may be a question whether he would not be entitled to a reward in the nature of salvage, the amount varying according to the risk of the service: (See *The Rosehaugh*, 1 Spinks, 267.) In the United States pilots stand on a somewhat different footing as to claiming salvage. There is no doubt that the Admiralty law is there precisely the same as in England; but certain statutory provisions have placed pilots on a peculiar footing as to salvage reward. The regulations of commerce is by the Constitution in the hands of Congress; but by an Act of Congress of 1789, c. 9 (1 U. S. Statutes at Large, 53) it is enacted that pilots are "to be regulated in conformity with the existing laws of the States respectively whereinever pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." Under this provision various enactments of the different State Legislatures are in force regulating pilots and pilotage in the United States waters. The greater number of these enactments impose upon pilots the duty of assisting vessels in distress, and give for such additional services a specific rate of compensation, or provide that the amount shall be settled by a named tribunal, usually the Commissioners of Pilotage or other pilotage authority. The effect of these enactments is to take services rendered by pilots to vessels in distress out of the category of salvage services in the view of the United States Admiralty Courts, and to make them mere extra pilotage services: (See *Dulany v. The Sloop Pelagic*, Bee's Rep. 212; *Schooner Ware v. Hyer*, 2 Caine's Cir. Court Rep. 131; *Callahan v. Hallett*, 1 Caine's Rep. 104; and the principle that a pilot is bound to render assistance to a distressed vessel has been applied even where there is no statute law binding him to do so: (*Love v. Hinkley*, Abbott's Adm. Rep. 436). Some extra services rendered by pilots are, however, held to be salvage, and even where the pilot could recover the extra compensation under the State statute: (*The Elvira*, Gilpin's Rep. 60; *The Brig Susan*, 1 Sprague's Rep. 499; *Hobart v. Drogan*, 10 Peter's U.S. Sup. Court Rep. 108). The question of salvage or no salvage by pilots would seem to depend very much upon whether the service was rendered whilst the vessel was in a navigable condition: As it is only the duty of a pilot to navigate a vessel when she is afloat or not so damaged that she is unnavigable, a pilot rendering service to a vessel by getting her off a shoal or bringing her into port after she had lost her rudder, will be entitled to salvage reward; but he will be entitled only to pilotage if although damaged the vessel can be navigated in the ordinary way: (See *Lee v. The Ship Alexander*, 2 Paine's Cir. Court Rep. 466; *Schooner Ware v. Hyer*, Ib. 131; *Hope v. The Brig Dido*, Ib. 243).—Ed.

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Deal, ordering an anchor and chain to replace an anchor and chain slipped to enable the vessel to get away from the vicinity of the Brake Sand, where she was in danger; in bringing out the anchor and chain ordered; and in assisting in navigating the ship to a place of safety in Margate Roads. George Porter had been engaged to act as pilot from the Downs to Beachy Head before the barque was in danger, and his claim was for advising measures to be taken which resulted in releasing the ship from her danger; for navigating and steering her to Margate Roads in safety during weather much worse than when he had come on board. Caspell claimed, as one of the crew of the lugger *Seaman's Glory*, for coming out to the barque for the letter, and for assisting Porter, who alleged that he wished to have somebody on board who understood English thoroughly and knew the locality, in navigating, by steering and looking out for bays; he was hauled on board the barque from the lugger by a rope, as the weather rendered it difficult for the lugger to get alongside. When the anchor was shipped, the barque was taken between the South Brake buoy and the sand, as the only practicable way of extricating her from her position. The rest of the crew of the *Seaman's Glory* claimed in respect of the letter carried ashore. The claim on behalf of the *Tiger* was for bringing out the anchor and chain to the barque when she had arrived in Margate Roads; for assisting in getting them on board; for damage done to the lugger by the anchor swinging about whilst being hauled on board the barque, in consequence of the steady rope being broken by the lurching of the vessels; for injuries done to two of the lugger's crew; also for remaining alongside the barque during the night after the anchor was put on board, as the wind had then increased, and there was danger of a ship driving down upon her. The work of putting the anchor and chain on board lasted from 7 p.m. till 11 p.m. The anchor and chain were let go as soon as they were got on board, although they afterwards turned out unnecessary. Porter afterwards piloted the ship to Beachy Head, in pursuance of his agreement. The crew of the lugger *Seaman's Glory* consisted of Caspell and five men; the crew of the *Tiger* of the same five men and eleven additional hands. There were six men among the barque's crew who understood English. The circumstances under which the services were rendered are fully set out in the judgment.

The *Admiralty Advocate* (Dr. Deane, Q.C.), (R. E. Webster with him), for the plaintiffs.—The service rendered in taking off the anchor and chain was a great service, and is entitled to large reward. As to the pilot, he assisted in rendering the services under circumstances of considerable danger. More service was rendered by him than is usually required from a pilot; the ship received at his hands greater skill and labour than could be expected in return for the remuneration stipulated for. He was not a licensed pilot, and therefore not bound by a licensed pilot's rules. In entering into the arrangement as to pay, he did not undertake to give more than ordinary pilotage service. Where a man is technically a pilot he may not be entitled to recover more than his pilotage, except in extraordinary circumstances; but this man being only a waterman cannot be bound by any such rule; if he rendered services over and above those strictly stipulated for, he is entitled to

salvage reward. The service he stipulated for was to pilot the ship from the Downs to Beachy Head; he actually took her from the Downs to Margate Roads, for which he had not contracted, and in so doing saved her from great peril.

Bull, Q.C. (E. C. Clarkson with him), for the defendants.—The service rendered by the luggers and their crews, and by Caspell, were not great, and in the event turned out unnecessary. The ship could have been taken to Margate Roads without their assistance, and the anchor and chain, although useful for the purposes of the subsequent voyage, were not actually needed to save the ship from any danger. The pilot's orders would have been perfectly understood by the crew. Porter's services were those of a pilot only, and he was entitled only to his pilotage. If a licensed pilot could not recover salvage, he could not. The test is, whether the court or the Trinity House would hold that it was not the duty of a licensed pilot, as a pilot, to take the ship to a place of safety. There can be no difference arising from the fact that he was not licensed, because a waterman acting as a pilot stands, with respect to his right to salvage, upon the same footing as a licensed pilot; (*The Columbus*, 2 Hagg. Adm. Rep. 178 n.) The court will not allow pilots to exaggerate their services from pilotage into salvage, unless the services rendered by them are very different from those which pilots are bound to render. Where the service rendered is something which from its nature a pilot would not be bound to do, he would be entitled to salvage reward; but if it is only ordinary pilotage service, he is not entitled. Even towage by a pilot boat does not entitle to salvage reward: (*The General Palmer*, 2 Hagg. Adm. Rep. 178.) [Sir R. PHILLIMORE.—At present I am inclined to think that the man must be considered as a pilot, and as taken on board for a particular act, namely, pilotage; and that he is therefore under the same disadvantages, as to claiming salvage, as a regular pilot.] His remuneration was sufficient, and unless it should appear that he rendered greater service than could be called for from a pilot, he has no claims. [Sir R. PHILLIMORE.—There was a considerable deviation from the ship's course, requiring no small knowledge of locality to accomplish.] To assist in effecting that, if necessary, was part of his duty; and, moreover, he was paid for delay. It is a matter of importance not to encourage pilots trying to turn pilotage into salvage. It is because the court does not encourage such attempts that pilots do not often make such claims, although they are often subjected to greater danger than existed in this case.

The *Admiralty Advocate* in reply.—The ground upon which *The General Palmer* (*ubi sup.*) proceeded was, that a licensed pilot has an express privilege to charge a high rate of pilotage, and cannot therefore be easily allowed to claim a larger remuneration. No such ground exists in this case, as Porter was not a licensed pilot; his remuneration was of a totally different character, as licensed pilots are paid by the draught of water of the ships which they pilot; he was a waterman hired for a specific purpose, and he performed extra labour. In *The Columbus* (*ubi sup.*) no extra services, beyond the pilotage, were rendered. In *The Enterprize* (2 Hagg. Adm. Rep. 178n), additional pilotage was given for extra services.

Our adv. vult.

Jan. 21.—Sir ROBERT PHILLIMORE.—This was a

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case of salvage, the merits of which were heard before me on Friday last. The vessel to which services were rendered was a large Dutch barque, the *Æolus*, of considerable value; the agreed value of ship, freight, and cargo was 40,000*l*. On the 16th Jan. 1872, the vessel was riding in a good berth close to the Deal Bank buoy, and about a mile from the South Brake buoy. At that time she had need of a pilot to take her to Beechy Head, and her master obtained the services of George Porter, one of the claimants in this cause, who came on board and made an arrangement to take the barque down the Channel, and he was to be paid for his services at the rate of 7*s*. a day whilst on board, and the sum of 5*l*. in addition. Porter was not a duly licensed Trinity House pilot, but he was a waterman who often acted as pilot. Another of the claimants claiming to be a salvor is Henry Caspell, who also, under circumstances to be afterwards stated, came on board the barque from one of the luggers, whose crews are the other plaintiffs in the cause. The history of the case is very narrow, and the main facts are admitted. Porter came on board on the 16th Jan. 1872, and on the 17th the wind came on to blow a whole gale, from S. to S.S.W., and the vessel began to drive, dragging her starboard anchor. Her port anchor was not down. She was commanded by a master, who was examined before the court, and appeared to be a very competent person to be in charge of a vessel of this character. He conferred with Porter, and they agreed that the best course to pursue was to slip their anchor, there being a difficulty in weighing it, on account of the vicinity of another vessel called the *Sea Breeze*, which was also driving, and the risk of going on to the Brake Sand. They also agreed that a signal should be made for a boat to come off to the ship to take a message ashore for an anchor and chain, to supply the place of the one they were about to slip. The lugger *Seaman's Glory* accordingly came off, and one of her crew, Henry Caspell, was put on board the barque with some difficulty, but not, I think, with that amount of danger which would have caused peril to life. He was put on board, because Porter naturally wished, although there was one seaman among the crew speaking English, to have some one on board who knew English thoroughly, so that he might be sure that his orders were understood, and also to have somebody on board with him who had that local knowledge of the buoys which would be found of great use in directing the course about to be taken. Caspell, accordingly, at first went to the helm, and, the anchor having been slipped, Porter took his place, and Caspell was sent forward to note the buoys, and the vessel was brought through the Gull Stream into Margate Roads. On the evening of the 17th she brought up with her port anchor off the North Foreland, in seven fathoms of water. In the meantime the lugger *Seaman's Glory* went to Deal and gave the order for the anchor and chains, but, being herself too small to bring them off to the ship, another lugger, called the *Tiger*, and of a larger size, was employed. This lugger arrived safely alongside the barque, and delivered the anchor and chain. This service was rendered with some peril to those on board the *Tiger*, and considerable damage was done to the lugger herself. This damage was proved to have amounted to 40*l*., a fact which shows the extent of the danger to which the lugger was ex-

posed. Two of the logger's crew were injured, one on the head and the other on the knee, by the anchor, which was of a large size and swinging about. I have no hesitation in pronouncing, and in fact it was admitted by the counsel for the defendant, that Caspell and the crew of the two luggers are entitled to recover as salvors—and it appears to me a very meritorious service. It is, however, a more difficult question whether Porter is entitled to be considered as a salvor; it would be extremely dangerous to allow the general rule, that pilots cannot claim as salvors, to be too easily violated. The exceptions to this general rule, should be few and clearly defined; this is my view, and the authorities go a long way to strengthen my opinion. Looking at the state of the weather, the dangerous vicinity of the Brake Sand, and the manner in which the anchor was brought out, I am of opinion that the services rendered were such that the court ought to reward them with a liberality proportionate to the value of the vessel. This is the principle on which the court always proceeds in awarding salvage remuneration. At the same time, it must be remembered that there was no absolute necessity, as the circumstances really happened, for the services of the two luggers. The total sum that I shall award is 280*l*., the distribution of which leads the court to consider the legal question, whether the services of Porter are to be considered, not those of a pilot, but rather those of a salvor. There is one point preliminary to the decision of this question which I must now consider. It was strongly pressed upon me in the first instance that Porter was not a licensed pilot, but only a waterman. I think that on principle this fact can make no difference. Porter took upon himself to discharge the duties of a pilot, and can only claim as a pilot. My opinion on this point is confirmed by the decision of Lord Stowell in the cases of *The Columbus* and of *The Michael* (2 Hagg. Adm. Rep. 178*n*). That learned judge there refused to consider fishermen, taken on board in the Channel as pilots, entitled to be rewarded as salvors, observing that they were engaged as pilots, and if they assumed that character they ought to adopt the rules, and be remunerated according to the rates of that service. On this case I conclude that, whatever the law is as to pilots, that law is applicable to the plaintiff Porter. As I have said, the exceptions to the general rule that a pilot cannot recover as a salvor ought to be few and well defined, and it ought to be well understood that the services of a pilot cannot easily be converted into those of a salvor. I find my opinion strengthened by other cases decided in this court. In the case of *The Frederick* (1 W. Rob. 17), Dr. Loshington said:—"It has been urged in the argument for the owners that pilots are not to convert their duties into salvage services. This may be a correct position under ordinary circumstances; at the same time it is to be observed, that it is a settled doctrine of this court that no pilot is bound to go on board a vessel in distress, to render pilot services, for mere pilotage reward. If a pilot, being told he would receive pilotage only, refused to take charge of a vessel in that condition, he would be subjected to no censure; and if he did take charge of her, he would be entitled to salvage remuneration." That case is an instance of one class of cases where a pilot might claim as a salvor. Another class of cases where a pilot may recover is also mentioned in the books namely, where he

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has been employed as a pilot, but circumstances supervene which so alter the character of his services that he becomes a salvor. In the present case, the vessel was not in distress at the time when the pilot went on board, and there was no supervening distress which required him to act as a salvor. He displayed local knowledge and the peculiar skill of a pilot. Such knowledge and skill, showing themselves in proper directions, the pilot tacitly contracted to apply; and it was the application of these qualities which brought the ship in safety to Margate Roads. This, which was strictly contracted for and within the scope of his contract, really constituted the service rendered by him. Before leaving this point, I will call attention to the case of *The Joseph Harvey* (1 C. Rob. 306). Lord Stowell there said: "It may be in an extraordinary case difficult to distinguish a case of pilotage from a case of salvage properly so called, for it is possible that the safe conduct of a ship into a port, under circumstances of extreme danger and personal exertion, may exalt a pilotage service into something of a salvage service. But in general they are distinguishable enough, and the pilot, though he contributes to the safety of the ship, is not to claim as a legal salvor." That seems to me the sound doctrine, to which I mean to adhere. After thus reviewing the facts and the law, I am bound to pronounce that they do not bring Porter's case within those exceptions which would give him the right to claim salvage in this court, and I therefore reject his claim. I shall distribute the sum I have awarded as follows:—To the *Seaman's Glory* I award 70*l.*; to Caspell 30*l.*; to the owners of the *Tiger* for the damage sustained, 40*l.*; and in respect of the salvage services of the *Tiger* I award 140*l.*, out of which sum double shares must go to the two injured men.

Solicitors for the plaintiffs, *Lowless Nelson, and Jones*.

Proctor for the defendants, *C. Waddilove*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Reported by J. P. ASPELL, Esq., Barrister-at-Law.

Dec. 6, 7, and 10, 1872, and Feb. 18, 1873.

(Present: The Right Hons. Sir James W. Colville, Sir Barnes Peacock, Sir Montague Smith, Sir R. P. Collier.)

GAUDET (app.) v. BROWN (resp.); CARGO OF ARGOS.

GEIPEL and others (apps.) v. CORNFORTH (resp.);
THE HEWSONS.

County Courts Admiralty Jurisdiction—Agreements made in relation to the use or hire of any ship or in relation to the carriage of goods in any ship—County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51) sect. 2—Admiralty Court Act 1861, (24 Vict. c. 10) sect. 6.

The County Courts Admiralty Jurisdiction Amendment Act 1869, sect. 2, conferring upon certain County Courts, having Admiralty Jurisdiction under the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), power to try "any claim arising out of any agreement made in relation to the use or hire of any ship or in relation to the carriage of goods in any ship," confers upon those County Courts a more extensive jurisdiction

in relation to such agreements than that possessed by the High Court of Admiralty, under the Admiralty Court Act 1861, sect. 6.

Although the High Court of Admiralty has under the Admiralty Courts Act 1861, sect. 6, only jurisdiction "over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales, in any ship for damage done to the goods or any part thereof, by the negligence of, or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court at the time of the institution of the cause no owner or part owner of the ship is domiciled in England or Wales," County Courts having Admiralty Jurisdiction have, under the County Courts Admiralty Jurisdiction Amendment Act 1869, sect. 2, jurisdiction to try causes instituted in rem by shipowners against goods laden or lately laden on board their ships to recover freight, demurrage, and expenses, and also causes instituted in rem by charterers against ships, which they have chartered, for breach of charter-party, irrespective of any damage to, or breach of contract or duty in respect of, goods carried on board such ships, even though the owners of the goods or ships may be domiciled in England or Wales.(a)

(a) This decision is likely to revive a difficulty which, it was hoped, was ended by the decision in *Simpson v. Blue*, and which has been the source of considerable anxiety to practitioners when advising their clients as to the court in which they should take proceedings in respect of breaches of charter-party or against shippers of goods. By the 9th section of the County Courts Admiralty Jurisdiction Act 1869, if proceedings are taken in the High Court of Admiralty or in any Superior Court, which might have been taken in a County Court, that is, which are in respect of a claim below the limit of the County Court jurisdiction, except by order of a Judge, and a sum is not recovered exceeding the amount to which the jurisdiction of the County Court in that Admiralty cause is limited by that Act, the party so proceeding is not entitled to costs, and may be condemned in costs, unless the Judge of the High Court of Admiralty or of a Superior Court certifies that the cause was a proper cause to be tried in the High Court of Admiralty or in a Superior Court. The Act of 1869 is to be read as one with the Act of 1868; and as the 2nd section of the Act of 1869 gives jurisdiction to the County Courts in cases where the claim does not exceed 300*l.*, it is often an important question to consider in advising proceedings whether the plaintiff has a chance of recovering a larger sum. If he has not, it is a risk bringing proceedings in a Superior Court, as he may lose his costs. There are, perhaps, few cases of breach of charter-party apart from damage to the cargo where the claim would exceed 300*l.*; and yet these are sometimes questions of mercantile law of the greatest importance, and should undoubtedly be brought before a Superior Court. It is not right that in such matters a plaintiff should run the risk of losing his costs, nor should his legal adviser be placed in the difficult position of having to decide whether the importance of the question is such as to justify the risk. It may be probable that in such cases the Judges would certify; but something more than a mere probability is required. There should be a certainty.

It is possible, however, to put a construction on the 9th section above quoted which will avoid the difficulty. The section only provides that costs shall not be given where the plaintiff does not recover the requisite amount in an Admiralty cause. The more important part of the jurisdiction given by the Act of 1869 (sect. 2) is not in respect of Admiralty causes, but of any other class of causes over which the Admiralty has no jurisdiction, and this would appear to be one result of the decision in the present case. If this be so, then the Act of 1869 only permits such causes to be brought in the County Courts, but does not require that they shall be so brought,

Simpson v. Blues (ante, p. 326; 26 L. T. Rep. N. S. 697; L. Rep. 7 C. P. 290) *dissented from*.

THESE were appeals from decrees of the High Court of Admiralty in cases coming before that court on appeal from the City of London Court and the County Court of Durham (Admiralty jurisdiction). The question in *Cargo ex Argos* (on appeal from the City of London Court) was whether that court had jurisdiction to entertain a suit in rem against goods to recover freight, demurrage, and expenses on behalf of a shipowner in whose ship the goods had been carried. The question in *The Hewsons* (on appeal from the County Court of Durham) was whether that court had jurisdiction to entertain a suit in rem against a ship on behalf of a charterer to whom the ship was chartered for successive voyages, where her owners had refused, after four voyages had been made, to complete the charter by making other voyages. In this latter case the claim did not arise in respect of any goods carried in the ship. The High Court of Admiralty has no jurisdiction under the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 6, or otherwise, over such suits, but it was contended in that court that such a jurisdiction was given to certain County Courts by the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), sect. 2. The learned judge of the High Court of Admiralty (Sir R. Phillimore) held that, although he was of opinion that the Act conferred the jurisdiction on the County Courts, he was bound by the decision of the Court of common Pleas in *Simpson v. Blues* (ante, p. 360; L. Rep. 7 C. P. 290; 26 L. T. Rep. N. S. 697) to decide that the County Courts had no jurisdiction and to dismiss the suits. The facts and judgments are set out in the report of the case below (ante, p. 360; 27 L. T. Rep. N. S. 64), and the sections of the Acts relied upon are set out in the judgment of the Judicial Committee. From this judgment of the Admiralty Court the plaintiffs in both suits (the respondents in the Admiralty Court) appealed to Her Majesty in Council on the ground that their claims were claims arising out of agreements made in relation to the use or hire of a ship, or in relation to the carriage of goods in a ship or were claims in tort in respect of goods carried in a ship within the meaning of the County Courts Admiralty Jurisdiction Amendment Act 1869. The two appeals were heard together.

Milward, Q.C., and Gainsford Bruce for the appellants in *Cargo ex Argos*.—The intention of the County Courts Admiralty Jurisdiction Acts (31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51), was to give to certain County Courts jurisdiction over certain causes on their admiralty side only, and to put an end to the difficulty arising from common law and admiralty jurisdiction existing in the same court. They provide that those causes over

which common law and admiralty courts have concurrent jurisdiction shall be in the County Courts admiralty causes only. The new jurisdiction under the first Act was co-extensive with that of the High Court of Admiralty up to a certain amount. The jurisdiction over "any claim for necessities" given by the first Act (sect. 3, subsect. 2) has been held to be the same as that possessed by the Admiralty Court.

The Dover, 22 L. T. Rep. N. S. 627; L. Rep. 3 Adm. & Ecc. 155; 3 Mar. Law Cas. O. S. 424; *Everard v. Kendall*, 22 L. T. Rep. N. S. 408; L. Rep. 4 C. P. 428; 3 Mar. Law Cas. L. S. 361;

Then in order to ascertain the meaning of the words "any claim for damage to cargo" in the Acts of 1868, giving jurisdiction to the county courts over such claims, the jurisdiction of the High Court must be considered; this jurisdiction is conferred by the Admiralty Court Act 1861 (24 Vict. c. 10) sect. 6, and if it appears that in that Act the words "damage to cargo" have a larger meaning than their ordinary sense would imply, that meaning must be applied in construing the County Courts Admiralty Jurisdiction Acts. Now "damage to cargo" is understood in the Admiralty Court as including all the claims over which the Admiralty Court has jurisdiction by sect. 6 of the Admiralty Court Act 1861. The marginal note to that section is "as to damage to cargo imported," and this has come to mean, rightly or wrongly, all the class of claims in sect. 6, and some effect is to be given to a marginal note, although it may not be absolutely binding: (*Olafsen v. Green*, L. Rep. 3 C. P. 511; 18 L. T. Rep. N. S. 607.) Such causes are referred to by Dr. Lushington as causes of damage to cargo: (*The Danish, Bro. & Lush*, 102; 9 L. T. Rep. N. S. 236; 1 Mar. Law Cas. 392), and that was a case of damage to cargo by short delivery. If the "damage to cargo" jurisdiction of the County Courts were confined to cases of actual damage done to goods, only part of the Admiralty Court Act, sect. 6, would be imported into the County Courts Admiralty Jurisdiction Act 1868, and the County Courts would have no jurisdiction in cases of breach of duty or breach of contract given by the former Act to the Admiralty Court. These latter claims can only be made in the Admiralty Court in respect of goods imported; (*The Kansas, Bro. & Lush*, 1), and are therefore included in the general term "damage to cargo." In *The Princess Royal* (L. Rep. 3 Adm. & Ecc. 27), which was a claim for breach of contract and duty, the suit was first instituted as a cause of "damage to cargo," and was afterwards amended to one of "breach of duty," but this was done at the instance of the plaintiffs, not of the defendant. We therefore submit that claims for breach of duty and breach of contract within the meaning of the Admiralty Court Act 1861, sect. 6, are included in the words "damage to cargo," and jurisdiction over such claims is given to the County Courts by the County Courts Admiralty Jurisdiction Act 1868, and that it was unnecessary to pass the Amendment Act 1869 to give such jurisdiction. Now, assuming that full admiralty jurisdiction was given to the County Courts by the former Act, the second Act must have extended the jurisdiction to some extent. Sect. 4 of that Act gives jurisdiction over all claims due to any ship by collision or otherwise, whilst the first Act gives only jurisdiction over claims for damage by collision. This is an

because the 9th section of the Act of 1868 does not apply to causes brought under the 2nd section of the Act of 1869, not being Admiralty causes; and if in such cases a plaintiff recovered in a Superior Court a sum exceeding 20*l.* in an action of contract, or 10*l.* in an action in tort, he would be entitled to his costs. There can be little doubt that the Judges would be inclined, if any conclusion can be drawn from recent decisions, to put such a construction upon this section as would most favor a plaintiff proceeding in a Superior Court in one of the class of causes over which it is now held that the County Courts have jurisdiction.—*Ed.*

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extension of jurisdiction, and to extend the jurisdiction is the whole object of the second Act. There is no attempt in *Simpson v. Blues* (*ubi sup.*) to distinguish between the two Acts, or to show that the second Act confers a different jurisdiction from the first. That case proceeds wholly on the ground of the inconvenience of the new jurisdiction. The decision expresses an opinion conflicting with that of this court, where it holds that the word "damage," as used in the Admiralty Court Act 1861 (sect. 7) does not confer jurisdiction over damage to persons, but only over damage to things. It approves of *Smith v. Brown* (*ante*, p. 56); but that case does not necessarily conflict with the case of *The Beta* (L. Rep. 2 P. C. 447), as the former related to a claim by the relatives of a person killed, the latter to a claim by a person injured claiming himself. Now, the whole course of Legislation with respect to County Courts has been to give to these courts a variety of limited jurisdictions, with appeals to those superior courts which have unlimited jurisdiction over the various subjects matter. The method of procedure is immaterial, the real object being to give jurisdiction over the subject matter. It is not material to consider where the appeals go, but in this case it is more convenient that all maritime questions should be brought before the Admiralty Court. [Sir M. SMITH.—If these are cases over which the Admiralty Court has no original jurisdiction, how do the appeals in them lie to that Court? They are not admiralty causes, and the Act of 1868, sect. 26, gives the right of appeal in admiralty causes only.] The two Acts are to be construed as one, and there is only one appeal; and as soon as a cause named in the second Act arises it becomes an admiralty cause, over which the County Court has jurisdiction within the meaning of the first Act. The distinction between admiralty and maritime causes in the second Act is only for the purpose of making the distinction between two sets of causes of one class. The term "maritime cause" is well known in the Admiralty Court, where causes are usually styled "civil and maritime." Recent legislation has had a tendency to give jurisdiction over all small claims to the County Courts, and the argument as to the injury sustained by shipowners by this enactment must be considered with the remembrance of this tendency. It must also be remembered that there is no appeal from a prohibition to a County Court by 18 & 20 Vict. c. 108, s. 42. (The rest of the appellant's argument was the same as that given in the court below. See *ante*, p. 360; 27 L. T. Rep. N. S. 64.)

W. G. F. PHILLIMORS (*A. Cohen* with him) for the appellants in *The Hewsons* (see argument below, *ubi sup.*).

The Admiralty Advocates (*Dr. Deane, Q.C.*), (*J. P. Murphy* with him) for the respondents in *Cargo ex Argos*.—If this extended jurisdiction is conferred in the County Courts then by sects. 6, 7, and 8 of the Act of 1868, these causes over which the Admiralty has no original jurisdiction, may be transferred to that court, so that, although the Admiralty Court has no original jurisdiction over breaches of charter-party apart from damage to cargo, yet by an order of transfer from a County Court it may hear and decide such claims. This is giving the Admiralty Court jurisdiction in a way never intended by the Legislature. The words of the Act of 1868, can be satisfied without

giving to the County Courts a more extensive jurisdiction than that possessed by the High Court under the Admiralty Court Act 1861, sect. 6. That sect. gives jurisdiction in two separate matters viz.: "Negligence and breach of duty or contract." *The Kasan* (*ubi sup.*) was a claim for damage done to the plaintiff in respect of goods, not for actual damage to the goods. The corresponding section of the Act of 1868, as to damage to cargo, contains no words which will embrace claims for breach of duty or breach of contract. The Act of 1869 can be satisfied by holding that the words of sect. 2 give jurisdiction to the County Courts over such claims. In the Admiralty Court Act 1861, sect. 6, the jurisdiction is limited by allowing claims to be made in that court only where the owner is not domiciled in England or Wales, but in these Acts there is no such limitation. If the larger construction is put upon the Acts of 1868, the County Courts will have a more extensive jurisdiction than the Admiralty Court; and the greatest inconvenience will arise to shipowners. If the same narrow construction be put upon this section as put upon the section of the Act of 1868, the inconvenience does not arise, and the jurisdiction accords with that of the Admiralty. The second Act deals with a new class of causes called maritime causes, but an appeal is given only in Admiralty causes. This must either be an Admiralty cause, and therefore to be restrained within the limit of Admiralty jurisdiction, or it is a maritime cause, and then there is no appeal to the Admiralty Court. (See also argument below: *ubi sup.*)

CLARKSON (*E. G. Gibson* with him) for the respondents in *The Hewsons*, after arguing as reported in the court below (*ubi sup.*).—A right of action on a bill of lading may be a right of action arising out of an agreement made in relation to the use or hire of a ship. Again there is a right of action in the Admiralty Court for a breach of duty on behalf of the vendor of goods against the master for refusing to deliver where the vendor stops *in transitu*: (*The Tigress*, Bro. & Lush. 38; 8 L. T. Rep. N. S. 117; 1 Mar. Law Cas. O. S. 323); and this is a breach of an agreement for the use and hire of a ship. Again, the wrongful sale of goods by the master of a ship is a breach of such an agreement: (*Schuster v. McKellar*, 7 E. & B. 704). The Admiralty Court often considers the terms of a charter-party in adjudicating on claims by owners of goods, as in the case of *The Norway* (Bro. and Lush. 226; 10 L. T. Rep. N. S. 40; 2 Mar. Law Cas. O. S. 17), which was a claim by the assignee of a bill of lading; but cases may arise where claims could be made by the owners or consignees of goods on the charter-party itself, apart from the bill of lading. As the Act of 1868 did not confer all this jurisdiction, the Legislature in the Act of 1869 used words of general character in order to give the same jurisdiction as that possessed by the Admiralty Court, but not to give more. The jurisdiction as to damage to ships given to the County Courts is not so extensive as that of the Admiralty Court, as they have only jurisdiction by the two Acts over damage by collision and damage to ships by collision or otherwise, so that they cannot entertain claims against ships for damage done by them to other things: (see *The Clara Killam*, 23 L. T. Rep. N. S. 27; 3 Mar. Law Cas. O. S. 463; L. Rep. 3 Ad. & Ecc. 161). It is improbable that a more extensive jurisdiction was intended to be

given to the County Courts in these cases when in other cases over which the Admiralty Court has jurisdiction, no jurisdiction has been given to the County Courts.

Gainsford Bruce, in reply.—In attempting to satisfy the words of the 2nd section of the Act of 1868, by giving to the County Courts the admiralty jurisdiction, the respondent runs counter to the judgment in *Simpson v. Blues* (*ubi sup.*), where it was held that the Admiralty Court has no jurisdiction over claims arising under a charter-party. In that case the judges adopt the construction put upon the Admiralty Court Act 1861, sect. 6, by Dr. Lushington, in *The St. Cloud* (Bro. & Lush. 4; 8 L. T. Rep. N. S. 54; 1 Mar. Law Cas. O. S. 309). [Sir M. SMITH: In *The St. Cloud* Dr. Lushington was only concerned with the definition of the term "assignee," and moreover he draws a distinction between "owners" and "assignees." In *The Tigress* (*ubi sup.*) it is distinctly shown that an owner of goods has a separate claim, and in many instances the claims of an owner of goods can arise only from his rights under a charter-party. The Court of Admiralty would have jurisdiction under the Admiralty Court Act, 1861, to entertain a claim by an owner of goods, although he did not claim under a bill of lading.] In *The Tigress* (*ubi sup.*) the plaintiff claimed in a bill of lading, which he had not parted with, and had presented to the master. A bill of lading is a contract for the carriage of goods, and a charter-party is an agreement for the use or hire of a ship; they are totally distinct, although they may refer to one another. The Admiralty Court has only jurisdiction over contracts for the carriage of goods, and therefore only over bills of lading. It is impossible to satisfy the words "use or hire of a ship" without holding that they refer to charter-parties, which are not within the admiralty jurisdiction. The restriction contained in the Admiralty Court Act 1861, sect. 6, as to domicile of the shipowner, cannot be applied to cases arising under the Act of 1869, as actions may be brought under that Act either against the shipowner, or owner of goods, or charterer; and as a charterer not resident here could not, unless he had goods on board the ship, be effectively sued in the County Courts, it would be absurd to limit the jurisdiction as to domicile.

Cur. adv. vult.

The judgment of the court was delivered by Sir MONTAGUE SMITH.—These are appeals from the judge of the High Court of Admiralty in two cases brought before him on appeal from the City of London Court and the County Court of Durham, in which, contrary to his own opinion, and in deference to the decision of the Court of Common Pleas, in the case of *Simpson v. Blues* (*ante*, p. 326; D. Rep. 7 C. P. 290) he reversed the judgments given by the courts of first instance in favour of the plaintiffs, on the grounds that these courts had no jurisdiction to entertain the suits, granting at the same time leave to appeal to her Majesty in Council. The two appeals involve substantially the same question upon the constructions of the County Courts Admiralty Jurisdiction Amendment Act 1869, and were argued together. In the first case (*Cargo of Argos*) the plaintiff instituted a suit for freight, demurrage, and expenses in the City of London Court by proceeding *in rem* against the goods, viz., 147 barrels of petroleum, which had

been shipped by the defendant in London on board the plaintiff's ship, the *Argos*, under a bill of lading making them deliverable at Havre to order or assigns. It was alleged that the French authorities at Havre having refused to allow the petroleum to be discharged at that port, the *Argos* endeavoured to land it at Honfleur and Trouville, but not being permitted to do so, took it back to London. The claim was for freight, back freight, demurrage, and expenses. Various defences were made, but it is sufficient, having regard to the advice which their Lordships propose to tender to Her Majesty, to indicate the nature of the suit without entering further upon the facts. The suit was heard upon the merits in the City of London Court, and also on appeal in the Court of Admiralty, without any objection on the ground of want of jurisdiction; but, pending the consideration of the judgment on appeal, the case of *Simpson v. Blues* was decided. The learned judge then directed the question of jurisdiction to be argued before him, and ultimately, in deference to the opinion of the Court of Common Pleas, whilst declaring his own opinion to be otherwise, reversed the judgment without giving any decision upon the merits. In the other case (*The Hewsons*) the parties were reversed. The suit was instituted by the plaintiff, the charterer, against the owner of the ship by proceeding *in rem* for a breach of the charter. The plaintiff had chartered the ship for successive voyages from Hartlepool to the Elbe during a definite period. It was complained that after the ship had performed four voyages her owners refused to complete the charter by making others pursuant to its terms. In this case an objection to the jurisdiction was made in the County Court but overruled, and judgment given for the plaintiff upon the merits against one of the defendants. The question turns upon the proper construction of the County Court Admiralty Jurisdiction Amendment Act 1869, by which jurisdiction is given to County Courts (appointed to have admiralty jurisdiction) to try and determine causes (amongst others) "as to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship," provided the amount claimed does not exceed 300*l.* The broad contention on the part of the respondent, is that this statute has given to the County Courts no more than a portion or branch of the existing jurisdiction which the Court of Admiralty then possessed; and if this be the scope and true meaning of the statute, the objection made to the competency of the County Courts to entertain these suits must prevail, because it is plain that the Court of Admiralty itself had not, in virtue of any authority derived either from the Crown or from Parliament, any original jurisdiction over such suits. This last proposition was not controverted on the part of the appellants; but it was contended that the Act of 1869 has intentionally given a new and enlarged jurisdiction to the County Courts appointed to have admiralty jurisdiction, over subjects of claim beyond those cognisable by the Court of Admiralty. It was not, on behalf of the respondents, denied that the language of the statute is large enough to include the present claims; but the contention at the bar was, that it may be collected from the Act itself, when read with the first statute conferring on the County Court admiralty jurisdiction, that the Legislature intended no more by the second Act than to give

[PRIV. CO.]

CARGO ON ARMS—THE HEWSONS.

[PRIV. CO.]

the County Courts a further part of the existing jurisdiction belonging to the Court of Admiralty which had been omitted from the first Act; and that the wide language of the enactment must be so construed as to limit its operation to this object. The question is thus raised, whether, by the legitimate application of recognised rules of interpretation, this intention can be collected from the statute with such distinctness as to justify a construction so greatly at variance with the ordinary and natural meaning of the words employed by the Legislature. The County Courts Admiralty Jurisdiction Act 1868, for the first time gave any admiralty jurisdiction to the County Court. That Act empowered the Queen in Council to appoint any County Court to have admiralty jurisdiction, and to assign districts to such courts within which it might be exercised. It then enacts that any County Court having admiralty jurisdiction shall have jurisdiction to try and determine certain causes, which in the Act are referred to as "admiralty causes," and among them in the words of the statute:—"As to any claim for damage to cargo, or damage by collision . . . in which the amount claimed does not exceed 300*l*." The 6th clause of the Act authorises the Court of Admiralty to transfer any admiralty cause pending in a County Court to itself, and the 8th clause enables the County Court judge so to transfer causes. By the 26th section an appeal from the judgments of the County Courts in Admiralty causes is given to the High Court of Admiralty. A further provision is made by the 7th section directing the judge of the County Court, in case, during the progress of an admiralty cause, it should appear that the subject-matter exceeded the limit of amount, to transfer the cause to the Court of Admiralty, which is empowered either to retain or remit it to the County Court. It appears to be agreed that this Act gave to the County Court no more than a portion, limited as to subject-matter and amount, of the jurisdiction then actually possessed by the High Court of Admiralty. The provisions above referred to are all consistent with what appears to be the scheme of the Act, viz., to confer on selected County Courts certain portions of the jurisdiction then belonging to the High Court of Admiralty to be exercised by them sub-ordinately to the High Court. The original jurisdiction of the Court of Admiralty (using that term to distinguish it from that given to the court by modern statutes) as it was understood to stand after the long and memorable conflicts with the Courts of Common Law, which virtually closed in the reign of Charles II, did not extend to claims arising upon charter-parties, bills of lading, or other agreements relating to the use or hire of ships, or the carriage of goods. Before, however, the passing of the County Court Acts of 1868 and 1869, the Court of Admiralty had, by statute, acquired a partial and limited jurisdiction over certain contracts relating to the carriage of goods. "The Admiralty Court Act 1861" (24 Vict. c. 10), which was passed "to extend the jurisdiction and improve the practice of the High Court of Admiralty," enacts (section 6) "that the court shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales, in any ship, for damages done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of

contract on the part of, the owner, master, or crew of the ship;" unless it was shown to the satisfaction of the court that, at the time of the institution of the suit, any owner or part owner of the ship was domiciled in England or Wales. The Court of Admiralty thus acquired jurisdiction over some claims arising out of contracts relating to the carriage of goods in ships, but in a very partial and limited manner. The jurisdiction is confined to claims by the owners, &c., of goods, and to cases where the goods are brought into an English port, and no owner or part owner of the ship is domiciled in England. No jurisdiction is given in the converse case of claims by the owner of the ship against the owner of the goods, and no jurisdiction whatever is given in the case of claims arising out of charter-parties or other agreements for the use or hire of ships. This was the state of the jurisdiction of the High Court of Admiralty in relation to claims arising upon contracts for the carriage of goods when the County Courts Acts of 1868 and 1869 were passed. It has already been shown that the Act of 1868 gave to County Courts only a partial and limited jurisdiction to try and determine "Admiralty Causes," relating to "any claim for damage to cargo," in which the amount did not exceed 300*l*. Their Lordships now come to the consideration of the Act of 1869. They will, in the first place, examine the enactment itself which is to be construed. It was enacted (sect. 2) "that any court appointed to have admiralty jurisdiction" (these words are descriptive only of the court) "shall have jurisdiction . . . to try and determine the following causes—as to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of any goods in any ship." This enactment, taken by itself, is certainly plain and intelligible, and the language is free from ambiguity. The described courts are to have jurisdiction to try and determine causes relating to certain claims. The first head of claims is, "any claim arising out of any agreement made for the use or hire of any ship." These words plainly and in apt language describe contracts for the use or hire of ships, e.g., charter-parties, and not agreements for the mere carriage of goods, which are described and provided for in the next branch of the enactment thus: "or in relation to the carriage of goods in any ship." Now, if the contention is allowed to prevail that no jurisdiction was conferred on the County Courts by this Act beyond that belonging to the Court of Admiralty, the consequence would be that no operation would be given to the first branch of the enactment relating to claims arising out of agreements for the use or hire of any ship, for the Court of Admiralty had no jurisdiction, either originally or by statute, over such claims. There appears to their Lordships to be great difficulty in an interpretation which would nullify this first and important branch of the enactment, and practically cut it out of the statute; and if this cannot legitimately be done, it would follow that some new jurisdiction beyond that possessed by the Court of Admiralty was given to the County Courts; and if any were so given, the whole contention of the respondent, which rests on the hypothesis that no such new jurisdiction was conferred, necessarily fails. The words which describe the second head of claim, viz., "any claim arising out of any agreement in relation to the carriage of goods in any ship," are

clearly wide enough to comprehend claims, as well on the part of the owners of ships as the owners of goods; thus again, in terms at least, going far beyond the partial jurisdiction given to the Court of Admiralty by the Admiralty Court Act 1861, in favour only of the owners of goods. It cannot be denied that it was intended by the Act of 1869 to give to the County Courts some new jurisdiction over claims arising out of agreements between shipowners and merchants beyond that bestowed on them by the Act of 1868, which gave jurisdiction only over "any claim for damage to cargo," but it was contended for the respondents that these last words, not being sufficiently large to include all the jurisdiction given to the Court of Admiralty by the Admiralty Act 1861, in favour of the owners of cargo, the Act of 1869 was passed merely to supply this deficiency. If this were really meant to be the limited scope of the second Act, it is reasonable to suppose that the language of the Admiralty Court Act 1861, would have been followed, or at all events that some words would have been used to indicate this limited intention. It seems scarcely conceivable, if the only object of the County Courts Act 1869 had been to give the County Courts so much of the partial and limited jurisdiction of the Admiralty Court Act 1861, as had not been included within the Act of 1868, and no more, that the wide language actually found in it should have been employed—language which describes with accuracy entirely new heads of claims, viz., those arising from agreements relating to the use and hire of ships, and claims by shipowners in relation to the carriage of goods, which had no place in the Admiralty Court Act 1861. It was contended for the appellants that, besides these considerations, the context of the Statute of 1869, really supported, or was at the least consistent, with the presumption of an intention to give the new jurisdiction, which the language of the enactment, taken by itself, would undoubtedly confer. Differences in the language and provisions of the Acts of 1868 and 1869 were relied on in support of this contention which appear to be deserving of consideration. The causes described in the Acts of 1869 are referred to as "admiralty causes," whereas in the 2nd section of the Act of 1868, which gives the new jurisdiction, the descriptive word is "causes" only. Again, the 5th section of the Act of 1869 empowers the judge to appoint "mercantile assessors," in any admiralty or maritime cause. In a technical sense, admiralty causes are no doubt maritime causes, but the latter word (maritime) is introduced for the first time in the second Act, as if to designate causes which could not be strictly referred to as admiralty causes. The power itself to appoint mercantile assessors, given for the first time, may not unreasonably be regarded as an indication that the Legislature really intended to confer enlarged mercantile jurisdiction upon the County Courts, in which the experience of merchants would be useful to the judges. On the other hand, their Lordships have felt the full force of the contention that, having regard to the general tenor and provisions of the two County Courts Acts, it ought not to be presumed that the Legislature intended to give these courts a large jurisdiction over mercantile causes not possessed by the Court of Admiralty itself, under the guise of maritime jurisdiction. Very strong grounds certainly exist against making such a

presumption, if the construction of the Act depended on an implication from language capable of two meanings. The second County Court Act is directed to be read and interpreted with the first; and the first, so far at least as it relates to claims arising out of contracts for the carriage of goods, did not confer more, if so much, jurisdiction, on the County Courts as the Court of Admiralty possessed under its own Act of 1861. The Act of 1869 is, in some respects, a supplement to that of 1868, and it might not be unreasonable to suppose that the Legislature only intended to give by the second Act further admiralty jurisdiction, properly so called. The new mercantile jurisdiction in question, if conferred, certainly established an eccentric system of procedure, calculated, in its operation, to lead to anomalous and inconvenient results. In the first place, it confers on the County Courts appointed to have admiralty jurisdiction, power to determine important mercantile causes up to the value of 300*l.*, which are not within the jurisdiction of the Court of Admiralty itself, and properly belong to the domain of the Common Law Courts. The appeal is given not to the courts which have jurisdiction over such causes when they exceed 300*l.* in value, but to the Court of Admiralty, which has not; and power is conferred on that court to transfer the causes to itself, and determine them, although possessed of no original jurisdiction to try them. One consequence of this legislation must obviously be to increase the risk of conflicting decisions on important questions of mercantile law, inasmuch as the determination of these questions when the value is above 300*l.* will belong to the Queen's Superior Courts of Law and Equity and to the Courts of Appeal from them; and when below that amount, to the County Courts and to the special appellate jurisdiction provided by the Act. A further anomaly, which may lead to practical inconvenience, arises from the fact that claimants within the limit of 300*l.* may seize the ship or cargo (as the case may be) by proceeding *in rem*, whilst those above the limit have no such power. This difference in remedy involves much more than a distinction in procedure, and may, among conflicting claimants, lead to inconvenience, if not to undue advantage to some, and prejudice to others. It is, however, to be observed that some of these anomalies must still exist, even if the construction of the Act be limited. The County Courts would still have jurisdiction over claims by owners of cargo in certain cases, and over claims of damage caused by collision up to 300*l.*, with the power of proceeding *in rem*, and with an appeal to the Court of Admiralty; although, no doubt, the great anomaly of giving admiralty procedure to the County Courts in causes which the Court of Admiralty itself could not entertain, does not exist in these cases. Their Lordships, whilst fully appreciating the effect of the anomalies and inconvenience above referred to, and of others which are pointed out with great force in the judgment of the Court of Common Pleas in the case of *Simpson v. Blues*, still feel the difficulty of limiting, by judicial construction, the plain and unambiguous words of the statute, especially when one of the consequences of the limitation must be, to leave without operation the important branch of the enactment relating to agreements for the use and hire of ships. Even in case where words are

ambiguous and capable of two constructions, the rule is to adopt that which would give some effect to the words rather than that which would give none. The rule declared by the judges in delivering their opinion to the House of Lords in the *Sussex Peerage* case (11 Cl. & Fin. 143) appears to be applicable to the present statute. It is as follows: "The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound these words in their ordinary and natural sense. The words themselves alone do in such case best declare the intention of the law-giver." The words of the present statute are precise and unambiguous, and, in spite of the anomalies pointed out, it would be difficult to say that, when construed in their natural and ordinary sense they lead (to use the words of Parke B., 2 M. & W. 195) "to manifest absurdity," and must therefore be qualified. The Legislature, having regard to the convenience of speedy remedy and decision, when witnesses were on the spot and available, may have considered that the County Courts which in maritime districts were appointed to have admiralty jurisdiction, and which under the first statute possessed a partial jurisdiction over mercantile agreements relating to cargo, might be entrusted to determine, with the aid of mercantile assessors, other mercantile and maritime causes relating to charter-parties, bills of lading, and similar agreements up to the value of £300; and they may further have thought that, as these County Courts were invested with admiralty procedure, the new causes should be dealt with as admiralty causes, and the appeal should go to the Court of Admiralty. If such really was the intention of the Legislature, however it may be regretted by those who value the symmetry of legal procedure, it has certainly used apt, precise, and unambiguous words to define the new causes it meant to add; and their Lordships find themselves unable to affirm that the Legislature did not mean what it has plainly said. The cases which were cited, with the exception of *Simpson v. Blues*, throw little light upon the construction of this peculiar statute. The rule that the generality of the words of a statute may in some cases be restrained by evidence of intention to be collected from other parts of it, has been indeed applied to the construction of statutes in *pari materia* with the Act in question: (See *The St. Cloud*, *The Douce*, *Everard v. Kendall*, *Smith v. Brown*, cited *supra*.) But in all these cases there were subjects to which the words were properly applicable, and which would satisfy them, when construed in a limited sense. It should be observed that in *The Douce* (*ubi sup.*) the present learned judge of the Admiralty distinguished the second County Court Act from the first in the same way as he had done in the judgments now under appeal, and that in the case of *Smith v. Brown* (*ubi supra*) Mr. Justice Blackburn doubted as to the correctness of the decision, although the words in that case were much more capable of receiving, properly and without violence, a limited construction than those of the Act now in question. Their Lordships have felt that the judgment of the Court of Common Pleas in *Simpson v. Blues* (*ubi sup.*), is entitled to great consideration, from the authority due to the court, and the force with

which the reasons for the decision are stated; and they would have been glad to have been able to rest upon it. The Queen's ordinary courts of law, which hold the power of prohibition, must in the end decide the questions of jurisdiction; and when their opinion has been fully declared, it must and ought to be acquiesced in; but if, when the question has been brought before them on appeal, their Lordships now yielded to the decision of the Court of Common Pleas, they would in effect conclude an important question of jurisdiction in a manner contrary to the opinion of the judge of the High Court of Admiralty, and, as at present advised, their own, upon the authority of the judgment of one only of the Common Law Courts, pronounced on a summary application, from which there was no appeal. They think, before this conclusion is reached, an opportunity should be given for further consideration of the statute. They will therefore think it right to advise Her Majesty to remit the causes to the judge of the Court of Admiralty, to be disposed of on the merits. The parties will be enabled, if so advised, to make proceedings which may lead to pleading in prohibition. It was suggested in the argument that, "if maritime" causes in the Act of 1869 meant suits different from admiralty causes, such suits were not within the Appeal Clause (Section 26) of the Act of 1868, which gave an appeal only in "admiralty causes." The word "maritime" is very vaguely used in the second Act, possibly to indicate causes other than admiralty causes properly so called, and probably with no reference to the fact that admiralty causes are technically styled "maritime." However this may be, it certainly seems to have been intended, by the scheme of the Act, to treat these new maritime causes as admiralty causes, and that the appeal should be to the Court of Admiralty. Indeed, the fact that the appellate jurisdiction would belong to that court has been strongly relied on to support the limited construction contended for by the respondents. It is unfortunate that a statute dealing with important questions of jurisdiction largely affecting commercial disputes, should be so framed as to afford ground for doubt and conflicting interpretations; and the Legislature may perhaps think it right to remove, by some explicit declaration, the inconvenience thus created. In the result, their Lordships will humbly advise Her Majesty to reverse the judgments appealed from, and to remit both causes to the High Court of Admiralty. They think the parties should bear their own costs of these appeals.

Appeals allowed and causes remitted.

Solicitors: Cattara, Jehu, and Cattara;
Heather and Son; Dyke and Stokes; Clarkson
Son and Greenwell.

[CHAM.]

THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY v. JAMES.

[CHAM.]

COURT OF APPEAL IN CHANCERY.Reported by E. STEWART BOCHER and H. PRAT, ESQ.,
Barristers-at-Law.

Wednesday, Dec. 4, 1872.

(Before the LORD CHANCELLOR (Selborne) and the
LORDS JUSTICES.)THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY
v. JAMES.*Limitation of liability—Merchant Shipping Act
Amendment Act 1862 (25 & 26 Vict. c. 63), s. 54—
Loss at sea—Railway company also shipowner—
Carriers—Contract—Injunction.**A passenger took a through ticket at a railway
station from London to Guernsey. The sea part
of the journey was performed in a ship belonging
to the railway company, which came into collision
with another ship during the passage, causing a
considerable delay, and the loss of the passenger's
luggage:**Held (reversing the decision of the Master of the
Rolls), that the company, as shipowners, were
within the protection of the Merchant Shipping
Act Amendment Act 1862, sect. 54, which limits the
liability of shipowners.**Injunction accordingly granted to restrain an action
at law by the passenger against the company on
the contract for the loss of his luggage.**Other actions had been brought against the company
for damage to goods, for damage done to another
ship which was run into, and for compensation for
loss of life under Lord Campbell's Act (9 & 10
Vict. c. 93):**Held (affirming the decision of the Master of the
Rolls), that the company was entitled to injunc-
tions to stay these actions.**This was an appeal from a decision of the Master
of the Rolls.**On the 17th March 1870, the Normandy, a ship
belonging to the London and South-Western Rail-
way Company, came into collision with the ship
Mary, when the latter was sunk, and nine of the
crew and passengers lost their lives, and the lug-
gage and cargo were lost, as was also some of the
luggage in the Normandy, including that of the
defendant James.**The Court of Admiralty held that the Normandy
was to blame for the collision, but decided, on the
petition of the company, that it was only answer-
able in damages to an amount not exceeding 6376*l.*,
or 15*l.* per ton on the registered tonnage of the
ship, as provided by the 54th section of the Mer-
chant Shipping Act Amendment Act (25 & 26
Vict. c. 63), and that amount was accordingly
paid into court by the company: (See 3 Mar. Law
Cas. O. S. 519.)**The defendant James, who had taken a through
ticket from Waterloo Station to Guernsey, and
had lost his luggage in the collision, brought
an action (in which he obtained judgment)
against the company, in respect of the breach of
contract to carry him and his luggage from
Waterloo Station to Guernsey, and he contended,
that as the company had entered into that contract
as carriers, their liability could not be limited
under the Merchant Shipping Acts.**Actions were also brought against the company
by the defendants, Messrs. Milburne and Co., and
others, for loss of goods; by the owners of the
Mary, who were defendants to this suit, for
damage to that ship; by the defendant Catherine**Jackson, as widow and administratrix of her hus-
band, who lost his life in the collision, for compen-
sation under Lord Campbell's Act (9 and 10 Vict. c.
93), and by several other persons. In some of these
actions judgment had been recovered.**On the application of the company, the Court of
Admiralty granted an injunction to restrain all
these actions, but the Court of Exchequer decided
that the Court of Admiralty had no jurisdiction to
restrain them, and issued a prohibition: (See *Mil-
burne v. The London and South-Western Railway
Company*, 3 Mar. Law Cas. O. S. 491; *James v.
The London and South-Western Railway Company*,
ante, pp. 226, 428.)**Thereupon the company instituted the present
suit to restrain the defendants from proceeding
with their actions until the liability of the company
had been ascertained under the Merchant Shipping
Acts.**On a motion for an injunction, the Master of the
Rolls held, with regards to James's actions, that
as the company filled the double character of
carriers by land and also owners of the Nor-
mandy, the contract in respect of which he sued
was distinct from any question of damages to
which the company might be liable as shipowners;
that the Merchant Shipping Acts did not apply to
his case, and that the motion, as against him, must
be refused, and that he should be at liberty to
proceed with his action. With regard to the other
actions, his Lordship granted an injunction to
restrain execution.**From this decision the company appealed.**The appeal motion came on for hearing before
the Lords Justices before last Long Vacation, but
feeling some difficulty about the case, they desired
it to be heard before the full Court of Appeal.**It accordingly now came on for hearing.**Sir R. Baggallay, Q.C., Wood, Q.O. (of the
Common Law Bar), and Loebeck Webb, for the
appellants.—The appellants are entitled to an
injunction against James as well as against
the other defendants. They are shipowners,
and entitled to the protection of the 54th
section of the Merchant Shipping Act Amend-
ment Act. If the company had issued two
tickets, one from Waterloo Station to Southampton,
and another from Southampton to Guernsey, there
could be no doubt that the company would have
been entitled as shipowners to have their liability
limited, in accordance with the provisions of the
54th section. What difference can it make that,
for the convenience of their passengers, they issued
a through ticket for the entire journey? They referred**Pianciani v. The London and South-Western Railway
Company*, 18 C. R. 220;*Le Conneur v. The London and South-Western Railway
Company*, 13 L. T. Rep. N. S. 325; L. Rep. 1 Q. B.
54;*Baerendale v. The Great Eastern Railway Company*,
L. Rep. 4 Q. B. 225;17 & 18 Vict. c. 104, *partim*, ss. 502, 503;

24 Vict. c. 10, ss. 7, 13;

25 & 26 Vict. c. 63, s. 54.

*W. G. Harrison (of the Common Law Bar) and
C. T. Simpson (with them Southgate, Q.C.) for the
defendant James.—We entered into the contract
with the company as carriers by land, and the
Merchant Shipping Act Amendment Act 1862,
cannot affect our rights under the contract. That
Act can only apply to contracts made with ship-
owners as such. They referred to*

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THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY v. JAMES.

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Witley v. The West Cornwall Railway Company, 27 L. J. 181, Ex.;

Muschamp v. The Lancaster and Preston Junction Railway Company, 8 M. & W. 421;

The Common Law Procedure Act 1860, s. 33.

Balhurst, for two members of the firm of Milburne and Co., who had become bankrupt, contended that they ought not to have been made parties to the suit.

Russell Roberts, for two other members of the firm, supported the same contention.

Miller, Q.C., and Kelly, for the owners of the *Mary*, referred to

The African Steamship Company v. Swanzy, 1 K. & J. 326-328; s. a. on app. 2 K. & J. 660.

Oppenheim (of the Common Law Bar), for Mrs. Jackson.—We are entitled to have our damages assessed by a jury:

Lord Campbell's Act (9 & 10 Vict. c. 93), ss. 1 & 2;

Smith v. Brown, ante p. 50; 24 L. T. Rep. N. S. 808;

L. Rep. 6 Q. B. 729, 733.

He also referred to

The Bala, 20 L. T. Rep. N. S. 983; L. Rep. 2 P. C.

447; *Glahelm v. Barker*, 2 Mar. Law Cas. O. S.

200, 298, 380; 14 L. T. Rep. N. S. 380; L. Rep. 1

Ch. 223.

Sir R. Baggallay, Q.C., was heard in reply.

THE LORD CHANCELLOR (Selborne).—We all think that the proper course will be to grant the injunction as asked in this case, upon the terms that have been mentioned—the payment of costs, including the costs of appeal, but only one set of costs to the bankrupts, who, perhaps, strictly speaking, ought not to have appeared at all, but as their trustee did not appear, we think it right to give them one set of costs. With regard to the main question in the case, of course it will be understood that, so far as Mr. James is concerned, it relates only to that particular kind of loss and damage which is within the language of the Act, that is, the loss of his luggage, but the principle applies to all goods lost by any persons whose goods were being carried on board this vessel. It has been faintly, if at all, argued that the limitation of liability, by the 54th section of the Act, has no application to the cases of persons and goods carried by the shipowner as a carrier in his ship. Mr. Harrison did indeed suggest the possibility of putting so very limited a construction as that which would exclude every case in which the shipowner was a carrier, but he was not in that respect followed by Mr. Simpson, and we think with very good reason, because it is manifest that the ordinary case—or at least one of the most ordinary cases in all contracts of affreightment is that the shipowner carries on board his ship, and the very language occurring in the Act, appears to me to show that the ordinary case—was not excluded, and every case, whether the owner was carrier or not, where the owner would be liable, was intended to be within the relief given to the owner by this Act. Supposing that to be so, then I do not understand that it was intended at all that, if this particular contract had been in terms to carry by railway to Southampton, and from Southampton by the ship *Normandy*, belonging to the railway company, to Jersey or Guernsey, the limitation of liability should not apply. But, as has been said by Lord Justice Mellish, in the course of the argument, it is not the ordinary course in a contract of affreightment, or in a bill of lading, to state upon the face of the instrument to whom the ship belongs. It cannot, therefore, possibly have been the intention of the Legislature to make

that applicable in order to give the remedy to the shipowner, when the shipowner was in fact the carrier, and the person liable. In this particular case the shipowner was in fact the carrier and the person liable; and, not only so, but if it be material to go further, and see whether the persons, who were or whose goods were conveyed, actually with their own knowledge entered into a contract for conveyance by one of the company's own vessels, it appears to me to be the just and proper inference from the facts, which are not in dispute in this case, that it was so, because for a long course of years the company, under lawful authority, had been carrying passengers from the port of Southampton by their own steam vessels, of which this was one; nor is it suggested that they ever carried in any other manner; and when they issue public advertisements for many years, as to a regular communication, with the times and places of departure of their steam vessels, and so forth, although it might be possible that they might fulfil their contract otherwise, yet *prima facie*, and in the natural course of things, it was rather to be presumed that they would do it by their own ships than otherwise; and anyone dealing with them in that course of dealing is, I think, rather to be taken as believing and knowing that which they actually knew, and that which is the actual course of business. Add to that fact that the terms, "The Royal Mail Steamships," are, as I understand, proved by the evidence, as they are stated in the bill, to be the terms by which the company's steam vessels, which carry the mails of the Crown, were called and commonly known, this being one of them, and upon the face of the ticket, in this particular case, the words "Royal Mail" occur, showing that the contract is to carry the passengers by the mode of conveyance known by that term, it seems to me to be exactly the same thing as if the particular ship had been mentioned. It is hardly necessary to carry it the next step further, which is this—if it were supposed to be left uncertain how the contract was to be fulfilled, as a matter of fact both the passenger and the company concur in the fulfilment of it by one of the company's own vessels. It appears to me, therefore, that this is a case of a claim against the carrier or owner, and that within the plain meaning of the Act. For this reason, I am of opinion that, as far as the principle is concerned, the appeal is right, and that as far as the particular case of the loss of life is concerned, the 54th section shows plainly that it was intended to give this court full jurisdiction in such cases, and not only where there had been an ascertained liability in respect of loss of life, but where one is alleged to have been incurred, and again where it might be not only known, but apprehended, that other claims of the same sort might come; for the power is given to the court in all these cases to determine the amount of liability, and also to suspend all questions and suits pending in any other court in relation to the same subject matter, and to do this in such manner, and subject to such regulations and so forth, as the court may think fit. Is there any reason of practical convenience which makes it better to direct that nine actions shall proceed in these cases of loss of life—Is there any reason which makes that more convenient than to refer the whole matter for inquiry to chambers, where it will be ascertained in how many of those cases there is a real contest which may require a deci-

sioo, it may be with a jury or it may be without? Upon that subject I say nothing at present. But the experience of the case that has already taken place I understand, of *Glaholm v. Barker* (3 Mar. Law Cas. O. S. 200, 298, 380; 34 Beav. 305), shows that where about the same number of cases of the same kind existed, they were all in fact settled in chambers without incurring further expense. It appears to me that the wiser and better course would be to refer the whole matter for inquiry to chambers, it being entirely in the power of the court, if it should eventually appear necessary, to determine any question of that kind by the opinion of a jury.

Lord Justice JAMES.—I am of the same opinion. I think it right to add that the difficulty which pressed on me when the matter was partly argued before the Lords Justices afooe, was satisfactorily answered, by the observation of Sir Richard Baggallay, that it was a difficulty arising from suggesting a number of hypothetical cases in which it might be difficult to apply the law; and I agree that it is not the legitimate mode of dealing with a case which is clearly within the words and meaning of the Act of Parliament, by suggesting that there may be other cases in which it might be difficult or impossible to apply the Act. The Act does clearly apply, both in words and in spirit, to the case actually before us.

Lord Justice MELLISH.—I am also of the same opinion. The case clearly comes directly within the words. The London and South-Western Railway Company were owners of the ship *Normandy*, and they are sued by Mr. James to recover damages in respect of the loss of goods which were being carried on board that ship. The case being directly within the words, it ought to be held to be governed by them, unless it is clearly not within what was the scope and intention of the Legislature in passing the Act. But what was the scope and intention of the Legislature in passing the Act? Ever since the reign of George II. there has been a limitation on the liability of the owners of ships. It has been thought a matter of public policy to encourage persons of capital to embark their capital in ships by limiting the liability that they might incur by the loss of goods, which I think previously to Lord Campbell's Act was the principal liability. It was thought expedient to limit their liability, because a ship may carry goods of enormous value; it may carry gold, for instance, from California, to the value of a million of money, and then, from some trifling act of neglect on the part of the master, or on the part of the man steering the vessel, the shipowner might be made liable to that enormous liability. On that account the Legislature thought it was for the public advantage that there should be this limit on their liability. Why does that not apply to the case before us? The London and South-Western Railway Company are encouraged by that limitation of liability to embark in the trade of carrying passengers and goods between Southampton and Jersey as shipowners. I do not understand what the grounds are upon which it is said that they are not to have the benefit of the provisions of this Act. The ground put by the Master of the Rolls is simply this, that the passenger takes a through ticket from London to Jersey. It is admitted on all hands that if the passenger had taken a ticket from London to South-

ampton, instead of from London to Jersey, and then when he got to Southampton had walked on board the ship, and had gone as a passenger to Jersey, then he would be subject to this limitation of liability. What possible object can there be in holding that in order that the company may avail themselves of this limitation of their liability, they must deprive all their passengers of the benefit of paying for their tickets at one time, instead of paying on two different occasions? In my opinion, the case is both within the words and within what I think was the spirit of the Act.

Solicitor for the appellants, L. Crombie.
Solicitors for the respondents, J. Rae; Franklyn; Philip and Behrend; Joel Emmanuel.

COURT OF QUEEN'S BENCH.

Reported by J. SHORT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Nov. 8, 1872; Jan. 25, 1873.

STEWART V. WEST INDIA AND PACIFIC STEAMSHIP COMPANY.

General average—Loss to cargo by water let into ship to extinguish fire—British custom—Agreement to be bound by custom.

A vessel, having loaded a cargo, was about to sail to her port of destination, when a fire broke out in the forehold. Every effort was made to extinguish the fire by playing water down the hatchways and through holes cut in the fore-castle deck; and this not being sufficient to subdue the fire, a hole was cut in the side of the ship, and her fore compartment was thereby filled with water. The fire was in this manner extinguished, and if this course had not been taken the remaining cargo (a portion having been discharged into lighters) would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck. The water poured into the ship having destroyed certain bark (part of the cargo) shipped on behalf of the plaintiff under bills of lading containing the words "average, if any, to be adjusted according to British custom."

Held, that the loss of the plaintiff's bark was properly the subject of a general average contribution, being a voluntary and intentional sacrifice of the bark, made under the pressure of imminent danger, and for the benefit and with a view to secure the safety of the whole adventure then at risk; but, it having been hitherto the practice of British average adjusters to treat a loss occasioned by water in the manner above described as not a general average loss, the plaintiff in the present case was precluded from recovering by the words of the bills of lading providing that average, if any, should be "adjusted according to British custom."

Nimick v. Holmes (25 Pennsylvania St. Rep. 366) followed and approved.

THIS was an action brought in respect of the loss of certain bark shipped on board the defendants' steamship *Veneruelan*, and consigned to the plaintiff; and by consent of the parties the following special case, without pleadings, was stated for the opinion of the court:—

1. The plaintiffs are merchants carrying on business at Manchester under the style or firm of Robert Barbour and Brother. The defendants are a company and registered pursuant to the pro-

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visions of the Companies' Act 1862, and are the owners of vessels trading regularly between the United Kingdom and the West Indies and South America, and amongst others of the steamship *Venezuelan*.

2. On the 19th Sept. 1871 the defendants' steamship *Venezuelan* left Liverpool with a general cargo of merchandises on a voyage to the West Indies. She arrived on the 8th Oct. at St. Thomas, and after discharging her cargo for that port proceeded on her voyage to the ports of Curacao, Santa Martha, Savanilla, and Colon, and having called at Curacao and there delivered her cargo for that place, came to an anchor in the port of Santa Martha on the 16th Oct. The *Venezuelan* after discharging at Santa Martha all her cargo for that port took on board there a general cargo of produce and merchandises for Savanilla, Colon, London, and Liverpool.

3. The general cargo so taken on board the *Venezuelan* at Santa Martha consisted of goods shipped by various persons, and amongst these goods were 180 serons of bark which were shipped on behalf of the plaintiffs for carriage to London under the terms of two bills of lading, one for 100 and the other for 80 serons. These bills of lading were in the same form, and the following is a copy of the one comprising the 100 serons:—"Shipped in good order and condition by Mr. Ide Mier, of Santa Martha, in and upon the good steamship or vessel called the *Venezuelan*, whereof Bremner is master for this present voyage, or whoever else may go as master, now lying in or off the port of Santa Martha, 100 serons bark covered by consignee's open policy of insurance, being marked and numbered as per margin, and to be delivered in the like good order and condition, subject to the terms and conditions stated in this bill of lading which constitutes the contract between the shippers and the company, unto Messrs. Robert Barbour and Brother, of Manchester, or to his or their assigns, at the port of London or so near thereunto as steamers may safely get; freight to be paid at the port of destination of the goods (without any deduction, and before the delivery if required) upon the gross weights or measurements taken on the landing of the goods from the above-named steamer as per present tariff issued by the West India and Pacific Steamship Company (Limited) unless otherwise specially stipulated in the margin hereof; average, if any, to be adjusted according to British custom. The company reserves to itself liberty for the steamers to sail with or without pilots, to tow and assist vessels in all situations, to proceed to the port stated in this bill of lading and any other port or ports in any order or rotation, whether in or out of the customary or advertised route, without the same being deemed a deviation, whatever may be the reason for calling at or entering such port or ports, to tranship or land and reship by lighter or otherwise the goods at the port of shipment and transshipment or at any port or ports, or into any other steamer or steamers, or to forward them from any port or ports by railway and land and water conveyance to port of destination; also to discharge the goods from the steamer as soon as she is ready to unload into hulk or temporary depot or lighter, or on a wharf at the shipper's or consignee's risk and expense after they leave the ship's deck. The company is not liable for any loss or detention of or damage or injury to the goods or the con-

sequences thereof occasioned by any or several of the following causes, viz.: the act of God, enemies, pirates, theft on land or afloat, vermin, barratry of master or mariners, restraint of princes, rulers or people, fire on board, in hulk or in craft, or on shore, or wugons, stranding, collisions, explosions or straining; perils of the seas, rivers, navigations, land, transit, lightering, storage afloat or ashore, interruption to navigation by ice, transshipments, any act, neglect or default of the pilot, master, mariners, engineers, servants or agents of the company; accidents from machinery, boilers, steam or defects in hull, engines or boilers, sweating, leakage, breakage, rust, decay, rain, spray, contact with or smell or evaporation from other goods, effects of climate or heat of holds, absence, obliteration or inaccuracies of marks, numbers, destination or address on the packages (in such cases the consignees to accept the goods as allotted by the agents of the ship), injury to wrappers, want of strength of packages, detention on board or ashore, however caused, at the ports of transshipment or at other port or ports. The shipper or consignees to be responsible for the proper description of the goods, and due compliance with all regulations imposed by the authorities at ports of shipment and discharge, and to be liable for any fines, expenses, loss, or damage. The company is not liable for gold or silver—manufactured or trinkets—watches, clocks, timepieces, mosaics, bills, bank-notes of any country, orders, notes or securities for payment of money, stamps, maps, writings, title deeds, paintings, engravings, pictures, statuary, silks, furs, lace, hats, cashmere, manufactured or unmanufactured, made up into clothes or otherwise contained in any parcels or packages, unless the value thereof be expressed in the bill of lading, and such extra freight paid as may be agreed upon weights, contents, and description unknown."

4. While the *Venezuelan* was at Santa Martha so loaded as aforesaid, and about to sail, a fire broke out at about 11 p.m. of the 18th Oct. in the forehold. Every effort was at once made to extinguish the fire by playing water down the hatchways by means of the fire-hose, and by cutting holes in the fore-castle deck and pouring water down on the cargo stowed in the forehold. This was continued to be done until about 4 a.m. of the next day, when the men at work near the forehold were driven out by the heat and smoke. The steamship was then turned stern on the wind to keep the fire forward, and portions of the cargo stowed in the afterholds of the vessel were discharged into lighters. The fire-hose was kept continually playing down the fore hatch and the fore-castle skylights, but it did not subdue the flames, and at about 8 a.m. the fire reached the upper deck. A hole was then cut in the side of the vessel, and her fore compartment was thereby filled with water. By this means the crew ultimately succeeded in extinguishing the fire. If this had not been done, the remaining cargo would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck.

5. The whole of the contents of the forehold were entirely destroyed by fire, and a great part of the cargo stowed in the adjoining holds was damaged or destroyed by water which was poured or let into the vessel as aforesaid in order to extinguish the fire.

6. It is admitted for the purposes of this case

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that 152 of the 180 serons of bark shipped on behalf of the plaintiffs were destroyed by the water poured or let into the said steamship in the manner above described.

7. It has been the practice of British average adjusters in adjusting losses to treat a loss occasioned by water in the manner above described as not a general average loss.

8. The *Venezuelan*, after discharging and re-loading cargo and undergoing temporary repairs at Santa Martha, subsequently proceeded on her voyage, and delivered the various portions of the cargo to the respective owners or consignees thereof.

9. The court is to be at liberty to draw such inferences of fact as a jury would be justified in drawing.

The question for the opinion of the court is: Whether the plaintiffs are entitled to recover from the defendants any sum of money by way of general average contribution or otherwise in respect of the aforementioned loss of the said 152 serons of bark. If the court shall be of opinion in the affirmative, then the court is respectfully requested to direct on what principle such sum is to be ascertained, and judgment shall be entered for the plaintiffs for such sum as shall be ascertained in accordance with the said directions of the court by the parties themselves, or, if they cannot agree by Messrs. Bailey, Lowndes, and Streakley, of Liverpool, average adjusters, together with costs of suit. If the court shall be of contrary opinion, then judgment is to be entered for the defendants, with costs of defence.

Bull, Q.C. (with him *Cohen*), for the plaintiff, contended that the rule hitherto followed by British average adjusters in treating a loss occasioned by water in the manner described in the case as not the subject of a general average contribution was erroneous. There is no decision in favour of the rule, and all the writers who have dealt with the question have disapproved of it. *Bencke* (on Average, p. 243) says: "Damage by fire, whether occasioned by lightning, by the intrinsic quality of the goods, or by other accidental causes, is doubtless particular average. But if sacrifices be made in order to extinguish the fire, if masts, or cables for instance, be cut away, or the vessel be run ashore, I am of opinion that the damage ought to be a general average, although an instance of a decision to the contrary is quoted by *Emerigon*. If water be thrown down the hatches to stop the progress of an accidental fire in the hold, or between the decks, this must be conceived to be done with the double intention of saving the articles which have already caught fire from utter destruction, and of extracting the vessel and rest of the cargo from an imminent danger. The effect of the water upon the former goods is, therefore, particular average; it is not an injury but a real advantage done to them. But the damage done by the water to the other goods is, I conceive, of the nature of general average, upon the same principle on which the occasional damage done to goods during a jettison is considered as such. In the *Ordenanzas de Bilbao* it is ordered that when a vessel catches fire in a river or harbour, and an adjoining vessel is sunk in order to save the others, the damage must be made good by a contribution from all the other ships and cargoes." The view that such a loss is not a general average, is also condemned by *Baily*

on General Average (p. 40), who states his tenth practical rule thus: "Damage done to a cargo by pouring water down upon it in order to extinguish a fire which has not touched the goods injured by the water is excluded from general average," adding "the principle upon which this rule is based is erroneous, and the rule is clearly inequitable." In the second place it is submitted that on the true construction of the bill of lading the English law should govern, and that it is not competent to the average adjusters to determine the question whether there was or was not a general average loss. By the words of the bill of lading, "average if any, to be adjusted according to the English custom," it could not be intended that the average adjuster should determine whether there was any average. [*Cockburn, C.J.*: If there is an existing practice which has become known as the English practice, and reference is made to a specific practice, we must assume that the parties intended to refer to that practice alone.] Persons must be presumed to know the law of the country, but not an erroneous practice opposed to the fundamental principles of the law of average. Persons are only bound to know customs which are legal. The meaning of the words of the bill of lading above referred to is that if there is, by law, to be any average adjustment, then such average adjustment is to be stated according to English custom; but before such statement it must be first determined whether there is any general average, and that must be determined according to law. [*Cockburn, C.J.*: Is there nothing but the authority of text writers for holding a loss of this kind not to be general average?] There is no English decision. *Johnson v. Chapman* (19 C. B., N. S. 563; 2 Mar. Law Cas. O. S. 404) has an indirect bearing on the question. It was a case in which deck cargo (timber) lawfully laden pursuant to charter-party, having broken adrift in pursuance of stormy weather, and impeding the navigation and endangering the safety of the vessel, having been necessarily thrown overboard, it was held that the shipper was entitled to claim a general average in respect thereof, as against the shipowner. In that case it was admitted "that hitherto it has been the practice of average adjusters not to allow as general average the jettison of such portion of the deck load as is immediately before the jettison in a state of wreck; but this admission is to be taken without prejudice to the right of the defendant to contend that such practice cannot affect the law. The words in the present bill of lading, 'according to British custom,' must be taken to mean, according to British custom so far as such custom is consistent with law: a custom inconsistent with it being an unreasonable one, and therefore bad. [*HANNEN, J.*: Perhaps this stipulation was put in to avoid the question which sometimes arises as to which of two foreign average adjustment systems should be applicable, but not to bind the parties to abide by the *maritime* practice of the English system.] The law as to this is stated in 2 *Arnould Mar. Ins.*, 4th edit., p. 811, thus: "As a general rule the place for the adjustment of general average is the ship's port of destination or discharge; when this happens to be a foreign port, the general average loss is adjusted there, according to the law and usage of the country to which such foreign port belongs: and the adjustment so made is called a foreign adjustment. If the adventure be broken up at an intermediate

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port, the ship and the cargo entirely quitting company with each other, that port becomes in effect the port of discharge, and the place, therefore, for adjusting the general average." The same doctrine is laid down in *Parsons on Shipping*, book 1, ch. 9, s. 21: "The proper place for the making of an adjustment is the home port, or the port of final destination. . . . The practical rule may be stated thus: the adjustment may be delayed as long as all the contributory interests continue together, and should be delayed until the vessel reaches her port of final destination, if they are to continue together so long. But if those interests are to be separated, then the adjustment should be made at the place where the separation first takes place." The American case of *Nimick and Co. v. Holmes and Co.* (25 Pennsylvania St. Rep. 366) is a distinct authority as to the general law. It was there held that where a vessel or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam in extinguishing the fire and by tearing up part of the vessel to gain access to the fire, is general average; and it makes no difference how the water is applied, whether by the aid of fire-engines from the land, or in the form of steam, or by settling the vessel. "An analysis of the cases," said Lowrie, J. delivering the judgment of the court, "very plainly reveals three things as the elements of general average: a purpose, a means, and a result; a design to avert a common danger by a sacrifice voluntarily made, and a successful issue. The first and the last are perfectly definite in their character, while the means must always remain to be defined by the rule of prudence when the danger arises": (see also *The brig Mary*, 1 Sprague (Amer.) 17). The same view is taken by all the text writers. Thus Stevens on Average, p. 12, reckons under the head of general average "damage done to the cargo by cutting holes in the ship, or by opening the hatches for the purpose of effecting a jettison, or by getting the goods on deck to heave overboard." So Arnould (Marine Insurance, vol. 2, p. 779, 3rd edit.) gives us an instance of a general average loss: "where water is thrown down a ship's hatches to extinguish an accidental fire and other goods are damaged thereby," referring to Stevens, p. 42, and Benecke, p. 243.

Honyman, Q.C. (with him *R. G. Williams*) for the defendants.—The meaning of the stipulation in the bill of lading, "average, if any, to be adjusted according to British custom," is that if the cargo should sustain any loss, the question whether such loss should be general or particular average should be determined by the average adjusters according to the actually existing English custom; because by the practice of some countries that is treated as general average which the practice of another country treats as particular average. Arnould says (4th edit. p. 813): "There is a great diversity in the practice of different countries with regard to what shall or shall not be included in general average; sometimes losses are included and charged for which are general average in the country where the adjustment is settled, but not in the country where the charter-party was entered into and the policy of insurance effected; and sometimes a different proportion of contribution is assessed in the foreign port from that which is chargeable in the home port." It was for the purpose of excluding all disputes as to which

system was to govern that this stipulation was inserted in the bill of lading. [HANNEN, J.: Lord Tenterden (*Simmonds v. White*, 2 B. & Cress. 805) says of the case of *Pover v. Whitmore* that it could not govern the case before him for two reasons, one being "because in the opinion of the court the facts there stated did not show that the average had been adjusted according to the established law and usage of the country where the adjustment was made." That, however, would not apply to a case where there is an express stipulation. If nothing is said by the parties about a particular custom, and that custom is an unreasonable one, it cannot bind them; but the case is different where the parties expressly agree to be bound by it. There is no doubt as to what the actually existing custom in this case is, Baily (on Average, p. 40), though strongly disapproving this rule, states distinctly that "damage done to cargo by pouring water down upon it, in order to extinguish a fire which has not touched the goods injured by the water, is excluded from general average." So Hopkins (Handbook of Average, p. 59): "The last species of voluntary sacrifice to be named here relates to damage done to goods in a ship's hold by throwing water down the hatches to extinguish a fire. Here again an act is performed manifestly for the common good. Either the fire must be extinguished, or a total destruction of ship, freight, and cargo will ensue. The means taken to rescue the conjoined interests from that destruction damage a portion of the cargo—one of the interests. This damage, then, it follows, should be made good in general average. By English custom, however, it is not so. This is another instance wherein our reasoning is set at fault by the present practice, which decides that the damage occasioned to the cargo in this manner must be borne by the goods themselves." A somewhat similar question arose in *Harris v. Scaramanga* (ante p. 339; 41 L. J. 170, C.P.). There the policy of insurance on goods on a voyage from Taganrog to Bremen contained a marginal note "to pay general average as per foreign statement, if so made," and certain warranties as to being free from particular average, and capture and seizure. It being necessary, owing to stress of weather, to put into ports of distress and charge the ship, freight, and cargo by bottomry bonds, the purchasers, B. and Co., of the cargo had to pay the bonds on the ship's arrival at Bremen in order to get the cargo; and a foreign adjustment was made, apportioning this charge between ship, and freight and cargo. The shipowner and master, being unable to pay the part apportioned to the ship and freight, and the ship on sale realizing only part thereof, and a supplemental adjustment having been made, including the residue as against cargo, the plaintiffs, as trustees for B. and Co., sought to recover payment thereof from the defendants, and it was held by Bovill, C.J. and Keating, J. that they were entitled to recover because the defendants had bound themselves to repay whatever had to be paid by the owners of the cargo and was general average according to the foreign statement, whether or not it were really general average by English or Bremen law, or arose from perils (not being those specially excepted) insured against. So here, it is submitted that the parties have bound themselves to abide by the English practice as to general average. [COCKBURN, C.J.: The question seems to me

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to depend a good deal on the meaning to be given to the word "adjusted." If the meaning is that in case of damage occurring, then the question whether it is general or particular average shall be determined by the English custom, your contention would be correct. But if the meaning is that if a case of average does exist, the apportionment of the average contribution shall be according to English custom, the case would be different.] The word "adjustment" means here settling the different heads of damage; the meaning of the parties, it is submitted, is that in case of damage being done, the liability of the parties to contribute was to be determined according to the actually existing British custom. In *Harris v. Scaramanga* (ubi sup.) Bovill, C.J., referring to the memorandum on the margin of the policy, said: "It seems to me that the general effect of the memorandum is to make the underwriters liable as for general average for whatever the assured owner of the goods might be called upon to pay on that account by the foreign statement of adjustment. This memorandum was probably introduced in order to avoid all questions, not only as to the propriety of particular claims being treated as the subjects of general average, but also as to the correctness of the apportionment, and I find it difficult to place any other reasonable construction upon the terms of the policy and memorandum. If it be open to this court to consider and determine the question whether the 663L 2s. 10d. claimed in this action, or any part of it, was properly the subject of general average according to the law of England, I should be of opinion that it was not, and that this was not a loss covered by an ordinary policy in the usual form. . . . It seems to me, however, that under the terms of this policy the underwriters and the assured have both agreed to accept the adjustment and statement of the average stated in the foreign port, if and when made, as conclusive between them, both in principle and in details as to the loss which the underwriters are to undertake in respect of general average, subject to the exception of any matters such as capture or seizure, which are excluded by the express terms of the policy." This reasoning is strictly applicable to the circumstances of the present case. In fact, it is not open to the court to determine what the parties have settled for themselves. In the case last referred to, Bovill, C.J. said: "How then is the question to be determined of whether the claim in this case is to be considered as general average for which the underwriters are liable? Is it to be determined by this court, or by the statement of the foreign average stater? It seems to me that by the express agreement of the parties contained in the memorandum it is not open to us to determine it, and that we have only to see whether the foreign adjustment, which gives rise to this claim, has been in fact made or not."

Butt, Q.C. in reply.—The parties agree to be bound, in case of any average, by British custom, not practice; and a custom cannot exist unless it be reasonable. [COCKBURN, C.J.: It cannot exist so as to be taken judicial notice of; but there is nothing to prevent the parties, by express contract, agreeing to be bound by it, because there is nothing unlawful in it.] A custom is a general thing; the practice of average staters may differ in different towns. The average adjustment binds only where it is rightly settled according to the law of the country. *Cur. adv. vult.*

Jan. 25, 1873.—The judgment of the court (Cockburn, C.J., Mellor, Hannen, and Quain, JJ.) was now delivered as follows by

QUAIN, J.—This is an action brought by the plaintiffs as the owners of 152 acres of bark shipped on board one of the vessels of the defendants, to recover a general average contribution in respect of the loss of the bark on a voyage from Santa Martha to England. The first question argued before us was whether the loss in question was a loss which properly formed the subject of a general average contribution according to the law of England. The manner in which the loss was occasioned is described in the fourth, fifth, and sixth paragraphs of the special case. It appears that while the ship was lying at Santa Martha, and just when she was about to sail, a fire broke out in the forehold. Every effort was made to extinguish it by playing water down the hatchways, and through holes cut in the forecabin deck. This not being sufficient to subdue the fire, a hole was cut in the side of the ship and her fore compartment was thereby filled with water. In this manner the fire was extinguished; and it is found and admitted in paragraph 4 that if that course had not been taken, the remaining cargo (a portion having been discharged into lighters) would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck. It is admitted in paragraph 6 that the plaintiff's bark was destroyed by the water poured or let into the ship in the manner described in order to extinguish the fire. On these facts, we are clearly of opinion that the loss was, according to the general law, properly the subject of a general average contribution. It was a voluntary and intentional sacrifice of the bark made under the pressure of imminent danger, and for the benefit and with a view to secure the safety of the whole adventure then at risk. No case has been cited in which the exact point to be decided has arisen in our courts, but we have been referred to an American case in which the question was considered and decided. That case is *Nimick v. Holmes* (25 Penny. St. Rep. 368) decided in the Supreme Court of Pennsylvania. There Lowrie, J. in delivering the judgment of the court, says: "Guided by the light of the rule and its instances, we feel constrained to say that when a vessel or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam in extinguishing the fire, and by tearing up part of the vessel in order to get at it, is general average. The danger is a common one, and the cost of the remedy must be common. It makes no difference how the water is applied, by the aid of fire-engines on the land, or in the form of steam, or by scuttling the vessel. . . . It was a sacrifice for the common safety, for it was intentionally injuring or destroying all that part of the cargo that could be thus affected by water in order to save the rest." We quite agree with this conclusion, and if the present case depended wholly on the common law applicable to general average losses, we think the plaintiffs would be entitled to recover. But it is contended for the defendants that the general law, as we have just expounded it, is excluded in this case by the express terms of the bill of lading, which contains these words, "average, if any, to be adjusted according to British custom," inasmuch as "British custom" can only mean the practice of British average

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adjusters; and it is admitted in paragraph 7 of the case to be the practice of British average adjusters to treat a loss occasioned by water in the manner above described as not a general average loss. It appears from the works of Mr. Stevens and Mr. Bailly (Stevens on Average, p. 41, 5th edit.) that the practice, as stated in paragraph 7, does prevail among British average adjusters, though it is condemned by both writers as unjust. "The damage done to cargo," says Mr. Bailly (on Average, pp. 81, 82, 2nd edit.), "by pouring water upon it to extinguish a fire, or by water admitted into a vessel's hold when she is scuttled to extinguish a fire, is excluded from general average. In defence of this practice no valid reason can be urged. It is based on an erroneous idea that a general average cannot arise when the degree of danger is so great that it amounts to a moral certainty of total loss, and on a fanciful distinction between the degree of danger existing in cases of fire and the degree existing when a vessel is on her beam ends or on the point of foundering—a distinction which the ingenuity of argument may draw, but which will not bear the test of common sense." The question in this case, however, is, whether the parties have not by the words used in the bill of lading made this practice a part of their contract, for, if so, they are bound by it, though the practice may be, according to the best opinions, vicious and unreasonable. On the other hand, it is argued for the plaintiffs that it was not intended by the expression used in the bill of lading to draw any distinction between British law and British custom, and that the words were inserted solely in order to prevent the average being adjusted by different laws, according to the different ports of destination at which the ship stopped in the course of her voyage. But we are only entitled to infer the meaning of the parties from the language which they have used; and as it appears on the face of the case, and also from the authorities above cited, that a practice prevails among British average adjusters not to allow a loss like the present as a general average loss, we can only construe the expression "British custom" as intended to apply to that practice, as the mode of adjusting the average by which the parties have agreed to be bound. It follows, therefore, that as the parties have agreed to make this custom a part of their contract, the case must be decided in accordance with the custom, and the result is that our judgment must be for the defendants. It is to be hoped, however, that in future there will be no difference between law and custom on this point, and that average adjusters will act on the law as now declared, and that bills of lading will also be framed in accordance with it.

Judgment for the defendants.

Attorneys for plaintiffs, Milne, Riddle, and Mellor.

Attorneys for defendants, Chester and Co., for Haigh and Co., Liverpool.

Nov. 23, 1872, and Jan. 23, 1873.

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Prohibition—Jurisdiction of Court of Admiralty—Vessel belonging to a foreign state.

The *Charkieh*, a steam vessel belonging to the Khedive of Egypt, and employed in the mail service between Alexandria and Constantinople, was

sent to England for repairs, and, for the purpose of lessening the expenses, carried a cargo to England, and, after being repaired, was advertised for the carriage of passengers and goods or freight from England to Alexandria. On a trial trip in the Thames she came into collision with another vessel, the owners of which commenced proceedings against the *Charkieh* in the Court of Admiralty, and had her arrested. A rule having been obtained for a prohibition, on the ground that the *Charkieh* was a public vessel belonging to a foreign state:

Held, that the rule must be discharged, the question whether the *Charkieh*, under the above circumstances, was exempt from the jurisdiction of the courts of this country being one which the Court of Admiralty was competent and peculiarly fitted to decide.

In this case Butt, Q.C. had obtained a rule nisi for a prohibition to the Court of Admiralty, to restrain that court from proceeding in a cause of collision instituted in rem against a vessel called the *Charkieh*, on the ground that the vessel was a public ship, the property of the Khedive of Egypt, and therefore not amenable to the British Court of Admiralty.

From the affidavits it appeared that on the 19th Oct. 1872 the steamship *Charkieh* came into collision, in the river Thames, with another steamship called the *Batavier*, which had cargo and passengers on board, and was at the time on a voyage from London to Rotterdam. The *Batavier*, the property of the Netherlands Steam Boat Company, sunk after the collision and became a total loss. The *Charkieh*, partly laden, was, at the time of the collision, coming up the river on a trial trip to try her engines at the measurement mills. On the 21st Oct. a suit was instituted in the Court of Admiralty on behalf of the owners, master, crew, and passengers of the *Batavier* against the *Charkieh* and her freight, and the *Charkieh* was arrested by warrant of the court. On the 22nd Oct. a notice was sent to the registrar of the Court of Admiralty by the solicitors for the Khedive of Egypt that the *Charkieh* was the property of His Highness the Khedive in his capacity of sovereign of Egypt, and a ship of the Egyptian Government or State, and was engaged in the public and national service of the Egyptian Government and State, and requiring the registrar immediately to withdraw the warrant of arrest on the *Charkieh*. In reply to a communication addressed to the Foreign Office, a letter was sent to the proctors for the *Batavier*, on the 4th Nov., informing them that the *Charkieh* had been claimed by the Turkish Government as belonging to the Imperial Ottoman Navy, and that she must, therefore, be released from arrest. To this letter a reply was returned that evidence had been obtained of the fact that the *Charkieh* was a vessel employed in mercantile trade and enclosing an ordinary broker's card advertising the ship *Charkieh*, being classed A1, for the carriage of passengers and goods or freight on her return voyage to Malta and Alexandria, which she was about to make after the trial trip upon which she was engaged at the time of the collision with the *Batavier*; also enclosing official copies of the Customs entries, showing that the *Charkieh* paid dues as an ordinary merchant vessel, whereas no such dues would have been paid had she been a public ship of a foreign government, and expressing the view that even if the ship were owned

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wholly or in part by the Khedive or the Imperial Ottoman Government, yet that being engaged as an ordinary trader, she was, whilst in British jurisdiction, and not engaged in any national service, accountable to British laws in the same manner as any other trader, and liable therefore to be arrested by the High Court of Admiralty, or at any rate that the matter ought to receive judicial investigation and decision.

An affidavit of Federico Maria Fedrigo Pasha, rear-admiral in the imperial Ottoman Navy, in the naval service of his Highness the Khedive of Egypt, stated that the *Charkieh* is the property of his Highness the Khedive, as sovereign of Egypt, and is a ship of the Egyptian branch of the Imperial Ottoman Navy, and is a public ship of the state of Egypt, and an Egyptian government vessel; that it is entitled to and in fact does carry and use the Ottoman naval pendant and the Ottoman naval ensign, as distinguished from the flags which are used by Egyptian merchant vessels, all the ships of the Egyptian navy carrying the Ottoman naval colours; that all the officers of the *Charkieh* are Egyptians, and hold commissions from his Highness the Khedive, and are in the naval service of the Egyptian government, with the exception of the acting commanders, the sailing master and the engineers, who are Europeans, not commissioned by the Khedive but under contracts to serve the Government of Egypt; that the officers and crew of the *Charkieh* are appointed by and under the control of the Egyptian Minister of the Marine, the said steamship being also ordinarily under the orders and control of the said Minister of the Marine; but for some time prior to the *Charkieh* leaving Egypt for England, she was under the control and at the orders of the Egyptian Minister of the Interior, and was employed by him as a Government packet, carrying the mails and passengers and cargo between Alexandria and Constantinople; that all freights and passage money earned by the *Charkieh* are ultimately received and accounted for to the said Minister of the Interior, and form part of the public revenue of Egypt; that certain cargo was brought by the said steamship *Charkieh* from Alexandria to England for the purpose of lessening the expense occasioned to the Egyptian Government by sending the said steamship to this country; that with the same object the said steamship had been advertised as about to sail from London to Alexandria, carrying a cargo; that the *Charkieh* had, since her arrival in this country, been recognised by the Lords Commissioners of the Admiralty of her Majesty as an Egyptian Government vessel, and had been repaired under the supervision of a surveyor appointed by the said Lords Commissioners, to whom application for such appointment had been made on behalf of his Highness, the Khedive; that the *Charkieh*, until the year 1870, belonged to an Egyptian trading company; that this company was dissolved in 1870, and the *Charkieh* and other vessels belonging to the said company were, in 1870, purchased by the Egyptian Government, and had ever since been public vessels of the Government of Egypt; and that the *Charkieh* had not since 1870 been in any way employed as a trading ship, nor was it intended that she should for the future trade between Egypt and the United Kingdom, but would resume the packet service above-mentioned.

Nov. 23, 1872, and Jan. 23, 1873.—*Milward, Q.C. and E. C. Clarkson*, for the owners of the *Batavier*, showed cause against the rule, and contended that the *Charkieh* was not entitled to the exemption granted to vessels of state, as it was not employed by the Ottoman government for purposes of state, but by the Khedive for purposes of trade. Wheaton (*International Law*, part II., §§ 33, 96, *et seq.*) mentions the cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which is the attribute of every nation, viz., first, the exemption of the person of a foreign sovereign from arrest or detention within a foreign territory; secondly, the case of foreign ministers; thirdly, where a sovereign expressly permits the troops of a foreign prince to pass through his dominions. The permission in the latter case must, according to Wheaton, be express; "but the rule which is applicable to armies, did not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting ships of war without special reserve into a friendly port. A different rule, therefore, with respect to this species of military force had been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports, be closed against vessels of war generally or against the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain under the protection of the Government of the place;" and such vessels are considered exempt from the local jurisdiction. But all this applies to vessels belonging to the fleet of another nation, and not at all to vessels of another nation engaged for purposes of trade, between which two classes of vessels Wheaton clearly distinguishes: "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other; or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation, if such individuals did not owe temporary and local allegiance, and were not answerable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects, then, passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently, these are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no motive for requiring it. The implied licence, therefore, under which they enter can never be construed to grant such exemption. But the situation of a public armed ship was in all respects different. She constitutes a part of the military force of her nation, acts under the immediate and direct command of her Sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being

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defeated by the interference of a foreign State. Such interference cannot take place without seriously affecting his power and his dignity. The implied licence, therefore, under which such vessel enters a friendly port, may reasonably be construed as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rites of hospitality." Further, this writer distinguishes between the private property of a foreign sovereign and that which supports his sovereign power. "It might safely be affirmed that there is a manifest distinction between the private property of a person who happens to be a prince and that military force which supports the sovereign power and maintains the dignity and independence of a nation; a prince by acquiring private property in a foreign country may possibly be considered as subjecting that property to the territorial jurisdiction, he may be considered as so far laying down the prince and assuming the character of a private individual; but he cannot be presumed to do this with respect to any portion of that armed force which upholds his crown and the nation which he is intrusted to govern." The *Charkieh* came to this country, not as a vessel of a foreign state, but as an ordinary merchant vessel carrying a cargo: and as such also she has been advertised to return, being in the advertisement classed A 1, and treated as one of a regular line of vessels trading to Malta and Alexandria. [COCKBURN, C.J.—The principle is that an armed ship duly commissioned is within the rule as to exemption from the territorial jurisdiction. I do not think that the rule includes any other ships.] That the rule is not understood to extend to a vessel employed, as the *Charkieh* has been between Alexandria and Constantinople as a mail packet, is shown by the express insertion of a provision to that effect in treaty, where such an object is desired to be attained. Thus, in Art. 9 of the Treaty between Great Britain and Belgium, relative to the conveyance of letters between the two kingdoms, made in 1834 (7 Hertlet's Commercial Treaties, p. 82), we find a provision that, "The packets of Her Britannic Majesty, being Government vessels, shall be exempt from all duties and port charges in the ports of Belgium. They shall be considered and treated as vessels of war, and entitled to all the consideration and privileges which the interest and general importance of their functions demand." So in the convention regulating the communication by post with the same country made in 1844 there is a provision in Art. 7 that "these vessels should be considered and treated, in the two ports above mentioned, and in all other ports of the two countries at which they may accidentally touch, as vessels of war, and be there entitled to all the honours and privileges which the interest and importance of their service demand." These express provisions furnish evidence that in their absence the exemption granted to vessels of war would not extend to mail packets. There is also a clause in Art. 9 of the convention last referred to, prohibiting the packets "from carrying goods, or merchandise, or freight." If they did so, it may be presumed that they would lose the exemption given by the convention. [COCKBURN, C.J.—It is a question which goes to the root of the matter, whether the Court of Admiralty would not have jurisdiction to decide that very point.] The proper course would then be for the owners of

the *Charkieh* to appear under protest to the jurisdiction, and the Court of Admiralty would then decide the question: (*The Santissima Trinidad*, 7 Wheat. Rep. 284, was referred to.) [COCKBURN, C.J.—In the present case one ship runs down another. This would be a case, therefore, clearly within the jurisdiction of the Admiralty Court. If the ship in fault is one not amenable to the jurisdiction of that court, that could be set up by plea; and it has never been held that the Court of Admiralty has not jurisdiction to decide upon that plea.] The court here called on

Butt, Q.C., Coker, and Gibson, in support of the rule.—Wherever, in a case in which a court would have jurisdiction under ordinary circumstances, a fact appears which deprives that court of jurisdiction, a prohibition will go. The cases on the subject are all collected in the opinion of the judges given by Willes, J. to the House of Lords, in *The Mayor, &c., of London v. Cox* (L. Rep. 2 H. of L. Cas. 225, *et seq.*): "The law upon the question of discretion," said his Lordship, "is thus stated in the judgment of the Queen's Bench, in *Burder v. Voley* (12 A. & El. 263): 'If called upon, we are bound to issue our writ of prohibition as soon as we are duly informed that any court of inferior jurisdiction has committed such a fault as to found our authority to prohibit, though there may be a possibility of correcting it by appeal . . . The question then remains, what are the defects that authorise and require us to issue the writ of prohibition? The answer, is, that they are in every case of such a nature as to show a want of jurisdiction to decide the case before them: (*Gardner v. Booth*, 2 Salk. 548.) In whatever stage that fact is made manifest to us, either by the Crown or one of its subjects, we are bound to interpose.' The writ, however, although it may be of right, in the sense that upon an application being made in proper time, upon sufficient materials, by a party who has not by misconduct or *laches* lost his right, its grant or refusal is not in the mere discretion of the court, is not a writ of course, like a writ of summons in an ordinary action, but is the subject of a special application to the court upon affidavit, which application, and the proceedings thereupon, are now regulated by the Act of, Will. 4, c. 21. Before that Act the proceedings were commenced by mere suggestion, which, with exceptions that do not include the present case, need not have been verified by affidavit. The proceeding was *qui tam*, and it supposed a contempt in disobeying an imaginary precedent writ of prohibition. To that course of proceeding only were the decisions relied upon, to the effect that the court will not interfere upon 'mere suggestions' before plea, applicable. They may amount to this, that before plea the court in its discretion, would not interfere upon a bare suggestion without an affidavit; and they have become inapplicable since the statute which substitutes a motion upon affidavits in all cases for a suggestion. . . . The jurisdiction, therefore, does not, it seems, depend (for in the case of the Crown or a stranger it cannot depend) upon the course of the pleading." Further on the learned judge says, "The rule is that where want of jurisdiction is apparent upon the proceedings, prohibition goes at any time after service of the process, and even before articles 'because it is much better for the party to apply for prohibition in the first stage than after expense is incurred:

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(*Francis v. Steward*, 5 Q. B. 994)." [COCKBURN, C.J.—Suppose the plaintiff says that the defence set up is in fact only a pretence, that the *Charkieh* is not the property of the Khedive, is not this a question for the Admiralty Court to determine?] But then the question of law will arise as to its jurisdiction over a vessel belonging to a foreign sovereign. [BLACKBURN, J.—Is there any case of a prohibition being granted where the facts of the case were triable in the inferior Court?] In *Dilks v. Brown* (2 Ld. Ray. 835), upon a motion for a prohibition, the case was, the defendant libelled in the spiritual court for tithes of faggots made of loppings of trees, and the suggestion for a prohibition was that these loppings were cut from the stumps of timber—trees above the growth of twenty years; and it was alleged that sentence was given in the Superior Court, and therefore that the plaintiff came too late to have a prohibition; but Holt, C.J., said, "the sentence will not hinder the having a prohibition in any case, but in case of prohibitions grounded upon 23 Hen. 8, c. 9, for citing out of the diocese," but the prohibition was denied because the plaintiff had not pleaded that matter in the spiritual court, which had jurisdiction of tithes, and if any special matter deprived them of their jurisdiction, it must be pleaded there. The application here was after sentence in the spiritual court, and upon suggestion only. In *De Haber v. The Queen of Portugal* (17 Q.B. 171), it was held that property in England belonging to a foreign sovereign prince in his public capacity, cannot be seized under process in a suit against him in this country on a cause of action arising here; and therefore, where a suit had been brought in the Mayor's Court against the Queen of Spain, upon bonds of the Spanish Government, bearing interest payable in London, and moneys belonging to her as the sovereign of that country had been attached in the hands of garnishees in London, to compel her appearance, the Court of Queen's Bench granted a prohibition, although the action was not in form brought against the Queen as Sovereign, it appearing sufficiently by the pleadings that she was charged with liability in that character. It was also held in this case that the motion might be made by the Sovereign Prince who is defendant in the Mayor's Court, though such defendant had not appeared and the garnishee had not pleaded. [COCKBURN, C.J.—It was manifest on the face of the proceedings in that case that the person against whom the suit was instituted, was one who could not be proceeded against in our courts.] In the case of *The Prins Frederik* (2 Dods. 451), a ship of war belonging to the King of the Netherlands, having suffered damage off the Scilly Islands was brought into Mount's Bay by the assistance of the master and crew of a British brig, and a cause of salvage was instituted against the foreign vessel, the captain appearing under protest to the jurisdiction of the court: after argument the case was directed to stand over until a memorial on behalf of the salvors should be presented to the ambassador of the Netherlands, who, after communicating with his own Government, requested that the amount of the recompence due to them might be submitted to the award of the judge of the Court of Admiralty, as an arbitrator; and in that capacity the learned judge made his award. In the case of the *Lerd Hobart* (2 Dods. 100), the case of a post-office

packet, the vessel was owned by a private individual, though employed by the post-office; and the learned judge having adverted to the objection, "certainly not immaterial, that the vessel was employed as a packet in the service of the General post-office," the deputy registrar stated that notice had been given to the post-office authorities in other cases of the same kind, and that their reply was that no objection existed on the part of the Post-office to the exercise of the jurisdiction of the court; whereupon Sir Wm. Scott proceeded: "That, I think, disposes altogether of the objection, and leaves me at liberty to decide upon this question precisely in the same way as I should in the case of any other ship. I could not be alarmed at the danger which I apprehended might have arisen to the public service from the detention of vessels of this kind, but the information which I have now received relieves me from the difficulty which I should otherwise have felt." That it is not necessary to enter an appearance before taking objection to the jurisdiction was distinctly laid down in *De Haber v. The Queen of Portugal* (*ubi sup.*): "We have now to consider," said Lord Campbell, C.J., delivering the judgment of this court, "whether we can grant the prohibition on the application of the Queen of Portugal before she appears in the Lord Mayor's Court. The plaintiff's counsel argue that before she can be heard she must appear and put in bail in the alternative to pay or to render. It would be very much to be lamented if, before doing justice to her, we were obliged to impose a condition upon her which would be a further indignity, and a further violation of the law of nations. If the rule were that the application for a prohibition can only be by the defendant after appearance, we should have had little scruple in making this an exception to the rule. But we find it laid down in the books of the highest authority that where the court to which the prohibition is to go has no jurisdiction, a prohibition may be granted upon the request of a stranger as well as of the defendant himself: (2 Inst. 607; Com. Dig., "Prohibition, (E).") The reason is that where an inferior court exceeds its jurisdiction, it is chargeable with a contempt of the Crown, as well as a grievance to the party: (*Edw. v. Jackson*, Fort. 345). Therefore this court, vested with the power of preventing all inferior courts from exceeding their jurisdiction, to the prejudice of the Queen or her subjects, is bound to interfere when duly informed of such an excess of jurisdiction." BLACKBURN, J.—There is a great difference between a suit against a ship and a suit against a foreign sovereign himself. In the latter case the sovereign must have come in and given bail to prevent arrest of the person—which would be an insult to him; but it is no insult or personal indignity to seize property. The sovereign is only required to give bail and to appear. There is no personal indignity. He may possibly enjoy the privilege of doing damage by his ships to other ships without paying for it; but he must show that such a privilege exists.] There is no practical distinction in this respect between proceedings *in rem* and proceedings against the person. Wheaton (Ed. Dana, sect. 228, note) speaking of the property of foreign ambassadors: "The same objection exists to allowing process *in rem* against such property, as to requiring his appearing in court

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as a party or witness. If his property is proceeded against he must become a litigant to defend or regain it, and he subjected to rules controlling his time and movements, even if he secures exemption from other obligations and liabilities of common suitors. The decision of this question ought not to depend, as most writers seem to make it, on the character of the property seized as official or unofficial; for the seizure is but a step in the litigation. The owner is to have notice to appear and litigate, and must either lose his property or become a party to the litigation. The balance of convenience is in favour of the exemption from seizure of all the property of an officer whom it is right to exempt from being compelled to appear as a defendant in a strictly personal suit." Those remarks apply equally to the property of sovereigns. [COCKBURN, C.J.—Ambassadors derive their rights from being the representatives of foreign sovereigns, and the same rule must therefore apply to their sovereigns.] In *Valtiassen v. Ormsby* (3 T. Rep. 315) a prohibition was granted to prevent the Court of Admiralty from proceeding in a suit, on a suggestion merely that the collision happened in the river Thames within the body of the County of Kent. The Court of Admiralty might in that case have tried the fact whether the collision had or had not taken place within the County of Kent; still this court granted a prohibition. So in *Clay v. Snelgrove* (1 Ld. Ray. 576), in a suit of wages instituted in the Admiralty Court, a prohibition was granted on a suggestion that the contract had been made upon land, though the Court of Admiralty could have tried the truth of a plea setting up that defence. [BLACKBURN, J.—In that case there was *prima facie* no jurisdiction. In the present case you claim an exemption by special privilege. Surely the Court of Admiralty is the proper court to dismiss the suit on the existence of the facts constituting the privilege being proved before it.] On the face of the present proceedings the Court of Admiralty has undoubted jurisdiction and is bound to exercise it unless we can satisfy this court that it ought, on a suggestion of the facts of the case, to prohibit. In the cases against the Mayor's Court it was always alleged on the proceedings that that court had jurisdiction. The rule as to suggestions, as laid down in *Cox v. The Mayor of London* (*ubi sup.*), seems to be that if the defect of jurisdiction is not patent in the proceedings below, and the defendant suffered judgment, no prohibition will go; but if the defect is patent then prohibition goes after judgment; but upon suggestion made prohibition will go before judgment. It is optional to plead in the inferior court, or before doing so, to apply for a prohibition. [BLACKBURN, J.—In all the cases cited the courts have decided that the foreign sovereign is not liable—not that they have no jurisdiction.] If a foreign sovereign is not amenable to the jurisdiction of any court in England, surely a prohibition should be granted to prevent proceedings against him. In *House v. Napier* (4 Barr. 1944) a prohibition was granted to prevent the Court of Admiralty proceeding in a suit for wages, on a suggestion that the contract was under seal, though the matter alleged in the suggestion might as well have been tried in that court. In *Argyle v. Hunt* (1 Str. 187), where a prohibition to the spiritual court was refused after sentence, though the word "whore" appeared to have been spoken in London,

on the ground that it should have been pleaded in the court below, the decision proceeded on the custom of the city of London, where an action lies for the word "whore." In *Buggin v. Bennett* (4 Burr 2035) a suit in the Court of Admiralty for seamen's wages, application for a prohibition on the ground that the contract was by deed made on land, was not made till after sentence, and it appearing only on the proceedings in the Admiralty Court that "it was covenanted and agreed, &c.," but was not expressly alleged to be by deed, and the application was refused on that ground; Lord Mansfield, C.J., saying: "If it appears upon the face of the proceedings that the court below have no jurisdiction, a prohibition may be issued at any time, either before or after sentence; because all is a nullity; it is a *coram non judice*. But where it does not appear upon the face of the proceedings, if the defendant below will lie by and suffer that court to go on under an apparent jurisdiction (as upon a contract made at sea) it would be unreasonable that this party, who, when defendant below has thus lain by and concealed from the court before a collateral matter, should come hither after sentence against him and suggest that collateral matter as a cause of prohibition, and obtain a prohibition upon it, after all this acquiescence in the jurisdiction of the court below Where the want of jurisdiction appears upon the face of the proceedings, an affidavit is not necessary, though every suggestion, that does not appear upon the face of the proceedings but is collateral and out of the proceedings, ought to be verified by affidavit." [BLACKBURN, J.—Is there any authority for the proposition that a person setting up a personal privilege, as in the present case is entitled to a prohibition?] *Wadsworth v. The Queen of Spain* (17 Q. B. 171) was referred to. In *Sewell v. Jones* (1 L. M. & P. 525), it was held that the defendant upon showing that the title to land was *bona fide* in dispute in an action in the County Court was entitled to a prohibition, and that he was not bound to wait till the County Court had proceeded to hear the case. In delivering judgment Wightman, J., observed, "It is said that this application is made too early, and that the defendant should have waited until the plaintiff came on for hearing in the County Court, and then have made the objection to the jurisdiction, which the County Court Judge would probably have entertained, and refrained from trying the case. If, however, the judge had decided otherwise, the application, on the same grounds as the present, must have been made; and yet the defendant might not have been able to make it on account of the Long Vacation. I therefore think he may come to the court for a prohibition, upon showing that the title is *bona fide* in question." *Re Ackroyd* (1 Ex. 479) was also referred to. [BLACKBURN, J.—I don't think it is put against you that it is necessary that you should have pleaded before coming for a prohibition; but that you should put the exemption which you claim as a matter of defence. COCKBURN, C.J.—I thought it was put that, if pleaded, it was an answer to the suit—not that it was a mere plea to the jurisdiction. BLACKBURN, J.—Just as if any other point of law were raised as a defence which the Court of Admiralty could decide.] It is a question for this court to decide whether a case falls within or without the jurisdiction of the Court of Admiralty to decide.

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[COCKBURN, C.J.—Suppose that the Court of Admiralty should find as a fact that this vessel does not belong to the Khedive, would not that be an answer to your objection?] Yes; but not if the Court of Admiralty should find as a fact what is not the fact, in order to give itself jurisdiction. It is stated on affidavit that the *Charkieh* is the property of a foreign sovereign, and it is part of the general law of the land that no English court has jurisdiction in such a case. [BLACKBURN, J.—Is it not rather a question of maritime and international law on which the Court of Admiralty is peculiarly qualified to pronounce?]—It is submitted that the exemption of the property of foreign sovereigns is part of the general law of the land, and not a question of maritime law peculiarly. [COCKBURN, C.J.—I doubt whether this court can interfere unless it sees clearly that there is an excess of jurisdiction on the part of the inferior Court. All the facts relied on to establish the exemption of this vessel can be determined in the Court of Admiralty. If a foreign ship which is not a ship of State in the strict sense is seized, I entertain great doubt whether the Court of Admiralty would not have jurisdiction. Here the ship is found in the hands of private individuals, and is applied not to purposes of state but of commerce. Whether, under such circumstances, the case comes within the ordinary principles applicable to ships of State of foreign sovereigns is a question which the Court of Admiralty may well entertain. BLACKBURN, J.—It seems to me that such a question is one which the Court of Admiralty is the tribunal best fitted to decide, subject, of course, to appeal to the Privy Council.] Where there is no right of action in the Court of Admiralty against the owner of a vessel, it has been decided that the court has no jurisdiction to proceed against the vessel itself.

Milward, Q.C., in reply, referred to sect. 4 of 3 & 4 Vict. c. 64, which enacts "that the said Court of Admiralty shall have jurisdiction to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages, or bottomry, which shall be instituted in the said court after the passing of this Act." The substantial point which the Court of Admiralty will have to decide is whether the Khedive of Egypt does occupy such a position as entitles his ships to the same privileges as those of foreign sovereigns. There might be some ground for the application for a prohibition if the Court of Admiralty were proceeding in a suit after it had been shown that the vessel did belong to a foreign sovereign, but whether it does so belong or not is a question for the Court of Admiralty to decide. [QUAIN, J.—But may not the same thing be said in every case where the question of fact is disputed on which the jurisdiction arises?] COCKBURN, C.J.—I think the law on the subject cannot be better expressed than it is by the Court of Exchequer in *Bunbury v. Fuller* (9 Ex. 140): "Now it is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject matter which, if true, is within its jurisdiction, and however necessary in many

cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to inquiry in the Superior Court. Then to take the simplest case: suppose a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits; on its being presented the judge must not immediately forbear to proceed, but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not with the principal subject-matter, according as he finds on that point; but this decision must be open to question, and if he has improperly either forbore or proceeded on the main matter in consequence of an error, on this the Court of Queen's Bench will issue its *mandamus* or prohibition to correct his mistake." This seems to me to be applicable to the present case. The matter here is a collateral one, and if the Court of Admiralty decides it in favour of the ship there is an end of the case; but if the Court of Admiralty decides it wrongly in order to give itself jurisdiction, we can still grant a prohibition.] *The Ticonderoga*, Swa. Rep. 215, was referred to.

COCKBURN, C.J.—I think we need not trouble you further, Mr. Milward. We are of opinion that this rule for a prohibition should be discharged, and I conceive it would be mainly, from the view I take of it, upon the ground that, assuming the facts of the case to be entirely as stated on the part of the applicant for the prohibition, a question of law is raised which is a matter of international law—I do not say it is not also a matter of law of this country; because the law of this country adopts the leading rules of international law as part of our own. One of those undoubtedly is that you cannot sue a foreign sovereign and make him appear and answer in the municipal courts of this country; and, if that were the case here, it would, in my opinion, raise a question whether the vessel in the present case was a vessel of the State. But this is not a proceeding against a foreign sovereign. The ship here is found apparently prosecuting a mercantile voyage; she is loaded with a cargo, and a collision takes place, which the parties suffering attribute to this ship, and she is seized under the ordinary process of the Court of Admiralty. It is alleged that she belongs to the Khedive of Egypt. But if she belongs to the Khedive—which, for the purpose of the argument, we assume to be the case—she is found in the hands of other persons and under circumstances which certainly lead to the inference, in my opinion, that she is not a vessel of war, nor a vessel at the time of the collision, in the employment of the State or the Khedive as a sovereign prince. Then there is the question of law—namely, whether or not a vessel belonging to a foreign potentate, but not used as a vessel of state, or a vessel of war, or for state purposes, is entitled to the immunity which ships of war and ships used for the purposes of government are entitled to. That is a question which it is peculiarly within the province of the Court of Admiralty to decide. Why are we to decide that the Court of Admiralty is not to deal with it? If that court does deal with it, there is an appeal to the Judicial Committee of the Privy Council—a court of appeal of

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the highest authority. But, beyond that, I should be very much disinclined to grant a writ of prohibition in a case where the facts are in doubt—in a case which the court whose jurisdiction is sought to be impeached is just as competent to determine as we are. If the court chooses to find contrary to the evidence in order to give itself jurisdiction, this court would not be bound by its authority, or if it was a manifestly erroneous decision, although not made for the purpose of giving jurisdiction to the court whose jurisdiction was challenged; still I say this court would be entitled to look into the circumstances, and I do not say that a prohibition would not be granted. In this case, which is within the jurisdiction of the Court of Admiralty, and which that court is perfectly competent to decide, I do not see any reason for granting a prohibition.

BLACKBURN, J.—I am also of opinion that this rule should be discharged. The case in which a prohibition is granted by this court is where the other court is inferior to it, and is exceeding its jurisdiction—when it is taking on itself to interfere and to decide on some matter which it has not jurisdiction to decide. Now, taking every fact brought before us on the part of the persons applying for the prohibition to be true, they would raise the case to this, that the Khedive of Egypt, whom I am inclined to hold at present to be a sovereign prince—but of course that may be disputed hereafter—is the owner of this vessel, and sent her here for repairs. A collision takes place in the Thames at the time the vessel was his property, and his officers were on board in possession of her. Now, supposing that to be so, the Court of Admiralty, having jurisdiction over ships within the general jurisdiction for that purpose to administer the maritime law and international law against foreign vessels, if these were the facts, the Court of Admiralty could not proceed, because it is a rule of international law that such a ship is privileged. The Court of Admiralty could not, then, proceed *in rem* against the ship. I think there is a good deal of authority for saying that the Court cannot proceed against a sovereign or a state; and I think there is also a good deal of authority for saying that it ought not to proceed against a ship of war or a national vessel, as one may call it. And it is obviously desirable that this should be so, because otherwise we might have wars brought about between two countries on account of proceeding in that way. But, then, comes a question where a vessel such as this, which is the property of a foreign state, causes a collision in this way, the vessel not being a ship of war, but a vessel which happens to belong to the state—whether this is a matter which goes to the jurisdiction. The case most favourable to the owners of the vessel is that of the *Prins Frederik* (*ubi sup.*), which came before Lord Stowell, and was argued at great length; and he most cautiously abstained from committing himself to any opinion on this point. But the foreign Government, which was the owner of the ship seized by the Admiralty in that case, very sensibly and properly agreed that they would refer the matter to Lord Stowell to decide as an arbitrator. The Khedive has in the present case, as I understand, made an offer to refer the matter to arbitration, but for some reason or other the offer went off, and the matter now stands upon the question whether or not it is, under the cir-

cumstances stated, a defence to the claim against the vessel that it is the property of the Khedive. On that point Lord Stowell, as I have stated, entertained an argument at great length, but avoided expressing any opinion; and when the arbitrator had made his award, he deliberately stated that the persons who wanted to get the salvage should have at first applied to the ambassador, when they would have got it as a matter of course, and that, in that respect, the proceeding was a very indecent one. Then he proceeds—I am quoting from memory—that a very nice question arose as to the international law in this country. Now we are called upon, in the present case, to prohibit the Court of Admiralty from entertaining that which Lord Stowell—perhaps the highest authority on these matters that ever was—declared to be a very nice question of international law. It seems to me that on a nice question of international law, it would be rather presumptuous in the Court of Queen's Bench to say that we are a better authority than the Court of Admiralty—a court whose peculiar province it is to administer matters of this sort. However, it appears to me that whether the defence set up in this case is a defence or not is a matter which the Court of Admiralty has jurisdiction to determine—that to determine the facts and to see whether the international and maritime law makes this a matter of defence is a matter for that court, and if it is wrong the Privy Council can set it right. The decision of the latter court being final, there would be no further appeal; but there must always be some finality somewhere. I do not see how it can be said that the Court of Admiralty is exceeding its jurisdiction in entertaining the matter as a question of international law; and, taking this view, I think that court cannot be prohibited from determining it. It may be that the Court of Admiralty will decide that this is a clear defence, or that it is no defence at all; I do not myself express any opinion upon the matter. The judge of the Admiralty Court, and, if necessary, the Privy Council will decide it for themselves.

MELLOR, J.—I am of the same opinion. I do not think it necessary to add anything to what has been said by my Lord and my brother Blackburn, except that if the learned counsel who have applied for a prohibition think we are wrong in our decision, they can apply to some other court and see what their fortune may be there.

QUAIN, J.—I give no opinion in this case, not having heard all the arguments in it.

MILWARD, Q. C., applied that the rule should be discharged with costs.

BLACKBURN, J.—I think you should have done what Lord Stowell said—first ask the sovereign or his ambassador in a civil manner what he would do.

MILWARD, Q. C.—I think we shall be able to show that we did all we could.

COCKBURN, C. J.—Was there not some suggestion that the matter should be referred?

BULL, Q. C.—We offered to refer the whole matter to the judge of the Admiralty Court.

BLACKBURN, J.—Did not the judge of the Admiralty Court decline to enter it?

COCKBURN, C. J.—My impression is that Mr. Milward, after taking time to consider, refused

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this offer. I do not think, therefore, that we ought to give costs.

Rule discharged without costs.

Attorneys for the Khedive, McLeod and Watney.
Attorneys for the owners of the Batavier, Clarkson, Son, and Greenwell.

COURT OF ADMIRALTY.

Reported by J. F. ASHFALL, Esq., Barrister-at-Law.

Nov. 29 and 30, Dec. 7 and 9, 1872, and
Jan. 28, 1873.

THE ONWARD.

Bottomry—Bond given as collateral security for bills of exchange—Duty to communicate with owners of cargo—Sufficiency of communication—Agency of master—His power to bind cargo for repairs of ship.

Where a bottomry bond on ship, freight, and cargo has been given by the master of a ship as collateral security for a bill of exchange drawn by him upon the bondholders, on the understanding that if the bill is properly met by funds being placed in the hands of the latter, the bottomry bond will not be enforced, but the master or shipowners, having placed no funds in the bondholders' hands, give notice that they do not intend to meet it, the bottomry bond is not bad as against the cargo, merely upon the ground that the bondholders have conditionally accepted the bill, and have neither presented it to the master for payment nor protested it.

The master of a ship, being only the agent of the cargo in special cases of necessity, is bound, when the circumstances permit, to communicate with the owner of the cargo before he does any act which seriously affects the value of the cargo. A master, therefore, putting into Port Louis, Mauritius, for repairs to his ship, and intending to raise money for those repairs upon bottomry, not only on ship and freight, but also upon cargo of an imperishable nature and belonging to one firm residing in Great Britain, is bound to communicate with them before having recourse to bottomry; otherwise the bond is invalid.

To justify a master in giving a bottomry bond on cargo where communication with the owners is necessary, a mere statement of injuries sustained by the ship and of the consequent necessity for repairs entailing considerable expense, unaccompanied by a statement that a bottomry bond is proposed, is not a sufficient communication; the law does not require the owners from such premises to draw the conclusion that the ship and cargo must be bottomried; although it may not be required that the words "bottomry of cargo" should be used in the communication, the fact itself should be stated, or at least the necessity for a bottomry bond should be on obvious and irresistible inference from the circumstances stated.

A communication detailing the disasters to the ship, and the probable expense of repair, but not expressing the intention to bottomry the cargo, and requesting the owners of cargo to wait for further information, is not, where any communication is necessary, sufficient; more especially where the information as to the bottomry has been given to the shipowners, but withheld from the owners of cargo; and under such circumstances the owners of cargo are not bound to conclude that the master

will resort to bottomry, or to reply to the communication.

The *Oriental* (3 Moore P. O. C. 398) followed; The *Bonaparte* (3 Moore P. O. C. 459) distinguished. *Sembla*, that a master, being, as agent for the cargo, as well as for the ship, bound to do his best for the whole adventure, and therefore not being entitled to bind the cargo for repairs of the ship at the sole expense of and without reasonable possibility of benefit to the cargo, cannot bottomry the cargo for repairs to the ship when the outlay for the repairs falling on the cargo would be so great that a reasonable and prudent owner, if present, would not have allowed his cargo to be bottomried, but would rather have paid the freight, and transhipped the cargo.

THIS was a cause of bottomry instituted on behalf of Messrs. Baring Brothers and Co., of London and Liverpool, merchants and bankers, the legal holders of a bottomry bond on the United States ship *Onward*, her cargo, and freight, against that vessel and the cargo lately laden therein, together with the freight due for the transportation thereof, and against Messrs. Thomas Dunlop Findlay and James Findlay, trading under the style of J. D. Findlay and Co., of Glasgow, the owners of the cargo intervening.

The plaintiffs' petition was as follows:—

1. The *Onward*, a ship of 933 tons register or tonnage belonging to the United States of America, whilst on a voyage from Monrovia to Queenstown or Falmouth for orders, and from thence to a port of discharge in the United Kingdom or on the Continent between Bordeaux and Hamburg, both ports inclusive, laden with a cargo of oak timber, was compelled to put into Port Louis, in the island of Mauritius, in order to repair and refit.

2. The master of the *Onward* being without funds and credit at Port Louis, and being unable to pay the expenses of the said repairs, and the necessary disbursements of the said ship at Port Louis, so as to enable the said ship to resume and prosecute her voyage, was compelled to resort to a loan of 24,369 dollars and 69 centimes of a dollar on bottomry of the said ship, her cargo, and freight for the purpose of enabling him to pay the said expenses and disbursements, which said sum Messrs. Houdlette and Co., of Port Louis, at the request of the said master by public advertisement, lent and supplied the said master at and after the rate of 128 dollars for every 100 dollars advanced, and accordingly the said master by a bond of bottomry dated the 13th Oct. 1870, by him duly executed, in consideration of the sum of 24,369 dollars and 69 centimes of a dollar Mauritius currency paid to him by the said Messrs. Houdlette and Co., bound himself and the said ship, and her cargo then laden on board her, namely, about 940 tons of oak timber and her freight, to pay unto the said Messrs. Houdlette and Co., their assigns or order or indorsees, the said sum of 24,369 dollars and 69 centimes of a dollar Mauritius currency, with the aforesaid maritime premium thereon, within twenty days next after the arrival of the *Onward* at her port of discharge from the said intended voyage; the said payment to be made both in capital and interest in British sterling money at and after the rate of 4s. for every dollar so advanced, with a condition that in case the said ship and cargo aforesaid should be lost, miscarried, or should be cast away during her voyage from Port Louis to Queenstown or Falmouth for orders and thence to her port of discharge in the United Kingdom or on the Continent between Bordeaux and Hamburg, both ports inclusive, then the said sum of 24,369 dollars and 69 centimes of a dollar, and the aforesaid maritime premium thereon should not be recoverable.

3. The *Onward* subsequently proceeded on her said voyage, and on the 7th Feb. 1871 arrived with the said cargo on board at the port of Liverpool, which was her port of discharge, and the said bottomry bond afterwards became due and payable.

4. The said bond was duly indorsed and assigned to the plaintiffs, Messrs. Baring Brothers and Co., of

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London and Liverpool, merchants and bankers, and they became and were the legal holders of the said bottomry bond before and at the time of the institution of this suit.

5. The said ship has been sold by order of this court, and the proceeds of the sale thereof have been brought into court, and the said freight has also been paid into court.

6. The said sum of 24,369 dollars and 69 centimes of a dollar Mauritius currency as aforesaid, with the maritime premium thereon, still remain due and owing to the plaintiffs. By a decree made on the 10th May 1871 the Right Honourable the Judge pronounced for the force and validity of the said bond so far as regarded the said ship and freight, and condemned the proceeds of the said ship and freight in the amount due on the said bond. The said principle and premium still remain owing to the plaintiffs, and the proceeds of the said ship and her freight available for payment thereof are very insufficient for such payment, and the plaintiffs are compelled to have recourse to the said cargo.

The answer of the defendants as originally filed was as follows:

1. The several averments in the 1st, 3rd, 4th, 5th, and 6th articles of the said petition are respectively true, except such of the said averments (if any) as may be inconsistent with the allegations hereinafter contained.

2. The several averments in the 2nd articles of the said petition contained are respectively untrue, except the averment that the bottomry bond therein mentioned was given and executed, which fact is admitted to be true.

3. The *Onward* proceeded on the voyage in the 1st article of the petition mentioned under a certain charter-party made by and between the defendants and the owners of the vessel, who resided at New York. And the cargo in the said article mentioned belonged to the defendants, and was shipped at Moulmein on board the said vessel by Messrs. Tod Findlay and Co., of Moulmein, on behalf of the defendants.

4. When the *Onward* put into Port Louis, as in the said 1st article of the petition mentioned, the master placed his ship in the hands of Messrs. Houdlette and Co., the persons in the 2nd article of the petition mentioned, and the repairs and disbursements in the 2nd article mentioned were made, directed, and expended under the orders, management, and on the credit of the said Messrs. Houdlette and Co., who at the outset contemplated the necessity of securing themselves by the hypothecation of the ship, freight, and cargo.

5. The master of the *Onward* and the said Messrs. Houdlette and Co. did not communicate to the said shippers of the said cargo, or to the defendants, the intention of hypothecating the ship, freight, and cargo, or the circumstances which might render such hypothecation advisable or necessary, but, on the contrary, without reasonable cause or excuse, abstained from so doing, although the comparatively small value of the ship and freight to be earned rendered it all the more important that such communication should have been made.

6. A reasonable and proper time was not allowed to elapse between the advertisements for the bottomry loan and the acceptance of Messrs. Houdlette and Co.'s offer to make such loan.

It is submitted that by reason of the premises, or some of them, the said bottomry bond is void as against the defendants, who had no opportunity of opposing, and did not oppose, the decree in the 6th article of the petition mentioned.

To this answer the plaintiffs replied originally as follows:—

1. The defendants since the 31st Dec. 1868 have been the only persons forming the firm of Tod Findlay and Co., of Moulmein, mentioned in the 3rd article of the said answer.

2. After the master of the *Onward* put into Port Louis as aforesaid, he employed Messrs. Houdlette and Co., in the petition mentioned, as his agents, and by his directions they by letter communicated to the defendants' firms at Moulmein and Glasgow the circumstances of the ship's distress, and the estimated amount of her repairs.

3. The defendants on a former occasion when the said ship, whilst in the performance of the said charter-party, was in distress at Bombay had refused to make to the said master advances of more money than they were bound by the said charter-party to advance for the ship's

ordinary disbursements, although the said master required much larger advances for the ship's necessary repairs and extraordinary expenses.

4. The said Messrs. Houdlette and Co., shortly after the said ship was put into their hands at Port Louis, offered the said master, in case he should require them to do so, to make the necessary advances for the ship's repairs, and to take his draft at 90 days' sight on Messrs. Baring Brothers and Co., of London, at the rate of 5 per cent. discount for the amount of the advances, together with a bottomry bond on ship, cargo, and freight, as collateral security; the bond to be void should the draft be accepted. The said master and the said Messrs. Houdlette and Co. by letter communicated to the owners of the *Onward* the circumstances of the said ship's distress and the aforesaid offer of the said Messrs. Houdlette and Co., and the said master by his letter requested the said owners to give him their directions on the subject. The said owners, shortly after, receiving such letters, by letter communicated with the defendants at Glasgow, and forwarded to them copies of the said lastly mentioned letter of the said master and of the said Messrs. Houdlette and Co.

5. The defendants' houses at Moulmein and Glasgow respectively received the letters referred to in the 2nd article of this reply in time to have communicated with the said Master at Port Louis before the giving of the said bottomry bond.

6. The defendants received the said copies of letters referred to in article 4 of this reply in time for them to have communicated thereon with the said master at Port Louis before the giving of the said bond.

7. The defendants did not at any time answer the said communications of the said Messrs. Houdlette and Co. or in any way communicate or attempt to communicate with the said master, or to direct him not to give or to prevent him from giving the said bottomry bond on the said cargo.

8. The said bond was duly advertised for sale, and was subsequently, and after a proper interval had elapsed, sold by auction in the usual way. There were several bidders at the sale, and the said Messrs. Houdlette and Co. were the lowest bidders in premium, and the said bond was knocked down to them. The said bond was not advertised for until the said ship was ready for sea, and up to that time the master of the said ship had expected to hear from her owners, and had hoped to be put in funds, and had not finally determined to resort to bottomry of the said ship or her cargo or freight.

9. There was every reason to believe that the said ship and her freight to be earned would be sufficient, or nearly sufficient, to meet the said bond, and a large portion of the sum advanced on bottomry was raised for the purpose of, and was expended in, defraying charges incurred on the said cargo at the Mauritius for discharging, storing, and otherwise.

10. Save as herein appears, the plaintiffs deny the truth of the seven allegations contained in the said answer.

To this reply the defendants rejoined as follows:—

1. The averments contained in the 1st and 3rd articles of the reply are respectively true. The money, however, which the master required, as stated in the said 3rd article of the reply, were supplied to him by the owners of the ship, and he was under no necessity of borrowing, and did not borrow, them on bottomry.

2. Messrs. Houdlette and Co. did communicate to the defendants' firm at Glasgow as mentioned in the 2nd article of the reply.

3. The said Messrs. Houdlette and Co. did not inform the defendants' firms at Moulmein or at Glasgow of any intention on the part of the master of the *Onward* to have recourse to bottomry, nor intimate to the defendants that there would be any necessity for so doing, and it was after the vessel had left Port Louis that they communicated to the defendants for the first time any information whatsoever relating to the advance of money to the master of the *Onward* on bottomry.

4. The first intimation which the defendants received of any intention or proposal on the part of the master of the *Onward* to have recourse to bottomry was received by the defendants in Sept. 1870. It was contained in a copy of a letter dated the 29th June 1870, and written by the said master to Messrs. C. and B. Poulton, of New

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Yerk, the owners of the ship, being the letter mentioned in the 4th article of the reply. The said copy was enclosed in a letter dated the 25th Aug. 1870, and written by the said Messrs. C. and R. Poillon to the defendants, and received by them in the following Sept., being the letter of the owners referred to in the 4th article of the reply.

5. On the reply of the letters in the last article mentioned, the defendants reasonably inferred that the vessel would have left Port Louis before any communication from them could have reached the said Master, and that it would consequently have been useless to have attempted to make any such communication.

6. Save as herein admitted, all the several averments in the said reply contained are untrue.

7. It is submitted that under the circumstances stated in the defendants' answer, and in the 3rd, 4th, and 5th articles of this rejoinder, the several averments in the said reply contained would, if true, be immaterial and irrelevant.

The pleadings were thereupon concluded, but at the hearing, the facts showing that the bond had been given as collateral security for a bill of exchange, the defendants, at the suggestion of the court (a) amended their answer by adding the following article:—

2a. The bond in the petition mentioned was given only as a collateral security for the payment of a bill of exchange for 5130*l.* 9*s.* 3*d.* drawn by the master of the ship on Messrs. Baring Brothers and Co., and the said bill of exchange was accepted and paid, or if not accepted and paid was not only presented, or if presented and dishonoured the said bill was not protested, and due notice of dishonour of the said bill was not given to the drawer or to these defendants.

To this additional article of the answer the plaintiffs replied by pleading in lieu of article 4 of their reply the following article:—

4. The said Messrs. Houdlette and Co. shortly after said ship was put into their hands at Port Louis, offered the said master in case he should require them to do so, to make the necessary advances, and to take his draft at 90 days' sight on Messrs. Baring Brothers and Co., of London, at the rate of 5 per cent. discount, for the amount of the repairs of the *Onward*, together with a bottomry bond on ship, cargo, and freight as collateral security, and accordingly the arrangement and terms upon which the said bill and bond were respectively drawn and executed were at the time of such drawing and execution put into writing and embodied in a letter from the said Messrs. Houdlette and Co. at such time handed to the master of the *Onward*, which letter was and is in the words and figures following, that is to say:—

Port Louis, Mauritius.
13th Oct. 1870.

Captain J. H. Hewitt,
Ship *Onward*.

Dear Sir,—We beg to acknowledge the receipt of your bills at 90 days' sight on Messrs. Baring Brothers and Co., London, in our favour for (5130*l.* 9*s.* 3*d.*) say five thousand, one hundred and thirty pounds, nine shillings, and three pence sterling. These bills we take with a bottomry bond on your ship, freight, and cargo as collateral security, with the express understanding and agreement that the bond should be cancelled on the prompt payment by the owners of the vessel to Messrs. Baring Brothers and Co. of the amount of the above bills, together with their charges; otherwise the bond to be enforced, principal and interest. We remain, Dear Sir, your obedient servants,
HOUDLETTE AND CO.
The said master and the said Messrs. Houdlette and Co.

(a) The learned judge on the defendants wishing to raise the defence that the bond was given as collateral security to bills of exchange, which they alleged had been accepted and paid, pointed out that such a defence ought to be raised on the pleadings, so as to give the plaintiffs notice on the defence. He quoted *The Bonaparte* (5 Moore P. C. C. 459) as showing the practice of the court, and gave leave to the defendants to amend their pleadings.

by letter communicated to the owners of the *Onward* the circumstances of the said ship's distress and the aforesaid offer of the said Messrs. Houdlette and Co., and the said master by his letter requested the said owners to give him their directions on the subject. The said owners, shortly after receiving such letters, by letter communicated with the defendants at Glasgow, and forwarded to them copies of the said last mentioned letters of the said master and of the said Messrs. Houdlette and Co. The said owners of the *Onward* did not promptly (and in fact never did) pay to the said Messrs. Baring Brothers and Co. the amount of the said bills, and their charges, as provided by the said agreement, and never in any way provided for the payment of the said bills or bond, but on the contrary refused to pay or provide the amount, and elected and determined that the said bond should not be cancelled, but should be left to be enforced. The said bills were accepted by the said Messrs. Baring Brothers and Co. under an arrangement between themselves and the said Messrs. Houdlette and Co., but not in payment of the amount secured by the said bond, and was paid by the said Messrs. Baring Brothers and Co. in pursuance of the said arrangement and not otherwise, and not on account or in satisfaction of the said bond. The said master of the *Onward* had not at the time of the drawing of the said bills, or at any time afterwards, any funds whatever in the hands of the said Messrs. Baring Brothers and Co., and upon the arrival of the *Onward* at Liverpool, as in the petition mentioned, refused to take up the said bills, and the defendants never offered, and never were ready or willing, to provide funds for the said bills. The plaintiffs further say that the additional article numbered 2A to the answer filed in this case is immaterial and irrelevant.

On the 7th Jan. 1868 the *Onward*, which was then the property of one B. J. Trask, of New York, was chartered to Messrs. T. D. Findlay and Co., of Glasgow, to carry a cargo of coal to a port in India or China, and thence proceed to Amherst for orders to load at Monheim, Rangoon, Bassien, or Akyah, one port only, a cargo of rice in bags, or teak timber, or planks, and thence proceed with such cargo to Queenstown or Falmouth for orders for a port of discharge in the United Kingdom, or on the Continent between Hamburgh and Bordeaux, both inclusive, or to a safe port in the Baltic; the charterers paying a freight 6*l.* 5*s.* for teakwood per load of fifty cubic feet for the United Kingdom or the Continent, such freight to be paid as follows: 3000*l.* to be advanced in England by the charterers' acceptances at three and six months, sufficient cash at current rate of exchange for necessary disbursements of ship abroad, not exceeding 700*l.*, say not over 300*l.* at port of discharge of onward cargo, and the balance at port of loading of homeward cargo; and after deducting previous advances from gross estimated freight, one-third of balance to be paid in cash to the shipowners' agents on arrival at final port of discharge, and the remainder on right delivery of the cargo by approved bills or in cash, at charterers' option; should the ship be ordered to Shanghai to discharge the onward cargo, the charterers to advance 700*l.* additional for disbursements there; the master to sign bills of lading as presented but not below current rate of freight, without prejudice to the charter-party. There was a second clause in the charter-party by which it was agreed that on the arrival of the ship at her loading port, the charterers should have the option of employing the ship for one, two, three, or four intermediate voyages from Rangoon or Moulemein to Calcutta with a cargo of teakwood; freight to be paid at specified rates, and sufficient cash for the ship's ordinary disbursements to be advanced to the master by the charterers; balance of freight to be

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paid on receipt of discharge from master, less 500*l.* to be retained by charterers till advice of ship having sailed on her homeward voyage.

The *Onward* sailed under this charter-party from Liverpool with a cargo of coals, and proceeded to Shanghai, and there discharged; she then proceeded to Amoy for orders, and was there ordered to go to Moulemein; she went to that port, and there loaded a cargo for Bombay under the second clause in the charter-party. On her voyage to Bombay she met with bad weather, and was damaged. At Bombay the master attempted to raise funds from the charterers' agents, William Nicholls and Co., to pay for the ship's repairs. The agents, however, declined to advance more than ordinary ship's disbursements; they communicated by telegram at the end of June 1869 with the defendants at Glasgow, and the defendants directed them by telegram, afterwards confirmed by letter, not to exceed ordinary disbursements, as they had already advanced beyond what had been earned on the outward voyage. The defendants on 22nd July 1869 again wrote to their agents in Bombay, acknowledging their agents' letter of 22nd June 1869 as to the damage to the *Onward* and saying that they thought "it not improbable that the master will be unable to raise sufficient funds on bottomry to pay the repairs, in which case it may be necessary to bring her to a sale," and again declining to make further advances if the ship was unable to complete her voyage. The agents actually advanced, with the consent of a member of the defendants' firm who was at Bombay at the time, 7500 rupees, and the master obtained 1000*l.* from his owners, who authorised him to draw for that amount upon the plaintiffs. This enabled him to complete the repairs of his ship. On the 5th Sept. 1868 the *Onward* had become the property of Messrs. C. and R. Poillon, wealthy merchants in New York, and on 5th Aug. 1869 Messrs. Poillon wrote to the defendants, informing them of the change of ownership, and that the plaintiffs would act as agents of the ship in Europe. The ship again went to Moulemein, and there loaded a cargo of teakwood and carried the same to Calcutta, where she discharged; she then returned to Moulemein, and there loaded for Europe a cargo of teakwood, for which the master signed bills of lading at the then current rate of freight, 3*l.* 5*s.* per load of 50 cubic feet. She was loaded by Tod, Findlay and Co., who were the representatives of the defendants' firm at Moulemein. The master had from the charterers' agents at Moulemein about 592*l.* for disbursements. The charterers advanced altogether 7380*l.* 14*s.* 2*d.*, leaving a balance due for freight on the ship's arrival in England of 2338*l.* 6*s.* 6*d.*

The *Onward* left Moulemein for Europe on 1st April, 1870, but at the mouth of the Mozambique Channel she encountered bad weather, and was compelled to put into Port Louis, Mauritius, where she arrived on 11th June 1870. The mails leaving Mauritius for Great Britain between the 29th June and 24th Oct. 1870 were as follow:—

Leave Port Louis.	Delivered in Glasgow.
1st July	30th July.
29th July	30th Aug.
26th Aug.	29th Sept.
23rd Sept.	24th Oct.
21st Oct.	24th Nov.

The only means of communication between Mauritius and Great Britain or the United States

was by French mail between Port Louis and Aden, and thence via Marseilles or Southampton. There was no direct telegraphic communication from the Mauritius, but messages could be sent to Aden by the mail steamer, whence they would be forwarded by telegraph. The time required to send a message to Glasgow from Port Louis, or vice versa, by steamer and telegraph was from twelve to fourteen days, i.e., from ten to thirteen days by mail steamer between Aden and Port Louis, and ten to fourteen hours by telegraph between Aden and Glasgow. The mails from England to Aden and Port Louis during the same period were as follow:—

Leave England.	Leave Aden.	Arrive at Port Louis.
9th July.	13rd July.	6th Aug.
9th Aug.	26th Aug.	4th Sept.
2nd Sept.	17th Sept.	1st Oct.
28th Sept.	23rd Oct.	3rd Nov.

By the first mail after the *Onward* put into Port Louis, 1st July, the master wrote to his owners in New York as follows:—

Port Louis, Mauritius, 29th June, '70.

Messrs. C. and R. Poillon,
224, South Street, New York.

Hon. Sirs,—After greeting, I beg to inform you that by circumstances most unfortunate I have been compelled by stress of weather to seek this port for repairs, arriving on the 12th of this month too late for the last mail.

The casualties of the voyage are as follows. Left Moulemein, or mouth of the Salween, on the 1st April last with a full cargo of teak timber and planks, about 900 tons, and 60 bags of guano, or about 5 tons. [The letter then set out the first part of the voyage, which is immaterial.] At noon on the 15th May sighted the Rodrigues Islands, and passed to the southward of them. Nothing further occurred worthy of note until the 31st May, 6h. 30m. p.m., after a day of continued squalls and varying winds a heavy gale broke upon the ship from the westward, with a continual increase for thirty-six hours, during which time the seas were fearful in abruptness. The ship laboured and planged heavily throughout the night. By 9h. a.m. we were making 350 strokes per hour of Adair's double-action pumps, and both main and mizen masts badly sprung. The bowsprit had wrought so much during the gale that the outwater is quite drawn from the stem, and I subsequently found that the pall-bit beam supporting its heel also carried away, and all the woodwork about the night-heads started. At 10h. 30m. a.m. 31st May, sea account latitude 29° 40', longitude 43° 40' east, after a consultation with the officers and crew, it was found expedient for the benefit of all concerned to deviate from the proper course of the voyage and seek this, our nearest port, for repairs. On the 13th ult. was towed into the harbour and moored safely. On the 15th envoys came on board and recommended to discharge until the leak should stop. On the 16th called for tenders for the discharge and storage of the cargo, one of which was accepted, and began to discharge on the 17th ult. We are now a little more than half discharged, the ship still making water about four inches per hour, and will have to go in dock by all probability. Tenders for the work have been duly sent in, and, as near as can be estimated, it will take from \$15,000 to \$17,000 to place her in repairs. Messrs. Houdlette and Co. agree to take my draft at 90 days' sight on Messrs. Baring Brothers and Co., of London, at the rate of 5 per cent. discount, for the amount of repairs on my vessel, together with a bottomry bond on ship, freight, and cargo as collateral security. Should you not approve of this, please advise by wire through Messrs. Baring Brothers and Co., of London, being the readiest mode in which intelligence can be conveyed to this island. It will take at least ten days more to discharge, and probably twenty to twenty-five days in repairing, and at least one month to reload. You will therefore have ample time for advising me by letter. In the mean time a faithful and proper attention shall be paid to all the work and expenditure as far as lays in the power of your humble servant,

JAMES H. HEWITT.

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The tenders referred to in the letter for the discharge and storage of the cargo, and for the repairs of the ship were procured through the United States Consul and Messrs. Houdlette and Co., who were employed by the master to act as the agents of the ship, and the repairs were afterwards executed on the credit of Messrs. Houdlette and Co. Although an estimate was made of the cost of the repairs before they were commenced, no estimate was made of what the value of the ship would be after the repairs had been done. When the repairs were completed the ship was, as appeared from her subsequent sale in England, actually of less value than the amount which had been expended on her for repairs. By the same mail, let July, Messrs. Houdlette and Co. wrote to the shipowners, and also by the master's directions to the shippers at Montmein and to the defendants at Glasgow. The letters were as follows:—

Manritius, 29th June 1870.

Messrs. Tod Findlay and Co., Montmein.

Dear Sirs,—We hereby beg to advise you that the American ship *Onward*, Captain Hewitt, from your port with timber for Europe, put in here on the 11th instant in the southern port of Madagascar and the African coast.

She has been surveyed and found making four inches of water an hour, her main and mizen masts badly sprung, and pall-hit beam broken.

Her cargo is now nearly discharged, and she will go into dock in a few days where she will have to be stripped, caulked, and re-coppered, and her broken masts and beam replaced by new.

By next opportunity will be able to give you further particulars, and thanking you for your fortnightly circulars regularly received from Rangoon, remain, dear Sirs, your obedient servants,

HOUDELETTE AND CO.

Manritius, 1st July 1870.

To T. D. Findlay, Esq., Glasgow.

Dear Sir,—We hereby beg to advise you that the American ship *Onward* from Montmein with timber for Cork or Falmouth for orders put in here on the 11th instant for repairs, she having experienced bad weather between the southern point of Madagascar and the African coast.

She has been surveyed and found making four inches of water per hour in still water, and her main and mizen masts found sprung, and pall-hit beam broken, and was recommended by the surveyors to discharge for further examination, and she is now nearly discharged, and will be obliged to go into dock and be stripped, caulked, and re-coppered, and broken masts and beams replaced by new.

We think that she will be detained here about two months longer to finish discharging, make the necessary repairs, and reload, and her expenses here will amount to about £4000.

By next opportunity we shall be able to give you more particulars, and in the mean time remain, dear Sirs, your obedient servants,

HOUDELETTE AND CO.

Manritius, 1st July 1870.

Messrs. C. and R. Poillon, New York.

Dear Sirs,—We hereby beg to advise you that your ship *Onward*, Captain Hewitt, from Montmein with timber for Cork or Falmouth for orders, put in here on the 11th ultimo in distress, having experienced heavy weather on the 31st May in latitude 25° 40' south, longitude 43° 48' E. causing her to spring a leak.

She has been surveyed and found to be making about four inches of water an hour in our harbour, her main and mizen masts badly sprung, and pall-hit beam broken, and some of her sails gone. The surveyors recommended her cargo to be discharged in order to lighten the ship for further examination, and now that the cargo is nearly out, the leak continues the same as when she was first surveyed, and she has, therefore, been recommended to go into dock and be stripped, caulked, and re-coppered, and her masts and beams broken to be replaced by new, which we think will detain the ship about two months longer with the reloading of the cargo, and will cost

about (4000l.) say four thousand pounds sterling, and for the purpose of procuring funds for the payment of these repairs we have proposed to Capt. Hewitt to take his draft on Messrs. Baring Brothers and Co., of London, drawn at 90 days' sight at 5 per cent. discount, with a bottomry bond on ship, cargo, and freight, as collateral security, with the understanding that the bond shall be null and void provided the draft be accepted, and should you approve of this proposal, you will please place in the hands of Messrs. Baring Brothers and Co. sufficient funds to meet the drafts upon presentation.

Captain Hewitt will write by this opportunity, and give you all the particulars of his case, and by the mail leaving on the 29th instant we shall be able to inform you of further progress, and in the mean time remain, dear Sirs,

HOUDELETTE AND CO.

On 9th July, after the discharge of the cargo, a second survey was held, and the ship ordered into dry dock. She went into dock on 11th July. By the mail leaving 29th July the master again wrote to his owners in New York, announcing what had been done, and the repairs recommended by the surveyors, and saying that he hoped to leave dock on 30th July and to commence reloading in another week, which he hoped to finish in a month. By the mail leaving on 26th Aug. the master again wrote to his owners in New York, saying that the repairs were not yet finished, that he had begun to reload, but that it would still take thirty or forty days, again saying that he hoped to have advice from them "by next mail in regard to raising of funds, of which I mentioned in my letter of 29th June last, namely, Messrs. Houdlette and Co. agree to take my draft at 90 days' sight on Messrs. Baring Brothers and Co., of London, at the rate of 5 per cent. for the amount of repairs on my vessel, together with a bottomry bond on ship, freight, and cargo as collateral security. Should you not approve of this, please advise by wire through Messrs. Baring Brothers and Co., of London, being the readiest mode in which intelligence can be conveyed to this island." No communication was sent to the shippers at Montmein or to the defendants at Glasgow by either of the last mentioned mails.

On 25th Aug. 1870 Messrs. Poillon, the shipowners of New York, wrote to the defendants at Glasgow as follows:—

C. AND R. POILLON,

Shipbuilders, Shipwrights, Caulkers, and Spar Makers,
224, South Street, New York,

25th Aug. 1870.

Messrs. T. D. Findlay and Co.,
Glasgow, Scotland.

Gentlemen,—By the enclosed copies of letters received from Captain Hewitt and Messrs. Houdlette and Co., you will perceive that the ship *Onward* under charter to yourself has been compelled to put into Manritius in distress, and will probably be detained there for two months or more for repairs. The information contained in the letters is all the particulars we have of the disaster. If we should obtain anything farther of importance, will advise by first opportunity after receipt. Your obedient servants,

C. AND R. POILLON, per E. H. GIBBS.

The enclosures referred to in the letter were the letters of 29th June and 1st July 1870 before set out, and the above letter and enclosures were delivered to the defendants at Glasgow on 8th Sept. 1870.

By the mail leaving Port Louis on 23rd Sept. the master again wrote to his owners in New York, saying that he had not yet completed reloading, but that he hoped "by the 8th of next month to be loaded." By the same mail Messrs. Houdlette and Co. wrote to the defendants at Glasgow as follows:—

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Mauritius, 19th Sept. 1870.

T. D. Findlay, Esq., Glasgow.

Dear Sir,—Since writing you on the 30th June the *Onward* has come out of dock, and has now finished her repairs, but the stavedores do not appear to understand the work of stowing timber, and the labour of taking in the cargo seems to drag, but the captain hopes to have finished in about two weeks, and we hope to see the vessel away soon after.

The *Onward* has been very thoroughly repaired, and we believe her to be a good strong ship, and Captain Hewitt has left nothing undone to push forward the work as fast as possible.

With nothing of importance to add, we remain, dear Sir, your obedient servants, HOUNDLETTE AND CO.

Messrs. Houdlette and Co. also wrote under the same date to the shippers at Moulmein to the same effect. The master having received no communication as to raising funds, advertised on 5th Oct., through the United States Consul, in the *Mauritius Commercial Gazette* for a loan on bottomry. The bond was sold by auction at the United States Consulate, and three bids were made. The advertisement and the result, as certified by the United States Consul, are as follow:—

Captain Hewitt, of the American ship *Onward*, will receive offers at the United States Consulate to-day, 5th Oct., at 11 a.m., for the loan of about (\$25,000) twenty-five thousand dollars, required to defray the necessary disbursements of his vessel at this port. The loan to be secured by a bottomry bond on ship, cargo, and freight.

The *Onward* is bound for Cork or Falmouth for orders, and the bond will be made payable twenty days after safe arrival at her port of discharge.

Consulate of the United States of America
for Port Louis, Mauritius.

5th Oct. 1870.

I, Nicholas Pike, Consul of the United States for Port Louis, Mauritius, do certify that the annexed advertisement in English was published in the *Commercial Gazette* on the 5th Oct. 1870.

I further certify that, agreeably to said advertisement, proposals of Houdlette and Co., merchants, of Port Louis, to advance the amount required by the captain for repairs and outfit, to enable the said vessel to proceed to sea, of twenty-eight per centum, were the lowest proposals received, and they are, therefore, best entitled to advance the same.

[L.S.]

NICHOLAS PIKE,
United States Consul.

The *Onward* on 13th Oct. 1870 completed re-loading, with the exception of 77 logs of teak wood which the stavedores at Mauritius were unable to get into her. On the same day the master signed a bottomry bond on ship, freight, and cargo, the substance of which is set out in the second article of the plaintiffs' petition. The master also signed bills of exchange in favour of Messrs. Houdlette and Co. for 5130*l.* 9*s.* 3*d.*, and Messrs. Houdlette and Co. gave the master an acknowledgment in the form of the letter set out in the amended article of the reply (article 4). The *Onward* sailed for Europe on 15th Oct. 1870. The 77 logs not shipped on board the *Onward* were sent by a British barque bound for London at a freight of 2*l.* 7*s.* 6*d.* per load of fifty cubic feet. Evidence given on behalf of the defendants showed that freights were very low in the Mauritius in 1870, and that there was a greater amount of tonnage there than there was demand for.

By the mail leaving Port Louis 21st Oct. 1870 Messrs. Houdlette and Co. wrote to the defendants at Glasgow as follows:—

Port Louis, Mauritius, 19th Oct. 1870.

T. D. Findlay, Esq., Glasgow.

Dear Sir,—We last had this pleasure on the 18th ultimo, and now beg to inform you that the *Onward* got

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away on the 15th instant, having taken all of her original cargo onward, with the exception of 77 pieces which were shunt out for want of room, and have been shipped on board the ship *Warren Hastings* bound for London.

The disbursements of the *Onward* amounted to about \$25,000, and we have taken the captain's draft on Messrs. Baring Brothers and Co. at 5 per cent. discount for the amount of same, and a bottomry bond on ship, freight, and cargo as a collateral security, which will be made null and void upon payment of the draft.

Trusting that this vessel will arrive at her port of destination in safety, we remain, dear Sir, your obedient servants, HOUNDLETTE AND CO.

By the mail and under the same date Messrs. Houdlette and Co. wrote to the shippers at Moulmein precisely to the same effect. By the same mail Messrs. Houdlette and Co. forwarded to Messrs. Baring Brothers and Co. the master's drafts and the bottomry bond. The bond was endorsed by Messrs. Houdlette and Co. "Pay to the order of Messrs. Baring Brothers and Co., London, Houdlette and Co." The bill of exchange drawn by the master was as follows:—

First Exchange for 5130*l.* 9*s.* 3*d.*

Port Louis, Mauritius.

13th Oct. 1870.

Ninety days after sight of this first of Exchange (second and third of same tenor and date unpaid) Pay to the order of Messrs. Houdlette and Co. the sum of five thousand, one hundred and thirty pounds, nine shillings, and three pence sterling, value received, and place the same, with or without advice, to account of ship *Onward* and owners for necessary disbursements at this port.

London.

JAMES H. HEWITT,

Master of ship *Onward*.

To Messrs. Baring Brothers and Co.

On receipt of the bond and bill of exchange Messrs. Baring Brothers and Co. accepted the bill by writing across it "Accepted 26th Nov. 1870, at Messrs. Martin and Co. B. B. and Co." One of the plaintiffs' witnesses, Mr. Theobald, partner and manager of Baring Brothers and Co. in London, explained that this was their ordinary mode of accepting bills when sent privately and not intended to go out of their hands into the market; otherwise they signed "Baring Brothers and Co." The bill was indorsed to them especially as obligees of the bond, "Pay to the order of Messrs. Baring Brothers and Co., London. Houdlette and Co." It never left the hands of Messrs. Baring Brothers and Co. Baring Brothers and Co. had acted for some years as agents for Messrs. Houdlette and Co., and had annually supplied the latter with a letter of credit for 10,000*l.* for the purpose of advances on bottomry bonds, agreeing with Messrs. Houdlette and Co., as well as with *bond fide* holders, that Messrs. Houdlette and Co.'s drafts for such advances at 90 days' sight should be duly honoured, provided that when the drafts were presented for acceptance Messrs. Baring Brothers and Co. should have received the bottomry bonds made out to their order; and also it was agreed that if the bonds were promptly paid the commission to be charged to the owners should be only 2½ per cent. and 1 per cent. for effecting insurance. Such a letter of credit had been sent to Messrs. Houdlette and Co. on 7th Feb. 1870 for that year. Messrs. Houdlette and Co. had kept Messrs. Baring Brothers and Co. advised of the proceedings in reference to the *Onward* by every mail leaving Mauritius while the vessel was there. On receipt of the bill of exchange and bond (26th Nov. 1870) Baring Brothers and Co. opened an account headed "Dr. The ship

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Onward and owners in account with Baring Brothers and Co. Cr., and debited the vessel with the amount of the bill of exchange, the cost of insurance, commission and interest.

On 21st Sept. 1870 the shipowners in New York wrote to Messrs. Baring Brothers and Co., as follows:

C. AND R. FOILLON,
Shipbuilders, Shipwrights, Caulkers, and Spar Makers,
224, South Street, New York,
21st Sept. 1870.

Messrs. Baring Brothers and Co., London.

Gentlemen,—We are in receipt of a letter from Capt. Hewitt of the ship *Onward*, dated Port Louis, Mauritius, 29th July, copy of which is enclosed, to which please refer: we are not desirous of advancing the money spent at Mauritius, unless by doing so we can make a saving, and for that reason would thank you on receipt of the documents, and before you accept or pay the bond, to get your average stated to make a rough estimate that will show how much the ship will have to pay after deducting from the total amount due under the bond (if promptly paid) such sums as the cargo and underwriters on freight will have to pay, and telegraph the result by cable; and we would like the amount also due from the ship classified so as to show how much the underwriters on vessel would have to pay, and how much would fall on the owners. With these two items before us, we can determine whether or not it is desirable for us to advance the money, or let the vessel be sold to pay the bond. If on the receipt of this information we conclude to pay, we will immediately deposit the amount required with the Messrs. Ward, and have them advise you by cable, so that you may then pay the bond for us; otherwise we shall let the ship be sold.

The freight will amount to say for	£	s.	d.
About 900 tons tonkwood at 40s. per ton	36	10	0
5 tons guano, price not named, say			
£15s. per ton	23	15	0

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from which to get at the average, an estimate for the outward freight value of the coals will probably have to be deducted to ascertain the amount that the cargo will be liable for on the homeward voyage; the quantity of coals we do not know, but it can be obtained from the charterers, Messrs. Findlay and Co. Your obedient servants,
C. AND R. FOILLON.

On 26th Sept. the shipowners again wrote to Baring Brothers and Co., sending further information as to the ship's voyages and cargoes, and again asking for an average statement. On 13th Oct. Messrs. Baring Brothers and Co. replied to the letter of the 21st Sept. informing the shipowners of their terms as to bottomry bonds; promising the average statement as soon as they knew the amount of the bond, and saying that they would place the shipowners on the footing described (as to the terms of payment) if the bond was taken up, but if the bond was enforced the maritime premium would also be enforced.

No correspondence passed between Baring Brothers and Co. and the defendants.

On 27th Jan. 1871 Messrs. Foillon wrote to the master at London as follows:—

C. AND R. FOILLON,
Shipbuilders, Shipwrights, Caulkers, and Spar Makers,
224, South Street, New York,
6th Jan. 1871.

Captain Jas. H. Hewitt, London.

Dear Sir,—We have received your letters from Mauritius, and we have also received the letter from Messrs. Houdlette and Co., and after full examination have concluded not to take up the bottomry bond on the ship *Onward*, and we have so informed Messrs. Baring Brothers and Co. Will you communicate by telegraph to us yourself immediately on the arrival of the ship at port of discharge and oblige your obedient servants,
C. AND R. FOILLON.

They also wrote under the same date to Messrs. Baring Brothers and Co. to the same effect. At the end of Jan. 1871 the *Onward* arrived in Liverpool, and the master having no funds to take up his bill, the ship was arrested in this suit; the freight was paid into court, and the ship afterwards sold. The master and crew also instituted suits of wages against the vessel, and the proceeds of the sale of the ship and her freight were insufficient to satisfy the bond.

Nov. 29 and 30, Dec. 7 and 9, 1872.—*Milward, Q.C. and Clarkson (Butt, Q.C. with them)*, for the plaintiffs.—First, as to the defence set up of want of communication, we submit that there was no necessity for communication, and, even if there were, that the communication made was sufficient. The English rule as to communication differs from the law of all foreign European states, and also from American law. In *The Bonaparte* (8 Moore P. C. C. 459) it was held that where a cargo belongs to a single individual known to the master, communication ought to be made to the owner of cargo before taking up a bottomry bond on the cargo, if it is reasonable to expect that the master might obtain an answer within a time not inconvenient with reference to the circumstances of the case, and that where the ship is in a port of a country near to that in which the owner of cargo resides, such communication ought to be made. Now Mauritius and Great Britain are not near, and it required two months at least to get an answer to a communication by letter, and as the master hoped to get away before that time he was not bound to communicate. But independently of this, there was sufficient communication. Houdlette and Co. wrote to the owners of cargo by the first mail after the ship put into Port Louis, and again by the mail of 23rd Sept., informing the owners of cargo that the ship was in distress. The first letter gave them sufficient information for them to conclude that it would be necessary to have recourse to bottomry. The communication was as explicit as that made in *The Bonaparte* (*ubi sup.*). The letter of 22nd July 1860 from the owners of cargo to their agents shows that at that time they contemplated that the necessity for bottomry might arise, and they were *a fortiori* bound to conclude on receiving the letter of 30th June 1870 from the Mauritians that bottomry was necessary. Houdlette and Co. communicated not only with the defendants, but with the shippers at Moulmein. If the defendants objected to bottomry they ought to have telegraphed to the master at Port Louis. In fact, if they had written by the mail leaving England on 6th Aug., they might have stopped the bond. On 8th Sept. they received copies of the letters from the master and agents to the owner in New York announcing the intention to bottomry, and even then they might have communicated with the Mauritians by telegraphing before 18th Sept. in time to catch the mail leaving Aden on that date, which reached the Mauritians on 1st Oct before the bond was given. Moreover, the defendants were aware that Baring Brothers and Co. were the shipowners' agents, and they could have communicated with them, but did not do so. The defendants, knowing the facts, did nothing, but held their hands. This must be taken as a consent that the master should do as he saw fit for the benefit of all concerned: (*The Bonaparte, ubi sup.*) The defendants declined or neglected to take means for the protection of their

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interests, and so admitted the sufficiency of the communication within the authority of that decision. The principles as to the duty of communication are laid down in the following cases:—

Glascot v. Lang, 2 Phillips (Chan. Cas.) Rep. 310;
Cargo ex Sultan, Swab. 504;
The Lizzie, L. Rep. 2 Adm. & Ecc. 254; 19 L. T. Rep. N. S. 71; 3 Mar. Law Cas. O. S. 150;
The Hamburg, 2 Moore P. C. C. N. S., 289; 10 L. T. Rep. N. S. 206; 2 Mar. Law Cas. O. S. 1;
The Panama, L. Rep. 2 Adm. & Ecc. 390; L. Rep. 3 P. C. 199; 22 L. T. Rep. N. S. 73; 21 L. T. Rep. N. S. 13; 3 Mar. Law Cas. O. S. 344, 461;
The Kernal, L. Rep. 2 Adm. & Ecc. 289; L. Rep. 3 P. C. 505; 18 L. T. Rep. N. S. 661; 21 L. T. Rep. N. S. 199; 3 Mar. Law Cas. O. S. 103, 276.

Secondly, as to the defence that reasonable and proper time did not elapse after the bond was advertised. The advertisement appeared in a proper way, and the bond was sold to the lowest bidder. Moreover, the bond was not given till the last moment, so that if remittances had been received from the owners it would not have been given. Thirdly, as to the plea that the bills were paid by the plaintiffs—that is—that the bond was void on payment by Baring of their own acceptance. It cannot be contended that the plaintiff's qualified acceptance of the master's drafts was an acceptance in a mercantile sense. The real agreement was that the bond was to be void, if the shipowners put money into the plaintiffs' hands to meet the bills. This appears from the letter of the agents to the shipowners of 1st July 1870. This was not done, and therefore the bond must be enforced. The bill was duly presented within the meaning of the agreement. Where the parties upon whom the duty of providing funds to meet a bill devolves refuse to supply the necessary money, presentation in the strict sense is not necessary for the purpose of obtaining the right to enforce a bottomry bond: (*The Staffordshire*, ante, p. 365; L. Rep. 4 P. C. 194; 27 L. T. Rep. N. S. 46). It is no objection to a bottomry bond that it was given as collateral security to bills of exchange.

Stainbank v. Shepard, 13 C. B. 418, 443;
The Emancipation, 1 W. Rob. 124.

The offer made to release the owners from the maritime premium on payment of the bills of exchange is a meritorious act, and deserving of the consideration of the court. The owners of cargo if they are compelled to pay this bond will not ultimately suffer, as they can recover over against the shipowners.

Benson v. Duncan, 3 Ex. 644; 18 L. J. 169, Ex.

Benjamin, Q.C. and Cohen, for the defendants.—Before the ship was discharged, before knowing what the repairs would cost, before an attempt was made to raise money on the credit of the shipowners, Houdlette and Co. secured to themselves the right of discharging for the repairs, and stipulated a bottomry bond on the defendants' cargo as security. There was not even an attempt to raise money on the security of ship and freight alone. Houdlette and Co. knew the position of Messrs. Poillon, as shown by their letters. The master never communicated with the defendants, but with his owners alone. By the mail leaving Mauritius on 1st July Houdlette and Co. wrote both to the shipowners and to the defendants, and although in the letter to the former they mentioned bottomry, in the letter to the latter no mention of

it is made. In effect the letter to the defendants says that there is nothing to communicate with regard to the cargo. The letter indicates that the ship will be gone in two months, and practically tells the defendants not to write, as they will get further particulars by the next mail, and requests them to wait for full information. No reason is suggested for not giving the information, although they are challenged to do so by our answer (par. 5). The letter was not calculated to cause any disquietude to the defendants as they knew that Poillons were rich, and that the plaintiffs were their agents, and the defendants might reasonably expect that funds would be provided by them. The cargo was put completely into the hands of Houdlette and Co. by the master and shipowners. If there had been any one at the Mauritius authorized to draw, the money would have been forthcoming on the shipowners' personal credit. A communication with owners should be made before spending money; it is no good to communicate after the *res* is bound. Houdlette and Co. did not write again for two mails, and then again said that there was nothing of importance to communicate, and said nothing about bottomry. The first communication from them as to bottomry is on the 19th Oct. 1870. The advertisement as to the auction of the bond was issued on the same day as the sale. This shows that the putting the bond up to auction was only a pretence, whereas an arrangement had been made months before that Houdlette and Co. were to take the bond as security to bills of exchange. This was the first public attempt to raise money, and proves our answer (par. 6). Nobody in the Mauritius could have known that there was to be a bottomry bond, and all the repairs had already been done on Houdlette and Co.'s credit. A communication by telegraph would have reached the defendants in the middle of July, and this was within the master's knowledge. The first communication as to bottomry was by the shipowners' letter reaching the defendants on 8th Sept., and then the shipowners say nothing about what they are going to do, but that they will communicate further, which they did not. The shipowners did not intimate that they would not meet the bills, and no request was made to the defendants to take care of their own cargo. The defendants could only suppose that the shipowners being rich would take up the bills on Barings. Especially in view of *The Bonaparte* (*ubi sup.*) we submit that in no letter to the defendants from the owners of the ship, their master, or agents, was the defendants' advice asked as to what was to be done; nor was any intimation given that their help was needed; and it was not until Jan. 1876 that the shipowners determined that they would not pay. At that time there was every reason to expect that the bills would be taken up, and that the bottomry bond would not be enforced. Even if the defendants had telegraphed after hearing on 8th Sept. 1870 of the proposal to bottomry, the telegram would have arrived before the bond was signed, but not before the bargain to give it had been made; it was this bargain that bound our cargo, and at that time the ship was reloaded. Moreover, the defendants had reason to believe that on 17th Sept., the date of the next mail leaving Aden, the vessel had left Port Louis, as the letters said she would be gone in two months from 1st July. The

plaintiffs contend, that on the authority of *The Bonaparte* (*ubi sup.*) their communication was sufficient. In that case, however, the owners of cargo had a letter three months before the bond was given, requesting advice from them, and they gave no answer, but left the cargo to be dealt with by those in charge of it. In *The Lord Cockran* 2 W. Rob. 329-333 it was found as a fact that the shippers were aware of the transactions as to bottomry, but chose not to interfere; and that the shippers' indifference was a virtual acquiescence in the master's proceedings; but Dr. Lushington said: "The shippers, it is to be noticed, were resident on the spot; and it is perfectly true that if they had been kept in ignorance of the intended bottomry transaction, that it would have been a strong argument against the *bona fides* of the master, that he had not put himself into communication with them." Then how much stronger is the inference against the *bona fides* of this transaction, where the agents put themselves into communication with the owners of cargo but said nothing about bottomry, whilst they spoke of it to the shipowners. An owner is entitled to receive notice of the intention to bottomry, in order to enable him to raise money for the purpose of rescuing his vessel or cargo from its difficulties at a smaller amount of premium than the maritime premium would necessarily entail: (*The Panama*, L. Rep. 3 P. C. 199, 203; 23 L. T. Rep. N. S. 12; 3 Mar. Law. Cas. O. S. 461, 463). The intention to hypothecate must be made known, not merely the delay. Such is the communication required, whilst here the defendants were led to suppose that there would be no need to hind the cargo. As to the defendants having refused to make advances at Bombay, they then supposed 'Trak was the shipowner, and his credit was not good. On the defendants refusing. Poillons, who were then owners, send through Barings the necessary money, and so inform the defendants. The defendants had, therefore, good reason in the succeeding year to suppose that the letters were merely intended to give information about the cargo, and that the shipowners would advance the necessary funds. The master of a ship is the chosen agent of the shipowner, but he is not the agent of the owner of cargo, except where necessity compels him to deal with it; his authority with regard to the cargo is strictly limited by the necessity which gives rise to the exercise of that authority: (*The Gratitude*, 3 C. Rob. 250.) In the absence of the owners, the master must deal for each owner as if he were present. The master cannot deal with the ship or cargo to the detriment of the other. He should ask himself what the owner of cargo would do if present to act for himself. Before any disbursements were made, this cargo was discharged. There were vessels ready to carry it on at a low rate of freight. If the master had let the defendants know that he required assistance to earn his freight, the first inquiry the defendants would have made would have been as to the value of the ship after repairs. This the master was bound to do as their agent, but no such estimate was ever made, and the master, therefore, did not act as an honest agent of the cargo. [Sir R. PHILLIMORE.—The practice in these cases seems to be that where surveys are made it is not usual to estimate the value after repairs; but it seems reasonable that they should ascertain whether that which they are going to repair

is worth the expenditure.] That is the principle where a claim is made under a policy of insurance in the case of a constructive total loss. The master was bound to ascertain what the vessel after repairs would have sold for in Port Louis. It was alleged that after repairs she was a better ship than when the master took her; in fact they made her practically a new ship, and that without any knowledge of her ultimate value. There was no necessity for dealing with the cargo without orders. The cargo was perishable, and was in safety and discharged at Port Louis. There was, therefore, an absence of the necessity which creates a master's authority. The master might have transhipped or left the cargo; it was not for the interest of the defendants to hypothecate it. The law requires communication in order that the owner may determine what he will do with his cargo, and that he may not be in the hands of an agent appointed by necessity. If the defendants had had the opportunity of communicating, and had forbidden bottomry, the master's authority would have been taken away and his agency destroyed; but here the bargain was made under his pretended agency two months before the bond was signed. A master has no right to incur expense on the cargo owners' credit except he cannot communicate. Although bottomry bonds on ship and freight may be encouraged, bonds on cargo should be carefully watched, as they are usually given not so much for the benefit of the owners of cargo as for the benefit of the shipowners, more especially where the money is advanced by the agents of the ships: (*The Hero*, 2 Dods. Adm. Rep. 139.) Bottomry bonds given under the law of foreign countries stand on a different footing from bonds given under English law, but the law of the United States as to these bonds is the same as English law.

Parsons on Shipping, pp. 143, 144, n.;

The William and Emmeline, Blatchford & Howland's Adm. Rep. 66, 71

Then as to the bills of exchange. The arrangement for taking up the bond was made exclusively for the benefit of the shipowners. We submit that no bond on ship, freight, and cargo can be valid where a secret benefit is reserved for the shipowners which is not also allowed to the owners of cargo. The shipowners were to be relieved from the maritime premium on prompt payment of the bills of exchange, but no such offer was made to the defendants. The bills were charged by the plaintiffs to the account of "Ship Onward and owners," and not to the ship, cargo, and owners. By the terms of the bills they were to be placed to the credit of the ship and owners. By law the master cannot make any agreement in which there is any difference as to the terms of reimbursement between the owners of ship and cargo. Being agent of both, he is bound to stipulate for the same benefit to both. By their letter of credit the plaintiffs intended the benefit to be applied to both sets of owners. The bond is therefore void as against the cargo. Moreover, the plaintiffs were under no obligation to accept the master's drafts, having no funds in their hands for the purpose. They did honour them, and the drawer is, therefore, discharged. This release of the master and shipowners releases the owners of cargo. The owners of cargo were only sureties for the shipowners for the repayment of the amount of the repairs, as argued for the plaintiffs,

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and can recover over against the shipowners. Now by the Mercantile Law Amendment Act 1856 (19 & 20 Vict. c. 97), sect. 5, a surety who discharges his principal's liability is entitled to have assigned to him all the securities held by the creditor, and to sue the principal in the name of the creditor. Before the date of accepting the bills the plaintiffs had been informed that the shipowners reserved to themselves the option of taking up the bills or not, and yet the plaintiffs chose to accept, and so paid the bill and discharged the bond. Again, the bills were never presented. Before a bond given as collateral security to bills of exchange can be enforced, there must be proof of presentation: (*The Staffordshire*, ante, p. 365; L. Rep. 4 P. C. 194; 27 L. T. Rep. N. S. 46). The defendants, if they had paid this debt, would have been entitled to the bills of exchange. If the plaintiffs had protested the bills of exchange instead of discharging the drawer by accepting them, the drawer would still be responsible. As it is, the master has a claim against the ship for his wages which takes precedence over the bond: (*The Daring*, L. Rep. 2 Adm. & Ecc. 260). He is discharged from his bill, and can now come upon the ship for an amount which the defendants' cargo, if the bond is enforced, will have to supply towards the payment of the bond. The plaintiffs have thus destroyed one of the securities to which we should have been entitled if they had protested that bill. The creditor who releases any of the securities which he holds for the payment of his claim, without the consent of another surety, releases that surety.

Milward, Q.C. in reply.—The plaintiffs are charged with fraud, not their mercantile position is sufficient to rebut any such presumption; moreover, the fact that any communication was made at all is inconsistent with such a charge. Then, first, was any communication necessary? Considering the difficulty of sending to Aden by telegraph, there was no necessity: (*The Australasian Steamship Co. v. Morse*, ante, p. 407; L. Rep. 4 P. C. 222; 27 L. T. Rep. N. S. 357). Secondly, did the master or agents communicate sufficiently? There was no necessity to communicate the intention to bottomry in express terms; it was not done in *The Bonaparte* (*ubi sup.*), and yet the bond was there upheld. The defendants were not entitled to stand by and do nothing; they should have acted on the communication. The letter of 30th June mentions probable expenses, and where was the money to come from except from bottomry. [Sir R. PHILLIMORE: The letter to the defendants stops short at a particular point. Mr. Benjamin contends that it is a singular thing that the same information was not given to the owners of ship and of cargo.] Unless there was fraud, this conduct avails nothing. They then most have known of the intention to bottomry, and if the first letter was not answered the others would not have been. If there was no fraud, the communication was ample. Moreover, however strong these arguments press against the shipowners, they cannot affect the innocent holders of the bond. *The Panama* (*ubi sup.*) carries the law as to communication no farther than *The Bonaparte* (*ubi sup.*). It does not touch the question whether notice of the condition of the vessel is sufficient. In *The Lord Cochrane* (*ubi sup.*) Dr. Lushington

said: "It appears, however, that only one or two of these individuals, and those possessing the slightest degree of interest, in any way interfered or took any share in the matter. In my opinion, this indifference was a virtual acquiescence in the master's proceedings, and is much the same thing as if a communication had taken place between the master and themselves, and their answer had been 'we will have nothing to do with the matter; you must act according to your own discretion.'" In the same way the defendants practically said in this case the same thing. As to transshipment, if the defendants had transhipped they would have been compelled to pay full freight to the shipowners, as well as freight home for another vessel, whereas if they had taken up the bills they would have paid only 2½ per cent. interest, and could have recovered over from the shipowners. The defendants were not bound to transship, but they were at least bound to write and stop the bottomry of the cargo. As they did nothing the master had authority to bottomry. The defendants were aware of the terms upon which the bond was given, and could have advanced funds to take up the bills. The master had no funds in the plaintiffs' hands, and, therefore, their conditional acceptance did not discharge him. The master cannot recover his wages in priority to the bond, as he himself is personally bound by it. They can sue the master on the bond, a better security than his bills.

Cur. adv. vult.

Jan. 28, 1873.—Sir R. PHILLIMORE.—This is a case of bottomry instituted on behalf of Messrs. Baring Brothers, the legal holders of a bottomry bond on the ship *Onward*, her freight, and cargo, against the owners of the cargo, Messrs. Findlay and Co., of Glasgow. The *Onward* is a large ship of 933 tons belonging to the United States of North America, and whilst on a voyage from Moolmein to Queenstown or Falmouth for orders, and from thence to a port of discharge in the United Kingdom or on the Continent between Bordeaux and Hamburg, both ports inclusive, laden with a cargo of teak timber, was compelled to put into Port Louis, in the island of Mauritius, in order to repair and refit. The plaintiffs allege that the master of the *Onward* was without funds or credit at that port, and was compelled to raise, for the purpose of repairs and necessary disbursements, a sum of 24,369 dollars and 69 centimes, being 5130*l.* 9*s.* 3*d.*; and it appears in the amended pleading that this bond was given as collateral security for a bill of exchange drawn for the same amount on Messrs. Baring Brothers and Co. The *Onward* arrived in London on the 7th Feb. 1871. The ship was sold by order of the court; the proceeds of the sale and the freight were paid into court. By a decree of the 9th May 1871 the court pronounced for the validity of the bond as far as regarded the ship and freight, and condemned the proceeds of them as the amount due on the bond. From a memorandum supplied to me from the registry, it appears that the vessel was appraised on the 11th April at 2000*l.*; she was offered for sale on the 19th April 1871, but no bid could be obtained; she was again appraised on 23rd April at 1700*l.* and sold on 26th April 1871 for 1870*l.*; the market for ships was in a very depressed state at that time. The statement of account of the proceeds of sale, of the payments thereon, and of the claims thereon, is as follows:—

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Gross proceeds of vessel	£	s.	d.
Marshall's fees, &c., on sale	1870	0	6
	121	16	8
Net proceeds	1748	3	4
Freight paid into court	2338	6	6
Total	4086	9	10

PAYMENTS THEREOUT.

Wages of Crew	604	14	9
Disbursements made by bondholders paid to them by order of court	240	9	6

845 4 3

Leaving a balance in court	3241	5	7
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There were prior claims thereon:—

*Costs as to wages of crew			
*Costs as to payment of disbursements by bondholders			
Master's claim			
Costs as to ditto			
Amount of bottomry bond on ship, freight, and cargo, say	6238	12	9

In respect of the two claims marked thus (*) the bondholders have been given a prior lien on the proceeds by order of the court. It is said that the master's claim amounts to 1200*l.*, and the result will be that nearly the whole amount of the bond, if valid, will have to be paid by the owners of the cargo. The defendants, the owners of the cargo, contend that the bond is invalid, as relates to the cargo, on various grounds which may be classed as follows: (1) that the bond was given as collateral security for the payment of the bill of exchange, which bill was accepted and paid, or if not accepted and paid was not duly presented, or if presented and dishonoured the said bill was not protested, and due notice of the dishonour of the said bill was not given to the drawer or to the defendants; (2) that the bond was entered into with undue haste, and before it was ascertained that the money could not be raised upon the credit of the owners of the ship; (3) that the bond was given on the cargo without due communication—that is practically without communication—to the owners of the cargo; (4) that if the communication made to the owners of the cargo was sufficient, the bond was given before sufficient time had elapsed to enable the owners of the cargo to send their answer; lastly, that all the facts disclose that from first to last there was a fraudulent intention of throwing upon the owners of the cargo the obligation which ought to have been borne by the owners of the ship; and that for one, or several, or all these reasons, the owners of the cargo ought to be dismissed from this suit. I will endeavour first to state the facts, admitted or proved, and then to state what I conceive to be the law in relation to them, and to the positions which I have adverted to as being set up in defence. First as to the facts: It appears that on the 5th Sept. 1868, Messrs. Poillon became the owners of the ship, and announced that fact on 5th Aug. 1869 to Messrs. Findlay and Co., the defendants. Messrs. Poillon dwelt at New York. The charter-party was dated the 6th Jan. 1868. Messrs. Findlay and Co., the owners of the cargo, are merchants at Glasgow, and have a house or agents of the same name at Moulmein, and the *Onward* set sail from Moulmein on 1st April 1870 (it is not necessary to go into the earlier history of the vessel) with a cargo of teak put on board by the Findlays' house at Moulmein for Calcutta, but bad weather, and considerable damage consequent thereupon com-

pelled the ship to put into the Mauritius on the 11th June. On the 13th she was towed into harbor. On the 14th or 15th surveyors recommended the captain to discharge the cargo. On the 17th the discharge began; on the 29th the captain wrote a letter to his owners (Messrs. Poillon) at New York, in which he set forth the misfortunes which had befallen the ship, and added that on 31st May, "after a consultation with the officers and crew, it was found expedient, for the benefit of all concerned to deviate from the proper course of the voyage and seek this, our nearest port, for repairs." It then set out what had taken place on the 13th, 15th, 16th, and 17th June, and continued: [His Lordship then read the remainder of the letter of the master to the shipowners of 29th June 1870, before set out.] On the same 29th June Messrs. Houdlette and Co. wrote to the Findlays' house at Moulmein as follows: [His Lordship then read the letter of 29th June 1870 from Houdlette and Co. to Messrs. Tod, Findlay, and Co., Moulmein, before set out]; and on the 30th June Messrs. Houdlette and Co. wrote to the Findlays at Glasgow pretty much to the same effect. It was as follows: [His Lordship then read the first part of the letter of 30th June 1870 from Houdlette and Co., to T. D. Findlay, Esq., Glasgow, before set out.] The letter is pretty much the same as the other, and ends in this way: "We think that she will be detained here about two months longer to finish discharging, make the necessary repairs and reload, and her expenses here will amount to about 4000*l.*"; and then follows these words: "By next opportunity we shall be able to give you more particulars, and in the mean time remain, &c." On the 1st July, that is the day after, and practically by the same post, I suppose, Messrs. Houdlette and Co. wrote to Messrs. Poillon as follows: [His Lordship then read the letter of 1st July 1870 from Houdlette and Co. to Messrs. C. and R. Poillon, New York, before set out, down to the words "four thousand pounds sterling" inclusive.] What follows it will be seen was not inserted in the letter to Messrs. Findlay, of Glasgow, on the 30th June; "and for the purpose of procuring funds for the payment of these repairs we have proposed"—these words deserve attention—"to Captain Hewitt to take his draft on Messrs. Baring Brothers and Co., of London, drawn at 90 days' sight, at 5 per cent. discount, with a bottomry bond on ship, cargo, and freight as collateral security, with the understanding that the bond shall be null and void provided the draft be accepted, and should you approve of this proposal you will please place it in the hands of Messrs. Baring Brothers & Co. sufficient funds to meet the draft on presentation, &c." [His Lordship read the letter to the end, as before set out.] It may be observed here that the first mail for Glasgow left the Mauritius on the 1st July, and would arrive at Glasgow about the 30th July, so that in fact the letter of 30th June to Messrs. Findlay at Glasgow, and that to Messrs. Poillon on the 1st July left the Mauritius on the same day. On the 25th Aug. Messrs. Poillon wrote to Messrs. Findlay, of Glasgow, as follows: [His Lordship then read the letter of 25th Aug. from Messrs. C. and R. Poillon to Messrs. T. D. Findlay and Co., of Glasgow, before set out.] The inclosures referred to were the letters of 29th June and 1st July from Houdlette and Co. to Poillon and Co. at New York, and from the master

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to Messrs. Poillon and Co. That letter of the 25th Aug. would be delivered at Glasgow on the 8th Sept. By the inclosures Findlay was, for the first time, apprized that it had been proposed to the master to take a bottomry bond affecting the cargo—this being recited in the passage of the letter which was omitted in the letter of 30th June from Houdlette and Co. to Findlay, the post could have brought no answer from Glasgow to the Mauritius which could arrive before the 3rd Nov.—the communication by telegraph would, if no obstacle had occurred, have occupied from twelve to fourteen days—that is, ten or fourteen hours by telegraph to Aden, and ten to thirteen days by mail steamer to the Mauritius. The *Onward* sailed from the Mauritius on the 15th Oct. Two mails elapsed before Houdlette and Co. wrote again to Findlay at Glasgow. On the 18th Sept. they sent the following letter:—"Dear Sir,—Since writing you on the 30th June—there is all that interval—" the *Onward* has come out of dock," &c. (see the letter of 18th Sept. from Houdlette and Co. to T. D. Findlay, Esq., Glasgow, before set out), and the letter ends as follows: "with nothing of importance to add, we remain, &c." (as before set out). They wrote to the same effect to the Findlays at Moulmein on the same 18th Sept. There is no mention in this letter of any intention to bottomry the cargo. On the 19th Oct. they wrote the following letter to Findlays at Glasgow and Findlays at Moulmein. [His Lordship then read the letter of 19th Oct. 1870 from Houdlette and Co. to T. D. Findlay, Esq., Glasgow, before set out]; and in this letter, for the first time, the Findlays were apprized by Houdlette and Co. that their cargo had been bottomried, though even then as a collateral security to the draft on Messrs. Baring—the ship having sailed, as I have already stated on the 15th Oct. No intimation was conveyed either in this letter or in that of 1st July, inclosed in that of 25th Aug., that the Poillons had not placed (as it had been suggested by Houdlette and Co. in the letter of 1st July) in the hands of Messrs. Baring Brothers and Co. sufficient funds to meet the draft on presentation: and indeed they had not made up their minds not to do so until the 6th Jan. 1871. In their letter to Messrs. Baring from New York, of the 21st Sept., they say: We are not desirous of advancing the money spent at Mauritius, unless by so doing we can make a saving, and for that reason would thank you on receipt of the documents, and before you accept or pay the bond, to get your average-estater to make a rough estimate that will show how much the ship will have to pay after deducting from the total amount due under the bond (if promptly paid) such sums as the cargo and underwriters on freight will have to pay, and telegraph the result to us by cable; and we would like the amount also due from the ship classified so as to show how much the underwriters on vessels would have to pay, and how much would fall on the owners; with these two items before us, we can determine whether or not it would be desirable to advance the money, or let the vessel be sold to pay the bond." And on the 6th Jan. they wrote as follows: [His Lordship then read the letter of 6th Jan. 1871 from C. and R. Poillon to Capt. James H. Hewitt, London, set out in the pleadings.] It was admitted by the counsel for the bondholders that the conduct of Messrs. Poillon in this matter was very reprehensible, but it was at the same time contended

that with this conduct the bondholder had no concern, and ought not to suffer on account of it. To these facts I will now endeavour to apply the law. And first as to the objection to the validity of the bond on the ground that it was a collateral security only to the bill of exchange, which had not been presented or protested. In support of this proposition the case of *The Staffordshire* (*ubi sup.*), recently decided by the Privy Council, was cited. I have considered that case, and I am of opinion that it does not warrant the conclusion sought to be derived from it. The bond in this case was to be cancelled, as the evidence shows, on the prompt payment of the bill—and, otherwise, to be enforced—there was no prompt payment. The Poillons never provided the Messrs. Baring with the requisite funds; the bills came home and were in fact duly presented—they were not protested because the drawer, the captain, had no money in the hands of Messrs. Baring, and no notice of dishonour was necessary, therefore, to be given. In the case of *Stainbank v. Shepard* (*ubi sup.*), decided by the Exchequer Chamber in 1853, the judges, referring to the cases in Admiralty Court, say: "We must not be supposed to intimate a doubt that a bottomry bond may not be given at the same time with and as a collateral security for bills of exchange drawn on the owner." It was argued that the Messrs. Baring took up these bills, but the evidence of Mr. Theobald with respect to their mode of transacting business of this kind satisfies me that this statement was incorrect. Upon the whole, I am clear that the bottomry bond is not invalid upon the ground that the bills of exchange have not been presented or protested. According to the law the master is always the agent for the ship, and in special cases of necessity the agent for the cargo also. He is the appointed agent of the former, the involuntary agent of the latter. From these principles of jurisprudence two important consequences flow. First, that when the circumstances permit the master must communicate with the owner before he does any act which seriously affects the value of the ship in the one case, or of the cargo in the other. This is a doctrine at which the English court have slowly but steadily arrived. That communication was necessary in the circumstances of this case, I have no doubt whatever, notwithstanding the argument to the contrary which has been addressed to me. The cargo was timber, not of a perishable character; it belonged to one firm. The owner might well have thought it for his interest to advance the requisite funds for the repairs, or to pay the full freight and to embark it in another vessel; the rate of freight for such timber was low at the Mauritius. As it is, he will if the bond be pronounced for, when demands having claims of priority have been satisfied, have to pay nearly, if not the whole, sum of 5130*l.*, his liability for freight being 2338*l.* It has been said that he is not really injured, for by another action in another court he may recover from the shipowner what he now pays to the bondholder. This operation, however, is not unattended with expense and delay where the shipowner is solvent and dwells in this country; but in the present case, though there be no reason to doubt his solvency, he is domiciled at New York, and I cannot discover that the doctrine of the English decision in *Duncan v. Benson* (*ubi sup.*) has ever been judicially recognized in that country. A communica-

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tion was, therefore, in my opinion indispensable in the circumstances of the case to the validity of a bottomry bond on the cargo. It has been argued, however, that a communication, though not necessary, was in fact made, and this is the next point to consider. Connected with this consideration is the allegation that Findlay was negligent, that he chose to fold his hands and do nothing. It does not seem to me that he was negligent. The master, his agent from the necessity of the case, never wrote to him at all. The agent of the ship wrote indeed on the 1st July to the owner of the cargo, enpressing in the letter the fact that he urged a bottomry bond on the cargo, which he revealed to the owner of the ship. The letter of the 25th Aug. from Poillon, which the defendant received on the 8th Sept., contained the first intimation of the bottomry bond, and then Findlay was informed that the ship would probably be detained only two months, dating from the 1st July. As it happened, by the use of telegraph and mail a message might have arrived before the vessel sailed on the 15th Oct. But even this was matter of uncertainty, and if such message had arrived, the bond, though not literally signed, had been determined upon, and a bargain made upon the faith that it would be duly executed. It is not impertinent to the question of sufficiency of communication to remember that in this peculiar class of cases, in which the interest of absent principals may be so seriously affected, the law has considered that the lender, as well as the borrower, has some duty to discharge. He is bound to make a reasonable inquiry as to the necessity which authorizes the master to hypothecate. Now the lenders in this case, Houdlette and Co., were the agents of the ship. "They represented me," the master said, when asked if the repairs were not done on their credit: and it appears to me from the correspondence to which I have already adverted that, from a very early period, before the cargo was fully discharged, before the expenses necessitated by the repairs were accurately known, before an attempt had been made to raise funds on the personal credit of the owners of the ship—whom they knew to be affluent merchants at New York—before any attempt had been made to raise money on the ship and freight, Houdlette and Co. suggested to the master, and advised him to give a bottomry bond on the cargo as well as on the ship and freight as a collateral security, indeed, to his draft on Messrs. Baring and Co. And here I must observe that the name of this great and much esteemed commercial firm, the present bondholders, was put before me as if of itself an argument against any want of *bona fides* in this transaction, but I am of opinion that I must consider this case as if Messrs. Houdlette and Co. were still the holders of the bond which has been transferred to Messrs. Baring. Whatever legal infirmities were incident to the instrument while possessed by the former belong to it in the hands of the present owners. Not only did Messrs. Houdlette and Co., as has been already observed, omit in their letter to the owners of the cargo the passage as to the bottomry bond inserted in their letter to the owners of the ship, but they state that "by next opportunity we shall be able to give further particulars"; that is, they suggest that Findlay should wait before he answers their letter. Findlay says in effect that this letter did not raise any alarm as to a bottomry bond on the cargo

and accordingly Mr. Findlay says in his evidence: "We did not answer, as we expected to receive further information as to the position of the ship by the following mail. We received no further letters for the next two mails." They did not answer the letter of the 25th Aug. because they had no time—he says—to write to the Mauritius; and writing to New York would have been of no avail to stop the proceedings at the Mauritius. Moreover, he assumed that Poillon would pay the money into the hands of Messrs. Baring, because he knew that Poillon was a rich man. Indeed, Poillon's letter of the 6th Jan. 1871 shows that it was not from want of means that he refused to pay the money. As to Houdlette and Co., they allow two posts to go out without further communication to Findlay. On the 18th Sept. they write that the vessel "has been thoroughly repaired," and they say they have "nothing of importance to add." They are still silent as to the bottomry bond. On the 19th Oct. after the ship had gone to sea—which she did on the 15th Oct.—they make the first communication from the Mauritius to Findlay that the cargo had been bottomried. If a communication was necessary and a proper communication was not made, I do not think that the absence of it can be excused on the ground of the laches of the owner of the cargo. In the case of *The Oriental* (3 Moore P. C. C. 398) the owner of the ship resided at St. John's, New Brunswick; the ship was at New York when the necessity for repairs arose. New York was distant 600 miles from St. John's, and between the cities there was a communication by electric telegraph. The agent of Wallace at New York telegraphed to him that his ship had been ashore, was leaky, and was discharging her cargo; an answer came by telegraph acknowledging the receipt of the message, saying he should beglad to hear by telegraph when necessary. Three days after, the agent wrote by post a general description of the injuries sustained by the ship, that a survey was to be held, and he would report what injury she had sustained, that the expenses would be considerable, but, as the cargo was valuable, would not fall so heavily on the ship; about a week after this the captain wrote to Wallace particulars of the damage, and about a week after that the agent wrote again to Wallace. In none of these communications was it directly said that a bottomry bond would be necessary; about the time of the last letter, however, the agent spoke to the captain about a bottomry bond, to which the captain at first objected, but afterwards agreed on the agent saying that he would write to Wallace. The captain made no communication to the owner as to the proposed bottomry bond. Some days after the agent wrote to Wallace by post to say that he had taken a bottomry bond, which he appears to have done three days before Wallace could have received the letter in due course of post. The owners of the ship and the cargo opposed the validity of the bond. Dr. Lushington (3 W. Rob. 243; 7 Notes of Cases, 476), however, pronounced for it, holding that the evidence established the necessity for it, and that the agent was not bound to have telegraphed before he took the bond. The Privy Council reversed this sentence on the ground that there had not been communication with Wallace, the owner. Sir John Jervis said: "There was not only the power of communication, but an

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absolute communication made. It was made, and properly made, at the moment of the accident, communicated and received within a few hours, and by a means of communication in existence, which must be taken to be the proper channel of communication; not to send money, as suggested, because the electric telegraph will not carry money, but to send a communication on the one hand and receive an answer on the other. Why, here being the means of communication, and the authority of the master being founded on the impossibility of a communication, their Lordships are of opinion that there was no authority in the master to raise money on bottomry." In the opinion of this appellate court, whose decisions are binding upon me, a mere statement of injuries done to the ship, and of the consequent necessity of repairs, which would entail considerable expense, unaccompanied by a statement that a bottomry bond must be had recourse to, was not a sufficient communication to the owners; the law did not require them, from these premises, to draw the conclusion that the ship and cargo must of necessity be bottomried." It may not require that the words "bottomry of cargo" should be used, but it requires that the fact itself should be stated, or at least that it should be an obvious and irresistible inference from the circumstances stated; the owner, as the Privy Council said in *The Panama* (L. Rep. 3 P. C. 204; 23 L. T. Rep. N. S. 12; 3 Mar. Law Cas. O. S. 461), "should duly receive notice of the intention to raise money by bottomry." Now in the present case the circumstances relating to the state of the ship, recited in the communication to the owners of the cargo, were certainly not stronger—I should say they were less strong—than those which existed in the case of *The Oriental*. In both cases the owner was led to expect further communication, and, in the case before me, there is this further fact continually presenting itself, namely, that the necessity for the bottomry bond, stated by the lender in the communication to the owner of the ship, was suppressed in that which was made to the owner of the cargo, to whom the master never wrote at all. On the other hand the case of *The Bonaparte* (8 Moore P. C. C. 459, 477) was cited to establish the proposition that if owners of cargo had ample information of the disasters which had befallen the vessel there was a sufficient communication. But an examination of the communications made in that case to the owners enables me to reconcile the judgment in it with the preceding case of *The Oriental*. In that case the owners of the cargo were specially apprised of the injury done, not only to the ship but to the cargo; and, moreover, their advice was specially requested as to what in the circumstances it would be best to do; and it was held that as they chose to pass by the whole matter in silence, and gave no instructions, which had been particularly and immediately requested, the communication was sufficient. In the case of *The Lord Cochrane* (2 W. Rob. 320, 333), decided in 1844 before the law as to the necessity of communication had been distinctly laid down, Dr. Lushington said: I now come to another point in the case which has been much commented upon, viz., the conduct of the master with reference to the shippers of the cargo. It has been said that it was the duty of the master, before he gave a bottomry bond upon the cargo in this case, to have com-

municated with the shippers in the first instance, and to have taken their directions; this observation, it is obvious, must be subject to great limitations under the circumstances of the case. The shippers, it is to be noticed, were resident on the spot; and it is perfectly true that if they had been kept in ignorance of the intended bottomry transaction, it would have been a strong argument against the *bona fides* of the master, that he had not put himself into communication with them. It is obvious, however, in the present instance, from the facts spoken to in the affidavits, that these shippers must have been cognizant of the transaction in question; and if they had deemed it expedient for their interests to interfere for the protection of the cargo, they had the opportunity, and were at perfect liberty so to do. It appears, however that only one or two of these individuals, and those possessing the slightest degree of interest, in any manner interfered or took any share in the matter. In my opinion this indifference was a virtual acquiescence in the master's proceedings, and is much the same thing as if a communication had taken place between the master and themselves, and their answer had been: 'we will have nothing to do with the matter, you must not according to your own discretion.' Having regard to the principle upon which communication is required, and the authorities upon the subject, and applying them to the particular facts of this case, I am of opinion that the communication was insufficient, and did not satisfy the law, and here I might end my judgment, but I desire to say a few words upon the remaining question of law which arises in this case. The next consequence from the doctrine of agency is that the master must sustain to the best of his power the interests of the absent owner. This is a principle of general maritime law, and not like the former one of English law only. "Il est le représentant des chargeurs absents; il doit faire ce qu'ils feraient eux-mêmes s'ils étaient sur les lieux," Bonlay-Paty observes (*Cours de Droit Commercial Maritime*, vol. 2, p. 404); that is, he must do that which there is fair reason to suppose the owner if present would do. "Il est donc," Emerigon says, "obligé de faire ce que feraient les chargeurs s'ils étaient présents" (Emerigon, par Bonlay-Paty, vol. 1; *Traité des Assurances*, chap. 12, sect. 16, p. 423). The master is to remember the foundation of his authority to bottomry the cargo is the prospect of benefit, direct or indirect, to the proprietor of it. This principle limits the authority of the master in this matter; he may sell a part of the cargo, but not the whole. Why? Because the former act may be, the latter cannot be, for the benefit of the proprietor. The interests of which he is respectively guardian may be conflicting, and in this case he must do that which is best for the whole adventure; he must endeavour to accomplish the contract between the two parties, whom for the occasion he represents, for the common benefit of ship and cargo, and, therefore, as in the case of the sale of the cargo, he may not sell the whole cargo; so neither may he do that which is in effect the same—repair the ship at the sole expense of, and without reasonable possibility of benefit to, the cargo. "It is therefore true," Lord Stowell says, "that if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bond the cargo for such repairs": (*The Gratitude*, 3 C. Rob. 250, 261.)

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The prospect of benefit must be such as a man of ordinary prudence and knowledge of the subject would in the circumstances entertain. The master must endeavour to hold the balance evenly between his two principals; he must not sacrifice the ship to the cargo, or the cargo to the ship. In this case the outlay on the ship which the cargo is to pay was very great; the master is asked whether by the repairs she was "made as good a ship as she was at the outset"; he answers: "Better ship than she was the day I took her." I do not think upon the evidence before me that a reasonable and prudent owner, if present, would have allowed his cargo to be bottomried for such very extensive repairs. He would rather have paid the freight and transhipped the goods. I do not, however, decide the case on this ground alone; but having regard to the circumstances already mentioned, and to the fact that the agent of the ship, being also the lender, while he communicated to her owners the intention to take a bottomry bond affecting the cargo, omitted that fact in the contemporaneous letter which he wrote to the owner of the cargo, in which letter, telling him only of the disasters to the ship, he promised further information, which he himself never sent till the vessel had sailed, and which through no channel reached the owner of cargo till too late; I decide that there was not in this case such a communication to the owners of the cargo as the law in these circumstances would require. And I pronounce, therefore, against the validity of the bond, with costs.

Solicitors for the plaintiffs, *Gregory, Rowcliffe, and Rawle*, agents for *Duncan, Hill, and Parkinson*, Liverpool.

Proctors for the defendants, *Prichard and Sons*, agents for *Bateson, Robinson, and Morris*, Liverpool.

COURT OF COMMON PLEAS.

Reported by H. F. FOOTEY and JOHN ROSE, Esqrs.,
Barristers-at-Law.

Feb. 7 and 8, 1873.

LISHMAN AND OTHERS v. THE NORTHERN MARITIME INSURANCE COMPANY (LIMITED).

Marine Insurance—"Slip"—Policy—Concealment of facts material to the risk.

On the 11th March the plaintiffs, shipowners, agreed with the defendants, underwriters, for the insurance of freight, and a slip or proposal containing all the necessary terms for a complete insurance was drawn up without any question being asked as to the amount of insurance upon the hull of the vessel, and was accepted by the defendants on that day. On the 16th March the ship was lost, and the plaintiffs became aware of the loss on the 17th. They sent on that day to the defendants for a stamped policy, in pursuance of the terms of the slip, and then for the first time the defendants inquired to what amount the hull of the ship had been insured. The plaintiffs' clerk gave the required information, and a stamped policy, which, with the amount insured on the slip inserted in it as a warranty, was delivered to the plaintiffs. No communication was made by the plaintiffs to the defendants of the loss of the ship before or at the time of the delivery of the policy. The plaintiffs

sued upon the policy, and at the trial the jury found that the risk was accepted by the defendants on the 11th March, and that it was not material to make known the loss to the defendants upon the 17th. Leave having been reserved to the defendants to move to enter a verdict for them, if the judge ought to have directed the jury as matter of law that the omission to communicate the loss on the 17th was a concealment of a material fact which avoided the policy:

Held that such omission was not a concealment of a material fact so as to avoid the policy:

Held, also, that the addition in the policy on the 17th of a term for the benefit of the underwriters, and not affecting the risk insured, did not prevent the policy from being one drawn up in respect of the risk accepted on the 11th March, and therefore the case was the same in principle with *Cory v. Patton* (ante p. 225; 26 L. T. Rep. N. S. 161; L. Rep. 7 Q. B. 304.)

This was an action upon a policy of insurance upon freight, whereby the defendants became insurers to the plaintiffs at and from the Tyne to Argasteria in the sum of 400*l.* upon freight in respect of goods laden on board the ship *Mayflower*, in consideration of the payment of a premium of 6*½* per cent. The first count of the declaration was upon the policy, and alleged the loss of the ship and goods during the continuance of the risk and the non-payment of the sum insured. The second count alleged that the defendants, in consideration of the premium, promised to execute a valid and binding policy of insurance upon the terms mentioned, and that before the execution of the policy the ship was lost and the plaintiff applied to the defendants to execute such a policy, but the defendants refused to do so, whereby the plaintiffs lost the 400*l.* agreed to be insured.

To this the defendants pleaded, *inter alia*, fourthly to the first count, that at the time of making and subscribing the said policy, and becoming such insurers as alleged, the plaintiffs and their agents misrepresented to the defendants a fact then material to be known to the defendants, and material to the risk of the said policy; fifthly, that at the time of the defendants making and subscribing the policy and becoming insurers the plaintiffs and their agents wrongfully concealed from the defendants a fact then known to the plaintiffs and their agents and unknown to the defendants and material to the risk of the said policy, that is to say that the said ship and goods had been and then were lost; tenthly, the defendants pleaded the fifth plea to the second count, which was abandoned at the trial.

The case came on for trial before Brett, J. and a special jury at the Liverpool Summer Assizes, 1872, when the following facts were proved:—The plaintiffs, trading under the name of John Hall and Co., were the owners of the ship *Mayflower*. That vessel on the 11th March 1871 left the Tyne on a voyage with cargo for Argasteria. On the same day the plaintiff Lishman, who resided in Newcastle, sent one of his clerks to the office of the defendants, also in Newcastle, to inquire as to the rate of insurance on freight. The clerk was then instructed to effect an insurance at the rate mentioned. He accordingly filled up at the defendants' office a proposal or slip in the following form:

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The Northern Marine Insurance Company (Limited),
Newcastle-upon-Tyne.

Please take on risk and hold insured for account of the undersigned, who will, when enabled, give full particulars for the extension of the policy.

To the amount of about 9000. at 65s. per cent.

On freight

By the *Marykloster*

From the Tyne

To Argenteria

Dated, 11th March 1871.

JOHN HALL and Co.,
Signed per John Robson.

Sailed.

This slip was handed by Robson, the plaintiffs' clerk, to the defendants' clerk, and at that time nothing more was said about the matter. When a slip is handed in as described, it is usual to make out and send the policy in accordance therewith in a few days. On 16th March the ship was lost off Harwich, and the same day a telegram arrived at the plaintiff's (Lishman's) office, announcing the loss. This telegram, however, was not opened by anyone until the morning of 17th March, when the plaintiff (Lishman) first learnt the loss. Lishman, after reading the telegram, sent Robson to the defendants' office to ask for the policy. Robson there saw Mr. Mitcalfe, the defendants' managing underwriter, and asked him for the policy. Mitcalfe said he would not give the policy until he knew what was insured upon the ship's hull. Robson thereupon returned to the plaintiff's office, and referred to the plaintiff's policy-book, and returning to the defendants' office, informed Mr. Mitcalfe that the ship's hull was insured for 2700*l.* Mitcalfe thereupon promised to send the policy, on freight in the ordinary form, but containing the words, "Hull warranted not insured for more than 2700*l.*" The plaintiff's (Lishman's) attention was called to this warranty inserted in the policy, and he sent a clerk (Alsopp) to the defendants' with the policy. Alsopp informed Mitcalfe that the plaintiff considered the insertion of such a clause unusual in a policy on freight, that the amount insured on the hull of the ship was practically 2700*l.*, as there was a policy on ship with the National Mutual Shipping Assurance Association of Teignmouth, which did not expire till 20th March, but that notice had been sent to the association that the policy would not be renewed. By the rules of that association it was provided "that the managers, unless they receive ten days' notice to the contrary, shall renew each policy on its expiration, except in cases where it may be deemed expedient not to renew the same, when the managers shall cause notice to be given to the owner." Notice had been given to the managers in writing about 20th Feb. 1871, not to renew the policy. On being informed of these facts, Mr. Mitcalfe consented to alter the policy by making the warranty read: "Hull warranted not insured for more than 2700*l.* after 20th March 1871." This alteration was made, and the policy was handed back to the plaintiff's clerk. It was admitted by the defendants at the trial, that on the 17th March a stamped policy was made out in accordance with the copy returned to the plaintiff's clerk, Alsopp, with the addition to the warranty in the copy, and that the defendants accepted the alteration in the policy. The learned judge thereupon allowed the defendants to add a plea of breach of warranty, as the defendants objected that the policy with the Teignmouth Association was a

continuing policy unless notice was given to discontinue, and there was no evidence of notice. The learned judge directed the jury that the accepting of the slip by the defendants as given, was an intimation to the plaintiffs that they accepted the risk; that there was at that time no mention made of the warranty; if the Teignmouth Association policy expired on 20th March, then there was no breach of warranty, that if the defendants accepted the risk before 17th March, and the introduction of the warranty was a mere alteration in the policy, the fact of the loss need not have been communicated, but that if the risk was not accepted until after 17th March, the fact was material and ought to have been made known to the underwriters. The jury found that the warranty was complied with, that the risk was accepted on 11th March, and that the loss of the ship was not on 17th March a material fact necessary to be made known to the defendants. A verdict was entered for the plaintiffs with leave to move to enter a verdict for the defendants, on the ground that the judge ought to have directed the jury as a matter of law that the warranty was not complied with, and that the omission to communicate the loss on the 17th March was a concealment of a material fact which avoided the policy. A rule having been obtained.

Holker, Q.C. and Gainsford Bruce, for the plaintiffs, showed cause.—They contended that the case was governed by *Cory v. Patton* (ante, p. 225; 26 L. T. Rep. N. S. 161; L. Rep. 7 Q. B. 304) and *Ionides v. The Pacific Fire and Marine Insurance Company* (ante, p. 330; 26 L. T. Rep. N. S. 738; L. Rep. 7 Q. B. 517, in the Exchequer Chamber), and, therefore, the jury having found that the risk was accepted by the defendants on the 11th March, the slip which was drawn up at that time constituted a complete and final contract, binding upon them in honour and good faith, whatever event might subsequently happen, and that the plaintiffs were not bound to communicate to the defendants the fact of the loss of the vessel which subsequently became known to them.

Herschell, Q.C. and Orompton, for the defendants, sought to distinguish the case from those of *Cory v. Patton* and *Ionides v. The Pacific Insurance Company*. They admitted that notwithstanding 30 & 31 Vict. c. 23, s. 7 and 9 (a), the real bargain between the assured and the underwriters took place when the slip was accepted. They argued, however, that in the present case negotiations were going on between the parties until the 17th March, and that there was no complete contract of insurance until that date, when the policy containing the added warranty as to the amount of insurance upon the hull was drawn up and delivered. The question was: When was this contract of insurance made, and when did the defendants undertake to insure upon these terms? It could not be main-

(a) 30 & 31 Vict. c. 23, s. 7.—No contract or agreement for sea insurance (other than such insurance as is referred to in the 55th section of The Merchant Shipping Amendment Act 1862) shall be valid unless the same is expressed in a policy; and every policy shall specify the particular risk or adventure, the names of the subscribers and underwriters, and the sum or sums insured; and in case any of the above-mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes.

SECT. 9.—No policy shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or in equity, unless duly stamped, &c.

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tained that a contract, about which the parties were not at one until the 17th, was entered into on the 11th. And, further, the plaintiffs received a policy on which they could not have recovered, because the amount in which the ship was insured was incorrectly stated to be 2700*l.*, and this amount had afterwards to be altered. The defendants had a legal right to refuse to give the plaintiffs a stamped policy. They cited

Morrison v. The Universal Marine Insurance Company, 27 L. T. Rep. N. S. 791; 42 L. J. 17, C. P.

Feb. 8.—The following judgments were delivered:

KEATING, J.—This was an action on a marine policy of insurance upon freight, and was tried before my brother Brett at the last Liverpool Summer Assizes, when a verdict was found for the plaintiffs for 400*l.* as upon a total loss of freight. It appeared that the plaintiffs, shipowners, being desirous of insuring the freight in question, on the 11th March 1871 sent to the defendants, who were underwriters at Newcastle-upon-Tyne, to inquire the terms of insurance, and ultimately an agreement was made at 65*s.* per cent., and a slip or proposal drawn up and accepted by the defendants at that rate. The slip contained all the necessary terms for a complete insurance at the above rate, and was drawn up without any question whatever being asked as to the amount of insurance upon the hull of the vessel. On the 16th March the ship was lost, and the plaintiffs knew of the loss on the 17th. They sent on that day to the defendants for a stamped policy in pursuance of the terms of the slip; and then, for the first time, the defendants required to know in what amount the hull of the ship had been insured. The plaintiffs had in fact effected insurances upon the ship amounting to 2700*l.*, and a further policy for 500*l.* with the National Mutual Shipping Assurance Association at Teignmouth, of which they were members, by which the insurance was to be for a year from the 20th March preceding, with renewal from year to year unless determined at the end of a year by notice from either party. Upon the requirement of the defendants' clerk, the plaintiffs' clerk gave the amount insured on ship at 2700*l.*, when the defendants inserted that amount as a warranty in what they stated to be a copy of the policy. The plaintiffs, however, sent it back in consequence of its not including the amount insured by the policy for 500*l.* on ship; and the words "after the 20th March" were added, and a stamped policy with that warranty given out. No communication was made by the plaintiffs to the defendants of the loss of the ship before or at the time of the delivery of the policy. Upon the policy the plaintiff sued; and the defence set up were a noncompliance with the above warranty, and, also, the concealment of a material fact, viz., the loss of the ship. At the conclusion of the plaintiff's case, the defendants objected that the warranty was not complied with, because the policy for the 500*l.* was a continuing policy beyond the 20th March unless notice to terminate it at that time were proved, and there was no evidence of such notice. They also objected that inasmuch as the real and only legal contract between the parties was the stamped policy of the 17th March declared on, and the loss having occurred on the 16th, and being known to the plaintiffs on the 17th the omission to communicate it on that day constituted the concealment of a material fact, and avoided the policy. The learned judge asked the jury whether the warranty was complied with, and they found it

was; and in answer to other questions they found that the risk was accepted by the defendants on the 11th March, and that it was not material to make known the loss to the defendants upon the 17th. The verdict thereupon passed for the plaintiffs, with leave to the defendants to move to enter a verdict for them if the judge ought to have directed the jury as matter of law that the warranty was not complied with and that the omission to communicate the loss on the 17th was a concealment of a material fact which avoided the policy. A rule was obtained upon that ground, with the alternative of a new trial on the ground of misdirection on the part of the learned judge in not so directing the jury, and also that the verdict was against the weight of the evidence. That rule has been argued, and the questions raised were those insisted on at the trial. Mr. Herschell, for the defendants, argued, first, that the policy for the 500*l.* was a policy to continue beyond the 20th March unless notice was given; and, secondly, that there was no proof of notice. But it seems that according to the terms of the Teignmouth Mutual Shipping Insurance Association's rules, and the words of the statute, 30 & 31 Vict. c. 23, that policy was not a continuing policy, and that in this case no new effective policy could have been made on the 20th March, the ship having been lost before that day. This renders it unnecessary to consider whether the evidence to prove the notice would have been sufficient if such notice had been necessary. The great question argued was, however, whether there was a concealment of a material fact so as to avoid the policy, and we are of opinion that there was not. It was admitted by Mr. Herschell, in accordance with the decision of the Court of Queen's Bench, in *Cory v. Patton* (ante, p. 225; 21 L. T. Rep. N. S. 161; L. Rep. 7 Q. B. 304), referring to *Ionides v. Pacific Insurance Company* (ante, p. 330; 26 L. T. Rep. N. S. 738; L. Rep. 7 Q. B. 517), in the Exchequer Chamber—that, notwithstanding the provisions of 30 & 31 Vict. c. 23 ss. 7 and 9, the real bargain between the assured and the underwriters takes place when the slip containing the terms of the intended policy is accepted; and that, although such slip does not constitute a contract enforceable at law, yet it may be looked at for the purpose of discovering at what time the risk was undertaken by the underwriters, and that a material fact coming to the knowledge of the assured between the date of the slip and that of the policy need not be communicated. Admitting this, however, Mr. Herschell contended, with considerable force, that in this case the slip on the 11th March could not show the terms of the bargain, as a negotiation between the parties was going on up to the 17th, when the policy containing the added warranty was issued, which contained the only complete contract of insurance between the parties, and, therefore, the case was distinguishable from *Ionides v. Pacific Insurance Company* and *Cory v. Patton*. In my opinion, however, the jury having found as a fact that the risk was accepted by the underwriters on the 11th March, it cannot be said that the addition of a term for the benefit of the underwriters, and not affecting the risk, prevented the policy from being one drawn up in respect of the risk accepted on the 11th; therefore the case is the same in principle with that referred to, and the occurrence of the loss subsequently to the 11th, though before the issue

[Ex.]

BEARD AND ANOTHER v. RHODES.

[Ex.]

of the stamped policy, did not render it incumbent on the plaintiff to communicate it, inasmuch as it could not affect the risk already accepted or the premium already agreed to and paid. I think, therefore, there was no misdirection on the part of the learned judge, and the evidence justified the verdict of the jury, and their answers to the questions put to them, and that the rule must be discharged.

GROVE, J.—I entirely agree with the judgment pronounced by my brother Keating and I have nothing to add.

BRETT, J.—I also entirely agree; and I will only add that when I allowed a plea to be added I did so upon the understanding that the question was to be left to the jury on the evidence as it then stood.

Crompton asked for leave to appeal if necessary upon the main point.

Holker, Q.C., suggested that the plaintiff should be at liberty to reply equitably to the added plea.

By the COURT.—The question as to the breach of warranty being now gone, the better course will be to raise the main point independently of pleading.

Rule discharged.

Attorneys for the plaintiff, Mercer and Mercer for Oliver and Botterell, Sunderland.

Attorneys for the defendants, Williamson, Hill, and Co. for E. P. and H. Phillips, Newcastle-upon-Tyne.

COURT OF EXCHEQUER.

Reported by T. W. BARNES and H. LEIGH, Esqrs.,
Baristers-at-Law.

Monday, Jan. 27, 1873.

BEARD AND ANOTHER v. RHODES.

Charter-party—Demurrage—Meaning of the words "at the expiration of" and "a reasonable time after."

The declaration was for money due in respect of the demurrage of a ship. The defendant pleaded that the charter-party contained the following stipulation: "that the said merchants (meaning the defendant) are to be allowed (a certain number) of clear working days for loading and discharging the said vessel each voyage, and in the event of that number being exceeded, a statement shall be furnished to the said merchants at the expiration of this charter, in which they shall be credited with the above number of clear working days for each voyage performed by the said vessel, and debited with those actually occupied in loading and discharging as aforesaid, and all the days so occupied in excess (if any) shall be paid for by the said merchants at the rate of 2*l.* per clear working day as demurrage," and that no statement was furnished to the defendant at the expiration of the said charter as required by the terms thereof. The plaintiffs replied "that a statement was furnished to the defendant in accordance with the said charter within a reasonable time in that behalf and before the commencement of this suit." To this replication the defendant demurred on the ground that the replication alleged a performance in terms other than those of the contract set out in the plea.

Held, that the replication was good, for that the

words "at the expiration of" were synonymous with the words "a reasonable time after."

This was a demurrer to the plaintiff's replication. The declaration stated that the plaintiffs sued the defendant for money payable by him to them for the demurrage of a ship of the plaintiffs kept on demurrage by the defendant, and for money due on accounts stated.

The defendant pleaded, first, never indebted; secondly, that before action he satisfied and discharged the plaintiff's claim by payment; thirdly, to so much of the declaration as claimed money payable in respect of demurrage, that the said money so alleged to be payable was payable under and by virtue of certain charter-parties, by which a certain ship or vessel called the *Susanna* was hired out to the defendant from time to time for certain divers long periods, and was payable under and by virtue of the following stipulation only, and none others, that is to say: "And it is hereby further agreed that the said merchants (meaning the defendant) are to be allowed a certain number of clear working days for loading and discharging the said vessel each voyage, and in the event of that number being exceeded, a statement shall be furnished to the said merchants at the expiration of this charter, in which they shall be credited with the above number of clear working days for each voyage performed by the said vessel, and debited with those actually occupied in loading and discharging as aforesaid, and all the days so occupied in excess, if any, shall be paid for by the said merchants at the rate of 2*l.* per clear working day as demurrage." And the defendant says that no statement was furnished to the defendant at the expiration of the said charters, or any of them, as required by the terms thereof.

The plaintiffs joined issue on the defendant's pleas respectively; and for a second replication as to the third plea of the defendant they said that a statement was furnished to the defendant in accordance with the said charters within a reasonable time in that behalf, and before the commencement of this suit.

The defendant demurred to the second replication.

The following were the defendant's points: First, that the replication confesses the breach of the contract alleged in the plea, and does not excuse or avoid the same; second, that the replication alleges a performance in terms other than those of the contract set out in the plea; third, that the replication does not allege any waiver of the condition set out in the plea.

The plaintiffs' points were: First, that the plaintiffs are entitled to recover the demurrage sued for, notwithstanding that no statement of days was furnished immediately upon the expiration of the charters, provided that such statement was furnished before action, and not before the expiration of the charters; second, that, at all events, it is sufficient if such statement was furnished within a reasonable time in that behalf; third, that the third plea is bad, because the furnishing the statement at the expiration of the charters is not a condition precedent to the plaintiffs' right to recover; fourth, that the replication is good, because it alleges performance of so much of the stipulation in the charters as is a condition precedent; fifth, that the replication, if not otherwise good, is good as a traverse of the allegation in the plea that a statement was not furnished as

EX. CH.] CO. OF AFRICAN MERCHANTS v. BRITISH AND FOREIGN MARINE INSURANCE CO. [EX. CH.]

required by the charter; sixth, that the statement in the third plea, and the replication thereto, taken together, do not show non-performance of any condition precedent.

Mitcheard, Q.C. (Patched with him), for the defendant, in support of the demurrer.—The plaintiffs by their replication seek to raise a different issue for the jury to that tendered by the defendant's third plea. The allegation in the plea is that a statement is to be furnished "at the expiration of this charter," but in answer to that the plaintiffs reply, that a statement was furnished "within a reasonable time in that behalf." Now, "a reasonable time" is an indefinite time, and may extend over a fortnight or more. [KELLY, C.B.—What is a reasonable time under the circumstances is for the jury. "At the expiration" must mean "a reasonable time after."] "A reasonable time" is surely something different from "at the expiration of a certain time." [KELLY, C.B.—What do the words "at the expiration" mean, but "a reasonable time after?"] They mean directly after; before anything else is done. Upon the pleadings as they now stand, we shall go before the jury to try not whether the statement was furnished at the expiration of the charter, but whether it was furnished within a reasonable time. That will be a false issue. If, in fact, the two mean the same thing, then there was no occasion for the replication. [MARTIN, B.—I say that of necessity "at the expiration of" means "within a reasonable time." The replication says exactly what the plaintiffs were required to do by the charter party.] If there is no difference in the expressions no harm will be done.

G. Williams, for the plaintiffs, was not called upon.

By the COURT (Kelly, C.B., Martin, Pigott, and Pollock, BB.)—The two phrases are identical in meaning. *Judgment for the plaintiffs.*

Attorney for the plaintiffs, H. S. Law.

Attorneys for the defendant, Bridges, Sawtell, and Co.

EXCHEQUER CHAMBER.

Reported by H. LEIGH, Esq., Barrister-at-Law.

ERROR FROM THE COURT OF EXCHEQUER.

(Before COCKBURN, C.J., and BLACKBURN, KEATING, MELLOR, GROVE, and HONYMAN, JJ.)

Feb. 18 and 19.

THE COMPANY OF AFRICAN MERCHANTS (LIMITED)
v. THE BRITISH AND FOREIGN MARINE INSURANCE
COMPANY (LIMITED).

Marine policy—Insurance of ship during her "stay and trade" on African coast—Meaning of words "stay and trade"—Deviation—Change of risk—Time or voyage policy—Total loss.

An insurance on a ship "at and from L. to the coast of Africa and during her 'stay and trade there,'" means that she is to go to the coast of Africa, and stay there for any purpose which properly falls within the description of African trade, and the ship cannot, under the terms of such insurance, be used for any other than trading purposes.

It is not necessary to a deviation or change of risk, whereby the underwriters are discharged, that the degree or period of the risk should be thereby increased. The assured has no right to substitute a different risk.

An insurance at a premium of 4 guineas per cent. was made on a ship and cargo of the plaintiffs "at and from Liverpool to the coast of Africa, during her stay and trade there, and back to a port of discharge in the United Kingdom," returning an increasing proportion of the premium for the risk ending in ten, eight, or six months respectively, but to be "held covered at 13s. 4d. per cent. per month, if longer than twelve months out," and with liberty for the ship to touch and stay at any ports or places whatsoever (without prejudice to the insurance. The vessel arrived and discharged her outward cargo at Kinsembo, on the African coast, in due course, and there took in a part of her homeward cargo, and then proceeded to other places on the coast, at each of which she took in more cargo, and on the 21st Nov. she arrived at Cabenda Bay, a roadstead on the same coast, where she lay at anchor, in the usual course, taking in more cargo. On the 24th Nov. her loading was completed, and she was made ready to sail homewards on the following day, the 25th Nov. Instead, however, of so doing she was detained by her owners, the plaintiffs, at her anchorage in the Bay, in order to enable her master and crew to assist in the salvages of the cargo of another vessel which had been wrecked and lay in the bay, and which had been purchased by the plaintiffs. While being so detained she was driven from her moorings by a tornado on the 5th Dec., and the damage was thereby done to her which eventually resulted in her total loss during her subsequent voyage to England.

In an action by the plaintiffs, the assured, against the defendants, the underwriters, to recover the amount of the insurance as on a total loss, the defendants pleaded a plea of "deviation," and it was

Held, in error upon a bill of exceptions to the ruling of Kelly, C.B. (by Cockburn, C.J., and Blackburn Keating, Mellor, Grove, and Honyman, JJ.), that the learned judge was right in ruling on the above-mentioned facts, that the plea of deviation was proved, and in directing the jury to find a verdict for the defendants upon the issue raised by that plea.

This was an action against the defendants, an insurance company, to recover as for a total loss upon two policies of marine insurance.

The declaration contained two counts; in the first of which was set out a policy, dated 19th July 1869, whereby, in consideration of a premium of 84*l.* being at the rate of 8 guineas per cent.) the company took upon itself the burden of an insurance to the amount of 1000*l.*, and agreed with the insured, the plaintiff, that the insurance should be an insurance (Lost or not lost) at and from Liverpool to West South-West Coast of Africa, during her stay and trade there, and back to a port of call or discharge in the United Kingdom—

Returning 30 per cent. for risk ending in 10 months;
" 40 " " " " 8 "
" 60 " " " " 6 "
upon the body, tackle, &c., of and in the ship or vessel called the William Dent.

And that the subject-matter of the said policy should be—

Upon ship valued at	£
Upon cargo valued at	2,000
	11,000
	£13,000

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Held covered at 13s. 4d. per cent. per month, if longer than twelve months out.

And it was agreed (*inter alia*) that "it should be lawful for the said ship or vessel in the voyage so insured as aforesaid to proceed and sail to and touch and stay at any port or places whatsoever without prejudice to this insurance." The perils insured against were expressed in the usual clause.

The first count further alleged performance of conditions precedent necessary to make the said policy valid and binding on the defendants, and a total loss within the true intent and meaning of the said policy whereby the defendants became liable, &c., of all which premises the defendants had notice, and non-payment by them.

The second count upon the other policy dated the 2nd Aug. 1869, upon the same vessel for the same amount, was similar in terms and form to the first count.

Pleas 16 and 17 (to the first and second counts respectively).—That, after the commencement of the risks in the said policies mentioned, and before any of the said losses or misfortunes, the said ship, without sufficient cause or excuse, did not proceed on the said voyage and deviated therefrom. (a)

Issue thereon.

The cause was tried on the 10th Dec. 1870, at Guildhall, before Kelly, C.B. and a special jury, when the plaintiffs gave in evidence the facts stated in the following bill of exceptions, which was afterwards signed and sealed:

1. That on the 19th July 1869 the defendants subscribed, executed, and delivered to the plaintiffs the policy of insurance set out in the first count of the above declaration.

2. That on the 2nd Aug. 1869, the defendants subscribed, executed, and delivered to the plaintiffs the policy of insurance set out in the second count of the above declaration.

3. That the plaintiffs' ship the *William Dent*, being the ship mentioned in the said policies, sailed in July 1869 from Liverpool, bound to the west coast of Africa, with a general cargo, and arrived at Kinsembo on that coast on the 28th Sept. 1869, where she discharged her outward cargo and took in a cargo consisting of nuts, palm kernels, bees' wax, and copper ore and some ivory.

4. That the ship left Kinsembo on the 8th Nov. with the said cargo, which was not, however, a full cargo, and then proceeded to several places on the coast of Africa, taking in more cargo at those places respectively.

5. That the ship arrived about the 21st Nov. at Cabenda, which is an open roadstead or bay on the south-west coast of Africa, and at times exposed to heavy seas which roll into the bay. There are no ports at that part of the coast, and vessels land and discharge there. A chart of the coast was put in evidence and may be referred to.

The plaintiffs' mate stated that it is considered one of the best bays on the south-west coast. He said that he had never been at Cabenda before, but that he was otherwise well acquainted with the south-west coast.

That the *William Dent* was anchored in 3½ fathoms of water about half a mile from the shore, which was as near the shore as she could properly

get, and that vessels are always laden from lighters in Cabenda Bay.

6. That on the ship's arrival at Cabenda as aforesaid, the before-mentioned ivory, which had been put into her at Kinsembo, was discharged into the *Pioneer*, a steamer which belonged to the plaintiffs, and was then at Cabenda, and which was to take the said ivory and other goods to Bonny on the coast of Africa, for the purpose of being shipped by steamer to England.

7. That the said ship then proceeded to take in more cargo at Cabenda, at about a distance of half a mile from the shore, and was on the 24th Nov. completely loaded with a full cargo, consisting principally of pea nuts and palm kernels, which belonged to the plaintiffs. On the same day the hatches were battened down, and secured, and the ship was then ready to sail on the homeward voyage to Liverpool.

8. That it was in fact intended by the plaintiffs agent at Cabenda, and by the captain of the *William Dent*, that the vessel should, so fully loaded as aforesaid, sail homeward either that day or the next.

9. That about the 25th Nov., after the said ship had completed her cargo as aforesaid, and was ready to proceed to sea, a vessel called the *Robert Jones* struck on the rocks at a distance of about four miles, and close to the entrance of the bay; with the aid of the *Pioneer* the *Robert Jones* was got off the rocks and was towed towards the shore, but she sank in about three and a half fathoms of water and about two or three cables' length from the *William Dent*. The *Robert Jones* and her cargo (consisting of coals), were afterwards, about the 25th Nov., purchased by the plaintiffs' agent at Cabenda for a small sum, and the said agent wrote to the plaintiffs as follows: "I completed the loading of the *William Dent* to-day, and she is now ready for sea, but I think it advisable to detain her for a day or two in order that she may haul alongside the wreck of the *Robert Jones* to remove the spars, and, if possible, some of the cargo. I write you at length, *vid* Bonny, of my purchase of the wreck, which I expect will turn out a very profitable transaction. I beg herewith to enclose one copy of a bill of lading, per *William Dent*." The agent, in the same letter, adds that he had promised the captain of the *William Dent* some remuneration for his special services touching the wreck; again, afterwards the same agent, writing from St. Thomas to the plaintiffs, says: "The *William Dent* is loaded and at Cabenda, but I have left instructions to Capt. Salt (captain of the *William Dent*) to remain at Cabenda as long as there is a prospect of his saving sufficient of the cargo and spars of the brig *Robert Jones* to warrant the detention. I instructed Capt. Salt to haul the *William Dent* alongside the brig, and in that position he will be able to save a vast quantity of cargo and gear."

The *William Dent* was not moved from her first place of anchorage until driven therefrom as hereinafter mentioned, nor was she in any way employed in salvaging the wreck of the *Robert Jones* by her master and crew, with the exception of one or two left on board as a watch, were so employed.

10. That the *William Dent* remained in Cabenda Bay with her full cargo on board until the 24th Dec., and her detention there was solely for the purpose of employing her master and crew in saving portions from the wreck of the *Robert Jones* and her cargo. On the 24th Dec. the plaintiffs

(a) There were fifteen other pleas to the said two counts respectively, but as the jury were discharged from giving any verdict upon the issues thereby severally raised, it is unnecessary to notice them farther.

said agent wrote from Cabenda to the plaintiffs, "I was extremely sorry to see the *William Dent* here when I returned, as although Capt. Salt has saved a great deal from the wreck of the *Robert Jones*, still I am sure you will not be pleased at the great detention of the ship."

11. That on the 5th Dec. there was a heavy tornado from the S.E., which parted the cable of the *William Dent*, and before the ship could be brought up with the second anchor, drove her athwart the above-mentioned ship *Robert Jones*, thereby causing some of the copper of the *William Dent* to be torn off, and also part of her bulwarks and rails to be carried away. The winds generally prevalent on the coast near Cabenda in November and December are southerly winds.

12. That the bulwarks and rails were repaired and the copper, as far as it could be, the vessel being afloat, and on the 26th Dec. the *William Dent*, loaded with her aforesaid full cargo as aforesaid, left Cabenda Bay bound for Liverpool. The plaintiffs' mate stated that according to his judgment and opinion the *William Dent* left in a perfectly seaworthy condition. He added that in his opinion the planking underneath was not injured, but he would not on his oath say that it was not injured. He further stated that the ship's bottom was examined by a diver, and that a stage was let down the side of the ship on which the ship's carpenter worked, standing in water up to his middle.

13. That during her said voyage to Liverpool the *William Dent* encountered bad weather and was stranded at the Island of Anna Bon, and during her said voyage events occurred, in respect, and on account of which the plaintiffs claim in this action a total loss in the above declaration mentioned. The defendants deny that there was any total loss. (A copy of the log was given in as an appendix and might be read as part of the case.)

14. And the Lord Chief Baron, after the above mentioned facts were proved by the plaintiffs' witnesses, expressed to the counsel for the parties his opinion that the plea of deviation was proved. He proposed thereupon to nonsuit the plaintiffs, to which the learned counsel for the plaintiffs objected, and asked his Lordship instead thereof to direct the jury according to his opinion, and that they should find a verdict for the defendants on the issues 16 and 17 above joined between the parties, and thereupon his Lordship expressed his said opinion to the jury accordingly, and they gave their verdict against the plaintiffs on the said last mentioned issues, the jury being thereupon, by the consent of the parties, discharged from giving their verdict upon any other of the issues so joined between the parties.

15. Whereupon the counsel for the plaintiffs, conceiving that the defendants were not by law entitled to have the verdict entered for them in manner aforesaid, on the said issues, made their exceptions to the directions so given by the Lord Chief Baron, who thereupon sealed this bill of exceptions according to the statute in that behalf.

The grounds of error assigned were, first, that the plea of deviation was not proved; secondly, that the evidence did not show any such delay or deviation as would determine the risks insured against by the policies; thirdly, that there was no implied warranty in the policies not to deviate.

The plaintiffs' points for arguments: First, that

the plea of deviation was not proved; secondly, that, considering the form of the policies, and the nature of the insured voyage, and of the African trade, it was a question of fact for the jury, whether the delay at Cabenda was unjustifiable or unusual, and that the jury were wrongly directed; thirdly, that the policies were to some extent time policies, and that what would be a deviation, such as to avoid an ordinary voyage policy, would not avoid the policies in question.

The defendants' points for argument: First, that there is no error in law in the record and proceedings herein; secondly, that there was in the policies of insurance declared on, of the 19th July 1869, and the 2nd Aug. 1869 respectively, an implied warranty by the assured not to deviate; thirdly, that the facts set forth in the bill of exceptions herein show such a deviation as avoided the policies respectively; fourthly, that the sixteenth and seventeenth pleas respectively were proved; fifthly, that the ruling of the learned Lord Chief Baron was right; sixthly, that the judgment entered for the defendants ought to be affirmed.

Cohen (with him Butt, Q.C.) appeared to argue on the part of plaintiffs in support of the bill of exceptions to the ruling of the Lord Chief Baron, and contended that the learned judge was not justified in directing the jury, as he had done, that on the plea in question the defendants were entitled to the verdict; but that he should have left it as a question of fact to the jury whether or not there had been, under the circumstances, a deviation such as to avoid the policy. Though it might possibly be admitted that, in the case of an ordinary voyage policy, delay might constitute deviation, on the ground that delay adds to the risk, the duration of the risk being thereby extended, yet that principle does not apply to a policy like that in the present case. On the negotiation for the policy it was considered probable that the vessel would be absent for a period of twelve months, and the premium was calculated on that footing; and there was to be a specified reduction in the amount of the premium if she happened to return within ten months, a further reduction if she returned in eight months, and a still further reduction if she should return in six months. But then, if she should remain at sea beyond twelve months, there is a distinct provision for the payment of 13s. 4d. per cent. per month, without any limit as to time, which sum, if worked out, will be found to amount to a premium of 8 guineas per cent. The policy therefore was in one sense a time policy, with a premium increased in proportion to the extension of the time, so that it was immaterial to the underwriters how long she remained abroad. A variation of risk sufficient to avoid the policy must be a variation which involves the possibility of increasing the risk; a mere change in the risk does not, unless the risk is increased, discharge the underwriters. The mere fact of a vessel, while remaining at a port, being occupied in other ways than was originally contemplated, does not discharge the underwriters, unless the risk be increased; and whether the risk be increased or not is essentially and especially a question for a mercantile jury. In Arnold's Marine Insurance, vol. 2, 4th edit., p. 446, it is said, "We come now to the consideration of those cases which establish the position that, if the ship, under the terms of the policy, was justified in originally visiting the

port, any trading during her stay, although foreign to the main purposes of the venture, is not a deviation, unless it causes additional delay, or otherwise substantially varies the risk. Formerly this was not so." It is not sufficient, I submit, for the defendant to show a mere *seintilla* of variation. Arnould then cites and comments on the cases of *Raine v. Bell* (9 East, 195), and *Laroche v. Owen* (11 H. 121). In the last-mentioned case, where goods were insured from Gottenburg to a port or ports in the Baltic, with liberty to unload at Carlsmann, after the ship had sailed from Gottenburg with convoy, and was lying in Melmoe Roads, under the commodore's order, a boat came alongside with boxes of indigo, no part of the original cargo, but which were all got on board without any delay to the ship; and it was held there was no deviation, for the risk incurred was neither enhanced nor varied; but merely something was done in the course of the voyage, which made no difference in either, and, therefore, was no discharge of the underwriters' liability. So it was in the present case. And at p. 449, Arnould proceeds to say: "The line of distinction between those cases and the class of cases, of which *Hammond v. Reid* (4 B. & Ald. 72) is the leading authority, though not at first sight obvious, is, nevertheless, clear and intelligible. In *Hammond v. Reid*, and cases of that class, the ship would not have touched at the port at all, except for some purpose totally unconnected with the main object of the voyage insured, and the execution of which purpose was itself the sole cause of the delay. In *Raine v. Bell* (*ubi sup.*), and the cases decided on its authority, the ship had originally put into, and was actually staying at the port for some purpose connected with the voyage; and while so being there for a justifiable and necessary purpose, some act was done which, though in itself it might be unconnected with the adventure, and not originally contemplated by the parties to the policy, was yet held not to amount to a deviation, because it caused no material variation of the risk." Now there was, it is contended, no increase of the risk here at all and no deviation. The ship was in a safe and good roadstead, where she was bound to be under the policy; and, whether "trading" or not, the premium was calculated according to the time of her stay. [BLACKBURN, J., refers to *Mount v. Larkins* (8 Bing. 108; 1 L. J. N. S., 20, C. P.), where Tindal, C.J., cites with approbation the judgment of Lord Mansfield, C.J., in *Hartley v. Buggin*, (3 Doug. 39; 2 Park Ins. 469) in which that learned judge says, that it is not material in order to constitute a deviation that the risk should be increased, the question being whether it has been varied.] That may be so in a voyage policy. But this is a time policy, and the increase of the premium is proportioned to the increase of the time. There has, therefore, I contend, been no increase of risk, and so no deviation. But at all events, a jury was the proper tribunal to decide that question as one distinctly of fact, and on that ground alone the plaintiffs are entitled to judgment.

Milward, Q.C. (with him was *C. Russell, Q.C.*) for the defendants, contra.—It is admitted that, if the instrument sued upon be a voyage policy, the plaintiff must fail. The words used therein are the ordinary ones found in such a policy. It is a voyage and not a time, nor a mixed voyage

and time, policy. In a time policy the limits of the risk are defined "by points of time, only without any designation of local termini at all": (1 Arnould on Insurance, 3rd edit., p. 361.) So here, if the parties had intended this to be a time policy, they would have stated the periods of risk only without local termini. The conditions, even in time policies, continue the same as in voyage policies. The substantial question to be determined is whether the ship was, within the time covered by the insurance, trading. There was, however, no pretence of trading during this month in which she lay alongside the wreck. She was, as is found in the case, loaded and ready to sail for England on the 24th Nov., and would have departed next day but for this improper detention; and if she had sailed in ordinary course she would have escaped the tornado. The case of *Hartley v. Buggin* (*ubi sup.*), to which Blackburn, J., has referred, is an authority directly in favour of the defendants. It is cited by Arnould at p. 460, and shows that an unreasonable delay in performing the voyage insured is equivalent to a deviation, and was so expressly ruled by Lord Mansfield. In that case the ground of defence was the detention of the ship as a floating slave depot on the African coast, and his Lordship said, "The single question in this case is, whether there has not been what is equivalent to a deviation, whether the risk has not been varied. It is not material to constitute a deviation that the risk should be increased" (3 Doug. 640; 2 Park Ins. 469). In the present case a different risk has been run to that undertaken by the defendants. The vessel was kept for a month in an open roadstead while the crew were employed on the wreck alongside which she was laid. If there for purposes of salvage only, she could not be said to be "trading." Where a vessel engaged in the African palm oil trade, with liberty to act as a tender to other ships in the same employ, was kept thirteen months in the Benue river, this was held an unreasonable delay, though during part of such time she was employed as a tender (*Hamilton and others v. Shedden*, 7 L. J. N. S., 1, Ex.; 3 M. & W. 49). The plaintiff wishes to read the words "stay and trade" as "stay and trade." [He was here stopped by the court.]

Cohen in reply.—It is not contended by the plaintiffs that this is a time policy in the ordinary sense of the word; but, having regard to the whole document, it is clear that it was to be in the discretion of the assured whether they were to let their ship remain a shorter or longer period on the coast of Africa, and the underwriters did not care how long the risk lasted, as they would receive an extra premium. Then the decided cases show that, if a policy be so framed that the ship is allowed to stay a certain time, the purpose for which she stays matters not. An intention to deviate is not deviation. This ship might undoubtedly have remained in the bay for a month—say while she exchanged cargo with the *Pioneer*. Can it be said that if she stayed there a month, although for the purposes of trading, the underwriters would be discharged? Yet they must go that length. The words "stay and trade" give the shipowner greater latitude than the phrase "touch and stay" would do. In the case of *Hartley v. Buggin* the policy was a pure time policy.

COCKBURN, C.J.—I am of opinion that the ruling of the Lord Chief Baron was right, and that this bill of exceptions cannot be sustained. I agree that this is not a voyage policy *simpliciter*, but on the other hand neither do I think it a time policy *simpliciter*. It is a combination of the two. It is a policy for the purposes of a voyage to the coast of Africa, subject to this, viz. that it is, in one sense, a time policy, by reason of the assured being entitled under it to keep the ship out there for any time he thinks proper, on paying certain stipulated premiums proportioned to the length of time he detains the vessel abroad. The purpose of the voyage, as specified, is that the vessel is "to go to the coast of Africa, to stay and trade there" for a certain period, according to the object of the shipowner. The question turns on the meaning of the words "stay and trade." Mr. Cohen ingeniously argues that those words mean stay and something more. But it occurs to me "stay" might be sufficient without more; but when the words "and trade" are added, I think the meaning of the phrase is this, "to go to the coast of Africa and stay there for any purpose which properly falls within the description of African trade." In my opinion, under the terms of this policy, the ship cannot be used for any other purposes than trading purposes. No doubt, if, with a view to trade, the captain after loading the cargo were uncertain as to whether it was most advantageous to send it, thinking that although the original destination was port A., it might be better to send it to port B., and if he stayed during such uncertainty for a month at the place of loading, I quite agree that that would be staying for the purposes of trade. And the same principle is applicable to any part of the world, where the vessel could be used for other purposes than trade; can it be said that, under the terms of the policy, the vessel might be used for any other purposes? In the case cited from Douglas (*Hartley v. Buggins*) the question was, whether the stay of a vessel used as a factory ship on the coast of Africa was a deviation—that was a question of fact. Now, if it could be shown that vessels sent to the coast of Africa were, by the custom of trade there, capable of being employed for some purpose other than those generally understood by the term "trade," that might have made a difference; but we have no evidence of that kind. No evidence before us shows that vessels, insured and sent out to that coast under such circumstances as in the present case, could be employed for the purpose of saving wreck, which is using her for the purpose of salvage and not of trade, and cannot come within the terms of the policy. Whether this is a generous or honourable defence to set up is not the question here. It seems to me that this voyage was for such purposes as fell within the definition of "African trade." This stay of the ship was not for such purposes, and, therefore, the Lord Chief Baron's direction to the jury was right. I agree that if any such evidence whatever had been adduced, which could have been properly left to the jury, to show that this stay was for the purpose of the "African trade," then there should be a *verdict de novo*, but there was none.

BLACKBURN, J.—I am entirely of the same opinion. I take the law to be very accurately stated in 1 Phillips on Insurance, p. 564, sect. 983: "It is not necessary to a deviation or change of risk, whereby the underwriters are discharged,

that the degree or period of the risk should be thereby increased. The assured has no right to substitute a different risk." And that, although Mr. Cohen endeavoured to make an exception from it, i.e. I conceive, the principle running through all these cases. The underwriters bargain for a particular risk, and the assured has no right to subsequently change or otherwise differentiate it. Now, in order to find the risk the parties intended to cover, we must look at the terms of the policy. [His Lordship here read them, and then proceeded as follows.] Undoubtedly therefore the parties knew that this voyage might be longer or shorter, and regulated the premium accordingly; but, for all that, it is obvious that they were covering the risk during the vessel's voyage to and stay and trade in Africa, and return to Liverpool, and if there was any deviation from that, whether such deviation increased or diminished the risk or not, the assured did change the risk to the underwriters. Now, in the African trade many things, in process of time, have become customary which were formerly not so. From my experience I remember that it used once to be a very common thing upon the African coast to employ a vessel as a tender or floating warehouse, and I am by no means sure that if some such custom were shown to exist, whether, under the words "stay and trade," used in this policy, the ship might not "stay and trade" for the customary purposes for which a ship is there used. So, although it is unnecessary to decide the point, I am inclined at present to think that, if the ship were used as a floating warehouse by that shown custom, there would not be any deviation. But if there is any change from the ordinary course of the voyage, then it does change the risk, because the underwriter takes on himself to say, "I know perfectly well what is ordinarily done on the coast of Africa, and the risk run." But, if the vessel stays, and does something different, that risk is changed—which is enough to free the underwriter from liability on the policy. He may say, "You never asked me to take this risk; if you had done so I might have accepted it, charging higher premiums, or I might have declined it altogether, *non in hac fœdera veni*," and so discharge himself. That is thrown out in *Hartley v. Buggins* (*ubi sup.*), where, on the question of granting a new trial, Lord Mansfield says, "The single question in this case is, whether there has not been what is equivalent to a deviation. It is not material to constitute a deviation, that the risk should be increased. The voyage is to the coast of Africa, and thence to the West Indies, which includes an insurance on the ship while she stays and trades in Africa, and it is with liberty to exchange goods and slaves; but that exchange is for the benefit of the ship, one slave for another. If a ship insured for a trade is turned into a factory ship, or a floating warehouse, the risk is different; it varies the stay, for while she is used as a warehouse no cargo is brought for her." Then the case was sent down for a new trial, whereas Eyre, C.B., left to the jury the question, "If the use made of the ship had the voyage for its object?" A verdict was found for the defendant which was never questioned. Now, true, the direction here would be "On this evidence do you, the jury, think that the stay of the ship, whilst she was waiting in the bay during this month was staying and trading in the ordinary course of an

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African voyage," if there was any evidence at all to show that it was in the ordinary course of an African voyage to keep the ship there with the object of salvage. (a) But there was no evidence of that kind at all, so that the doctrine in the case of *Ryder v. Wombwell* in the Exchequer Chamber (19 L. T. Rep. N. S. 491; L. Rep. 4 Ex. 32; 38 L. J. 8, Ex.), does not come in, for there was no scintilla of evidence here at all of that, and consequently nothing to leave to the jury. This stay of the vessel for the purposes of salvage clearly carried the risk whether it increased or diminished it, and, therefore, the ruling of the Lord Chief Baron was right and the judgment below should be affirmed.

KEATING, J.—I am of the same opinion.

MELLOR, J.—I quite agree with the construction put upon this policy by my lord and my brother Blackburn.

GROVE, J.—I have had some doubt in this case—not with respect to the law as expressed by my brother Blackburn and the decided cases—that in the case of an ordinary policy it is not necessary to a deviation liberating to the underwriter, that the risk should be increased; but I understand Mr. Cohen's argument not to be founded on that class of cases or reasoning, but to be this, viz., that it was not other than the contemplated voyage here because of the terms of the policy stipulating for the payment of an extra premium for an extended time, and that the words "stay and trade" might be read disjunctively "stay or trade." But looking more closely into the policy, I find that the word "or" is used correctly in other places, where the parties intended such disjunction, which shows clearly that they knew the difference between "or" and "and." I read the words "stay and trade" to mean "stay trading." Now, it is evident that there was no stay of this kind here. This vessel had loaded a cargo, the hatches were battened down, she was ready and just about to sail homewards, and then there was what may be termed a capricious delay, and consequently one not within the terms of the policy. The risk was altered, and therefore our judgment must be for the underwriters.

HONYMAN, J.—I am entirely of the same opinion, and only wish to add that Mr. Cohen has dealt with the case in his argument as if the words "stay and trade" were written "stay ^{or} trade." Had they been so, his argument would have had much weight. But that is not the wording of this policy.

Judgment affirmed.

Attorneys for the plaintiffs, Walker and Sons, agents for Ellis, Field, and Moss, Liverpool.

Attorneys for the defendants, Argles and Rawlins, agents for Hull, Stone, and Fletcher, Liverpool.

(a) "The insurer, in estimating the price at which he is willing to indemnify the trader against all risks must have under his consideration the nature of his voyage to be performed, and the usual course and manner of doing it. Everything done in the usual course must have been foreseen and in contemplation at the time he engaged." (Per Lord Mansfield in *Felly v. Royal Exchange Assurance Company*, 1 Barr. 346.)

COURT OF ADMIRALTY.

Reported by J. F. ASPINALL, Esq., Barrister-at-Law.

Nov. 21 and 27, and Dec. 12, 1872, and Jan. 14, 1873.

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Priority—Master's wages—Bottomry—Mortgage—Reference to registrar and merchants.

Maritime liens, being in the nature of rewards for services rendered, rank against the fund out of which they are to be paid in the inverse order of their attachment on the res, and the last in time should be the earliest in payment.

The claim of a master for his wages earned and disbursements made subsequently to a voyage, during which a bottomry bond has been given on his ship, takes priority over the claim of the bondholder.

A bottomry bondholder is entitled to priority over the claim of a master for wages earned on voyages previous to that during which the bond is given. (a)

A master's claim for wages and disbursements, whenever earned or made, takes priority over the claims of mortgagees.

THIS was a question of priority between a master suing for his wages, a bottomry bondholder, and mortgagees. The court pronounced for the various claims and referred them to the registrar and merchants to find the amounts, and to decide in the first instance as to the order in which the claims ought to be paid. The facts and arguments are fully set out in the report of the registrar.

W. G. F. Phillimore, appeared before the registrar and merchants for the master.

E. G. Clarkson, for bondholder.

Cohen and Wood Hill, for the mortgagees.

The report of the registrar (Mr. H. C. Rothery) was as follows:—

"These cases came before myself and one of the merchants on the 21st and 27th Nov. ult. The main question at issue, and which the parties agreed should in the first instance be decided by myself, was one of very considerable difficulty and importance—as to the relative rights of a bondholder, a mortgagee, and the master of the ship to priority of payment out of a fund in court, which is sufficient to pay all, or indeed any two, of the claims. And as the view, which I have found myself obliged to take of this question, is at variance with the generally received opinion on the subject, and would even at first sight appear to be opposed to some of the reported decisions, I pro-

(a) It is remarkable that this question seems never to have been previously formally raised and decided. In *The Mary Ann* (9 Jurist, 51), Dr. Lushington expressed an opinion that wages earned on an outward voyage before the bond was given, could not take precedence of the bond, but it was not so expressly decided. In the United States the priority of all seamen's wages seems to have been taken for granted, but the question arising in this case has not, so far as can be gathered from reported cases, arisen: (See *Blaine v. Ship Charles Carter*, 4 Cranch's U. S. Sup. Ct. Rep. 324; *The Virgin*, 8 Peter's U. S. Sup. Ct. Rep. 538; *Furness v. The Brig Indragum*, Olcott's Adm. Rep. 55; *The Hilarity*, Blatchford and Howland's Adm. Rep. 90.) As a subsequent bottomry bond is given to secure advances for repairs, which enable the ship to reach her home port, and the crew thus to earn their wages, it seems only equitable that the general rule of maritime liens should be applied in such a case as in all others, and that the bondholder should have priority.—Ed.

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pose to state my reasons in detail, so that I have erred in the conclusions at which I have arrived, that error may readily be corrected by the court.

"The circumstances of the case are briefly as follows:—

"On the 14th June 1869, George Henry Webber was appointed to the command of the *Hope*, by his brother Charles Shilston Webber, of Bristol, who was the sole owner. No written agreement was entered into between them as to the rate of wages which he was to receive; but he informed us that it was verbally agreed between himself and his brother that he should have 15*l.* per month. The vessel, which was at the time at Bristol, shortly afterwards proceeded to Cardiff, and, having taken in a cargo, sailed therewith on the 18th Aug. 1869, bound to Monte Video. Thence she proceeded to Rosario, and, having discharged her cargo at Bordeaux, ultimately returned to Cardiff, where she arrived on the 24th June 1870. It should here be stated that, whilst the vessel was away on this voyage, the owner, by an indenture dated the 6th Dec. 1869, mortgaged her to a person named Pooley, who a few days afterwards transferred his interest under that mortgage to the persons who are now suing the vessel as mortgagees in cause No. 5954.

"On the 22nd Aug. 1870, the *Hope* again left Cardiff under the command of George Henry Webber, and proceeded to Barcelona; from thence she sailed to Port Mahon and Tarragona, and thence to Buenos Ayres. From Buenos Ayres she went to Cape Town, and, having taken on board a return cargo, arrived therewith at Falmouth on the 9th Sept. 1871.

"On the 17th of the same month the master, being, as he says, seriously ill, with the consent of the owner, was discharged; and a new master, one Robert Bruce, was appointed in his place, and under his command the *Hope* proceeded to Hamburg, and there discharged her cargo. Whilst the vessel lay at Hamburg, it was deemed necessary to do some repairs to her; and the balance of freight, which had been received at Hamburg, being found insufficient to pay for these repairs, as well as for the necessary outfit and provisions to enable her to return to this country, the master, Robert Bruce, borrowed a sum of 60*l.* from the persons who are now suing as bondholders in cause No. 5969, and as security for the repayment gave them a bottomry bond upon the ship for that sum; with a bottomry premium of 9*l.*, payable within three days after the safe arrival of the vessel at Londonderry, to which port she was bound on leaving Hamburg. The *Hope* arrived at Londonderry towards the end of Nov. 1871; and there the master Bruce, and the greater part if not the whole, of the crew left her; and on the 30th of the same month George Henry Webber, having, as he states, recovered his health, resumed the command, and with a mate and six runners engaged especially for the run, brought her to Newport, where she arrived on the 28th Dec. 1871.

"On the 5th Jan. 1872, the mortgagees entered his action, and on the following day the vessel was arrested. This was followed on the 11th by an action by the bondholder, and on the 16th of the same month George Henry Webber entered his action for the wages and disbursements due to him. On the 20th Feb. 1872, the court pronounced for the bond, and ordered the vessel to be appraised and sold; and on the same day it also pronounced

for the mortgage, with interest to the time of payment. The vessel was accordingly sold, and on the 19th April following the gross proceeds of the vessel, amounting to the sum of 540*l.*, were brought into court by the marshal. On the 23rd of the same month the court pronounced in favour of the master's claim, but on the joint application of the bondholder and mortgagee referred it to the registrar to report thereon.

"It should here be observed that the claim of the master is for a sum of 539*l.* 3*s.* 4*d.*, besides a supplemental claim of 35*l.* for expenses incurred at Newport; the claim of the bondholder is for a sum of 69*l.* and interest; and that of the mortgagees is for 569*l.* 11*s.* 7*d.*, with 26*l.* 9*s.* 8*d.* for interest to the 31st Oct. 1871, and interest that has since accrued. And as the whole fund in court, after payment of the charges thereon, is only 410*l.* 10*s.* 9*d.*, it is clear, as has been already said, that it is wholly insufficient to pay any two of the claimants.

"The case came before us, as I have said, on the 21st and 27th ult.; Mr. Phillimore was counsel for the master, Mr. Clarkson for the bondholder, and Mr. Cohen and Mr. Wood Hill for the mortgagees. There were four witnesses examined, the master and his accountant, and two other witnesses who were produced on behalf of the bondholder and mortgagees to prove the rate of wages usually paid to masters of vessels such as the *Hope*, a point, however, on which, as will be seen in the result, nothing turned.

"The evidence of the master, however, was of great importance. He stated that on his return from his first voyage he had given all the vouchers which he had to his brother, and that a statement of account had been agreed upon between them, but that his brother being in difficulties he could not obtain a settlement from him, and that the whole of his wages and the balance of his disbursements for that voyage consequently remained unpaid. He stated that the same thing had occurred on his return from the second voyage; that a statement of account had been made out between them, but that he could get no settlement from his brother, and that the whole of his wages and the balance of his disbursements for that voyage also were still due to him. He stated that, when he left her at Falmouth, he ceased to be her master; that Bruce was not his deputy; and that his (Webber's) services in her had terminated when he left her at Falmouth. He admitted that he had gone to Hamburg during the time that Bruce was in command of her; that he had stayed there a week; that during that time he had been almost constantly with Bruce the master, but that they had never on any occasion spoken about the ship's affairs; and that, although he knew that a sum of about 400*l.* had to be received at Hamburg as the balance of freight, and that there was then due to him for his wages and disbursements between 500*l.* and 600*l.*, he never applied to have any part of it paid over to him, for that, not being any longer her master, he considered that he had no right to interfere; he added that he did not know, and had never troubled himself to inquire, how the freight had been disposed of. He stated also that he knew nothing of any bottomry bond being required at Hamburg, nor of the intention of Bruce the master to give one. As to the accounts which had been filed in the case, he stated that, not being able to obtain payment of his claim, he had gone, without his brother's know-

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ledge, to the box which contained the papers relating to the *Hope*, had opened it, and had abstracted therefrom all the vouchers which he could find; that he had handed them to his accountant, together with such rough notes as he had kept of his expenditure on the two voyages, and that the accountant had, from these materials, and from the explanations which he had given him, made out the accounts in the form in which they had been given in; that when the accounts had been made out, the accountant had given him back the rough notes of his expenditure which he had kept on the two voyages, and that, thinking that they were of no further use, he had destroyed them after the institution of these suits, and although he was at the time aware that his claim would be disputed, and that he would be required to prove every item of it. He stated that he could not say what had become of the statements of account, which he alleged had been agreed upon between himself and his brother at the termination of each voyage, nor could he obtain any information on the subject, as his brother had died, about three months since, bankrupt.

"The accountant in his evidence stated that he had drawn up the accounts from the materials and explanations furnished by the master: that he had then handed the accounts, with the vouchers, to the master's solicitors, and the rough notes of expenditure he had given back to the master himself. He had never seen the alleged statements of account agreed upon by the two brothers. He stated further, that he had had great experience in the adjustment of masters' accounts with their owners; that as a rule they were generally very irregularly, or rather informally, kept; and that it was not usual to require masters to produce vouchers for all their payments. He added that many of the items in the master's account were unvouched, but that he did not consider the expenditure on the two voyages to be either excessive or unreasonable.

"With such evidence before us, it was impossible not to look with some suspicion on the claim of the master. The fact that, knowing his brother to have been in difficulties, he had allowed the account of his wages and disbursements to run on without obtaining a settlement of his claim; that he should, after institution of the suit, have destroyed the only evidence which he possessed of many of the unvouched items of his account; that he should have gone to Hamburg, stayed there a week, and during that time have been in constant communication with the master, Brose, and yet never have said one word to him about the ship's affairs, or asked for any payment out of the freight, which he knew was to be received, although there was then due to him, according to his own account, between 500*l.* and 600*l.*; the near relationship of the parties, and the very convenient arrangement by which the bond was given, at a time when Webber had temporarily given up the command of the vessel, and when possibly it might have been thought that the money could be raised on bottomry, without invalidating his claim; all those circumstances tend to throw some suspicion upon the master's case; and although perhaps they do not amount to a positive proof, as was contended, that the claim is a fraudulent one, it is clear that the master can ask for no special indulgence, and that he is entitled only to what the law will give him, and to no more.

"I now proceed to consider the question of priority; and first, as to the relative rights of the master and the bondholder.

"Formerly, as is well known, a master had no remedy for his wages or disbursements, either against the ships or against the freight. By the 191st section of the Merchant Shipping Act 1854, however, it was enacted, 'that every master should have, so far as the case permits, the same rights, liens, and remedies for the recovery of his wages, which by this Act, or by any law or custom, any seaman, not being a master, has for the recovery of his wages.' The same section further provided that, if a counter-claim was set up by the owner, the master was entitled to have all the accounts between them gone into. This provision was further extended by the 10th section of the Admiralty Court Act 1861, which gave the court jurisdiction 'over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship; and it was held by Dr. Lushington, in the case of *The Mary Ann* (13 L. T. Rep. N. S. 384; L. Rep. 1 Adm. & Ecc. 8; 2 Mar. Law Cas. O. S. 294), that the effect of these statutes has been to convert the master's claim for his wages and disbursements into a 'maritime lien.' This decision has been since frequently acted upon by this court; and it must, therefore, now be taken to be settled law that the claims of a master of a ship for his wages as well as for his disbursements is a 'maritime lien,' enforceable in this court. But if the claim of a master is a 'maritime lien,' so also is that of a bottomry bondholder, and one too, of a very high and sacred character. Bottomry bonds being, as has been said, 'for the benefit of ship-owners and the general advantage of commerce,' have always been regarded with peculiar favour in Courts of Admiralty. Both these claims then being, in the words of Mr. Maclachlan, in his work on Merchant Shipping, p. 596, 'liens in the nature of rewards for benefits conferred,' and, as such, 'maritime liens' of the first class; and, according to that learned authority, the general principle in regard to all such liens is, that they are entitled to 'rank against the fund in the inverse order of their attachment on the *res*,' or, in other words, 'the later in time is the earlier in payment;' 'the sole reason of this,' as he elsewhere remarks, 'being that the later benefit preserves the *res* to satisfy the earlier claims, and earns thereby a superior equity in respect of the common fund.' Nor, as he rightly says, are wages any exception to the rule, although they 'might be supposed, from the language of judges, to have attained to a special and inviolable precedence.' But 'the language alinded,' he observes, 'is fully justified by the circumstances to which it is applied, being those of the usual case when liens have attached in the course of the voyage; but seamen's wages not accruing until the end of it, become, in fact, the later lien.' Thus, he says, 'a bottomry bond gives precedence to subsequent salvage, that again to subsequent bottomry; all taking rank before prior wages, all yielding priority to wages subsequently earned.'

"If, this, then, is to be the principle by which I am to be guided in the present case, there can be no doubt whatever what ought to be my decision. Webber's wages for the first voyage accrued when that voyage was terminated at Cardiff, in June 1870. His wages for the second voyage accrued when he

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left her at Falmouth, on the 17th Sept. 1871, or, at all events, when she terminated that voyage by the discharge of her cargo at Hamburg. Subsequently to this, and to enable her to perform a new voyage from Hamburg to Londonderry, the bond, which bears date the 7th Nov. 1871, was given. It is clear, therefore, upon this principle, that, except for the small amount of wages and disbursements due to him after he resumed the command at Londonderry, the master's claim must take rank after that of the bottomry bondholder. To hold that the resumption of the command by the master at Londonderry would revive his claim for the wages and disbursements due to him for the two previous voyages, so that they could be deemed to have accrued only at the final termination of his services in the vessel, is a position which could hardly be maintained. But it was contended by Mr. Phillimore that there are certain reported cases, which give a master priority over a bottomry bondholder for the amount of his wages and disbursements, no matter when they may have accrued; and I propose, therefore, to examine these cases, and to see how far they support the position which have been contended for; for if there be any such decision, it is, of course, binding upon me.

"The first case then to which I will refer is that of *The Janet Wilson*, reported in Swabey, p. 261. In that case the application was for payment out of the proceeds in court of a sum of money, which had been paid for seamen's wages pilotage, and other necessary disbursements, in priority to the claim of a bondholder. The court, however, rejected the application, and in doing so said, 'It is perfectly true that under certain circumstances the mariner has a claim for wages which will take precedence of a bottomry bond, but I do not think it is universally true that in all cases the mariner is entitled to come to this court and say, "I shall have my wages in preference to a bottomry bond." I have very great doubt in my own mind whether, where wages have been earned prior to the time when a bottomry bond has been given, a mariner has a right to come to this court and say, "Let me have a preferential payment over the person who holds the bottomry bond;" and for the obvious reason that the payment of those wages out of the proceeds of the ship is conditional upon the arrival of the ship in this country; and that event was brought about by the bond having been given, and the money having been advanced.' So far, therefore, as this case goes, it is an authority rather for preferring the claim of the bondholder to that of the master, as well in respect of the latter's wages as of his disbursements.

"The next case is that of *The Jonathan Goodhue*, reported in the same volume of reports, p. 524. In that case the learned judge rejected the claim of the master for the payment of his wages in priority to that of the bondholder, mainly on the ground that the master had by the bond rendered himself personally liable for the payment thereof; at the same time observing: 'As to wages, seamen no doubt are generally entitled to a priority of payment, but even here difficulties might arise, and the court has guarded itself against expressing any opinion in case of wages earned before the execution of a bond or on a previous voyage.'

"The next case to which it is necessary to call attention is that of *The Union*, reported in Lush.

p. 128. In that case the court no doubt held that seamen's wages, earned as well before as after the giving of the bond, were to be preferred to the claim of the bondholder; but that case differs essentially from the present, in that the wages had been earned on the voyage in which the bond had been given, and not, as in the present case, in two previous voyages; and, secondly, that they were wages due to seamen, and not wages and disbursements due to the master of the ship. Moreover, it is to be observed that in that case the question was rather one of marshalling the assets, for it appeared that the proceeds of ship, cargo, and freight, all of which were liable for payment of the bond, were amply sufficient to cover the claims both of the bondholder and of the seamen; whereas the ship and freight alone were not sufficient even to pay the bond. If, therefore, the bondholder's claim had been preferred to that of the seamen, the latter would have lost all remedy; whereas, by preferring the seamen to the bondholder, there were sufficient funds to satisfy both claims.

"A very similar case will be found in the same volume of reports, p. 69, *The William F. Safford*. In that case the learned judge preferred the claim of seamen for their wages to that of a bottomry bondholder. But then the wages had accrued subsequently to the giving of the bond; so that that case comes strictly within the principle laid down by Mr. Maclellan, namely, that liens in the nature of rewards for benefits conferred rank in the inverse order of their attachment on the res.

"The next case to which I will refer is that of *The Salacia*, reported in the same volume of Lushington's Reports, p. 545 (see also 7 L. T. Rep. N. S. 450; 1 Mar. Law Cas. O. S. 261). In that case there was a claim by seamen for their wages, amounting to £811; by the master for wages, 285s.; and for disbursements, 84s.; and besides these there was a bottomry bond on the ship, freight, and cargo. To meet these claims the proceeds in court were only 471l. The master claimed to share ratably with the seamen, on the ground that under the 191st section of the Merchant Shipping Act 1854, he had the same rights, liens, and remedies for the recovery of his wages as they had; but the court held that his claim was not entitled to rank with that of the seamen, and that the seamen were to be preferred to the master. The court then went on to say that, as the claims of the seamen would more than consume the proceeds of the ship, there was no other question at that time before it, but it intimated its opinion that, as between the master and the bondholder, the claim of the master upon the freight was to be preferred. I apprehend, however, that this, strictly speaking, was no more than an *obiter dictum*; it was not the question before the court, and, for all that appears to the contrary, the words may be those of the reporter, and not of the learned judge. But, at the utmost, to what does it amount? Merely to this, that wages will take precedence of a bond arising in the same voyage; for the claim in that case was for wages earned during the last voyage, and not, as in the present case on two previous voyages.

"The last case to which I need refer is that of *The Edward Oliver* (16 L. T. Rep. N. S. 575; L. Rep. 1 Adm. & Ecc. 379; 2 Mar. Law Cas. O. S. 507). In that case the ship, freight, and cargo, being amply sufficient to cover the claims of the

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master and of the bondholder, the question was, whether the ship and freight were first to be exhausted in payment of the bond, which would have left nothing for the master; but the court held that, there being funds amply sufficient to pay both, the master's claim should be first satisfied out of the ship and freight, and the balance thereof applied towards the payment of the bond, any deficiency being made good from the cargo. It was a question of marshalling the assets, and was very similar to that of the *Union*, referred to above.

"I have now, I think, examined all the reported cases bearing upon the question of the relative rights of a bondholder and a master to priority of payment out of a common fund, and I have come to the conclusion that there is not one which meets the circumstances of the present case. There are, no doubt, *obiter dicta* that wages are entitled to precedence over other liens; and there are instances also of priority having been given to seamen over a bondholder for wages earned during the voyage in which the bond was given; as well as priority to masters, where the only fund against which the master could claim was insufficient to satisfy both his claim and that of the bondholder, and where there was another fund amply sufficient to satisfy the bondholder's claim. But I do not find any case in which it has been held that a master is entitled to priority over a bondholder for wages and disbursements incurred on voyages prior to that in which the bond was given. This being so, I must adhere to the general rule, as stated by Mr. Maclellan, that liens in the nature of rewards for services rendered rank against the fund in the inverse order of their attachment on the *res*, and that the last in time should be the earliest in payment. I must therefore hold that except in respect of the comparatively trifling sum which is due to the master for his services after he had resumed the command of the vessel at Londonderry, the bondholder is entitled to priority.

"Lastly, as to the claim of the mortgagees, relatively to that of the master. If, indeed, I had any doubt upon the point, but which I have not, the cases *The Chieftain* (Brown & Lush, 212); of *The Mary Ann* (*ubi sup.*); of *The Feronia* (17 L. T. Rep. N. S. 619; L. Rep. 2 Adm. & Ecc. 65; 3 Mar. Law Cas. O. S. 54), and other cases would be absolutely binding upon me, that the claim of a master for his wages and disbursements is to be preferred to that of a mortgagee. It was, however, attempted to be shown that in the present case the master's claim was fraudulent, and that there had been a conspiracy between the two brothers to defraud the just claims of the bondholder and the mortgagees. No doubt a claim preferred as this master's has been is open to very grave suspicion, but fraud must not be presumed, and I do not think that the facts of this case go so far as to establish a charge of fraud. But it was said that the master had forfeited his claim by *laches*; and that, even assuming the claim to be a genuine one, he had no right to lie by and by not availing himself of the many opportunities which had offered of enforcing it, to create a secret lien on the property to the prejudice of the mortgagees. I think, however, that the case of *The Chieftain* (*ubi sup.*), which has been already referred to, is conclusive on this point; in that case the learned judge held that a delay of even ten months after

his discharge would not bar the master's claim for his wages and disbursements, so far, that is, as a mortgagee is concerned. Nor must it be forgotten that, if the master has been guilty of *laches*, so also have the mortgagees; they know of the embarrassed circumstances of the owner; of the close connection between him and the master; and yet, so far as appears from the evidence in this cause, not only do they allow the interest on their mortgage to run on, but they take no steps to ascertain whether the accounts between the master and the owner on the previous voyages had been settled, nor do they appear to have made any attempt to secure any part of the freight towards the payment of the interest or principal of their mortgage. I think, therefore, that I cannot, on the ground of the master's *laches*, give the mortgagees priority. At the same time I think that, under all the circumstances of the case, the mortgagees were fairly entitled to have the master's claim investigated, and I shall therefore allow them their costs.

"My report will therefore be that, except in regard to the small sum that may be due to the master for his wages and disbursements, after he resumed the command of the vessel at Londonderry, the bondholder is entitled to priority of payment out of the fund in court, both for the amount of his bond and interest, and for his costs; that the cost of the master and of the mortgagees should then be paid; and that any balance that may remain, and which can hardly be very considerable, the available proceeds being only 410*l.* 0*s.* 9*d.*, shall be paid to the master, in part satisfaction of his claim. This will obviate the necessity of inquiring whether or not 15*l.* a month wages was or was not too high a rate for a vessel of this class and description, and for such a voyage; as well as whether the sums charged in the master's account, for which no vouchers have been produced, are to be allowed.

"H. C. ROTHERY, Registrar."

"Admiralty Registry, Doctors' Commons,
"Dec. 12, 1873."

Jan. 14, 1873.—Sir R. PHILLIMORE confirmed the registrar's report, which had been filed in the master's cause of wages, and not objected to by the other claimants.

Solicitor for the mortgagees, C. R. Rivington.
Solicitors for the bottomry bondholders, Ingle-
den, Ince, and Greening.

Proctors for the master, Rothery and Co.

Tuesday, Jan. 21, 1873.

THE ROSE.

Mortgage—Possession—Sale by mortgagee—Discharge by mortgagee indorsed on mortgage—Refusal of Custom House authorities to register the bill of sale—Jurisdiction.

Mortgagees in possession sold under their power of sale a ship, and at the request of the purchaser indorsed on the back of the mortgage a discharge, which by mistake was registered at the Custom House. The registrar at the Custom House afterwards refused to register the bill of sale of the ship, on the ground that by the discharge the property in the ship had passed to the original owner. The mortgagees and purchaser thereupon instituted a cause of mortgages and possession

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against the ship. The original owner had died intestate and bankrupt; no letters of administration had been taken out, and notice of the cause was served on his personal representatives and his trustee in bankruptcy. The purchaser sought a decree, declaring the property of the ship to be in him:

Held, that the court had jurisdiction to declare the property to be in the purchaser, and that the plaintiffs were entitled to a decree.

THIS was a cause of possession and mortgage instituted on behalf of Christopher Dove Barker and William Winship against the ship *Rose*, her tackle, apparel, and furniture, under circumstances set out in the petition filed in the cause, which is as follows:—

1. Before and at the time of the execution of the mortgage security hereafter mentioned, Thomas Gibson was the sole owner of the British ship *Rose*, belonging to the port of North Shields.

2. In Oct. 1867, the said Thomas Gibson, being indebted to Messrs. Woods and Co., of Newcastle-upon-Tyne, bankers, in the sum of 1000*l.*, it was agreed by and between the said Thomas Gibson and the said Messrs. Woods and Co., that the said Thomas Gibson should execute a mortgage of the said ship to Christopher Dove Barker, one of the plaintiffs in this cause, who was and is one of the partners in the said firm of Woods and Co., as security for the repayment of the said sum of 1000*l.*, and such further advances as might be made by the said Messrs. Woods and Co. to the said Thomas Gibson.

3. Accordingly, on the 3rd Oct. 1867, the said ship was mortgaged by the said Thomas Gibson to the said Christopher Dove Barker to secure the repayment of the sum of 1000*l.*, and such further advances as aforesaid together with interest thereon, to be paid at the rate of and in the manner therein mentioned.

The Exhibit A hereto annexed is a true copy of the said mortgage. (The mortgage is immaterial, and not set out.)

4. The said mortgage was duly registered at the port of North Shields on the 7th Oct. 1867.

5. The said Thomas Gibson died in June 1872, and at the time of his death there remained due and owing on the said mortgage security the principal sum of 1,000*l.*, together with a large sum of money for further advances, and interest.

6. The said Christopher Dove Barker being unable to obtain payment of the principal money and interest as due as last aforesaid, in the month of July 1872, sold the said ship, under the power of sale contained in the mortgage deed, to William Winship, one of the plaintiffs in this cause, for the sum of 800*l.*

On or about the 20th July 1872, the said William Winship paid to the said Christopher Dove Barker the said sum of 800*l.*, and the said Christopher Dove Barker, by the direction of the said Messrs. Woods and Co., executed a bill of sale of the said ship to the said William Winship.

The Exhibit B hereto annexed is a true copy of the said bill of sale. (The bill of sale is immaterial, and not set out.)

8. On the 24th July 1872, the said William Winship signed a declaration such as is required by the 56th section of the Merchant Shipping Act 1854, the said declaration is true, and the said William Winship has always been ready to declare to the truth of the same in the manner by law required.

The Exhibit C hereto annexed is a true copy of the said declaration. (The declaration is immaterial, and not set out.)

9. The said William Winship, believing that, in order to complete his title to the said ship, it was necessary that a discharge of the said mortgage should be endorsed on the back of the original mortgage, and signed by the said Christopher Dove Barker, requested him to make such endorsements and to sign the same.

10. Accordingly the said Christopher Dove Barker, in pursuance of such request as aforesaid, endorsed and signed the said discharge on the back of the said mortgage, on the 26th July 1872, as appears by the said

Exhibit A. And the said mortgage was given by the said Messrs. Woods and Co. to one of their clerks.

11. The said clerk by mistake took the said mortgage to the Custom House at North Shields on the 27th July 1872, and produced the same to the registrar, who recorded the said discharge.

12. The said William Winship afterwards presented the said bill of sale and declaration, mentioned in the 7th and 8th articles of this petition, to the registrar at the Custom House at North Shields, and requested him to register the said bill of sale, but the said registrar refused to register the said bill of sale, upon the ground that the property in the said ship had passed to the representatives of the said Thomas Gibson.

13. The said Thomas Gibson died intestate and insolvent, and no administration of his estate and effects have been taken out.

14. The execution and registration of the said discharge is wholly void at law in equity.

15. The said William Winship is entitled to be registered as the legal owner of the said ship, but owing to the said mistake he is unable to be registered as such legal owner without the assistance of this honourable court.

The petition concluded by praying the judge "to pronounce the said William Winship to be the lawful owner of sixty-four sixty-fourth shares of and in the said ship *Rose*, and to decree the possession of the said ship, her tackle, apparel, and furniture, be given to the said William Winship as such lawful owner, and that all things may be done necessary to complete his title to the said ship."

No appearance had been entered in the suit, but from affidavits filed in support of the petition, which proved the facts therein stated, it appeared that the mortgagor had died intestate; that before his death he had become a bankrupt; that no administration had been taken out; and that notice of the suit and of the arrest of the vessel had been served both upon his trustee and his next of kin, and upon all persons having any interest in the matter.

Gainsford Bruce for the plaintiffs, the mortgagee and purchaser.—This suit is rendered necessary by the refusal of the customs officer to enter the purchaser as the owner of the ship. (Sir R. PHILLIMORE.—Have I jurisdiction in such a suit?) This is a cause of mortgage and possession, and by 3 & 4 Vict. c. 65, s. 3, the court has jurisdiction over all causes of action of any person in respect of any mortgage, when the ship is under arrest, by process of the court; and by sect. 4 the court has jurisdiction to decide all questions as to the title and ownership of any ship or vessel arising in any cause of possession, &c. Also, by the Admiralty Court Act 1861 (74 Vict. c. 10, s. 11), the court has jurisdiction over any claim in respect of any mortgage duly registered, whether the ship is arrested or not. It is necessary that some court should declare the purchaser entitled to the ship, and these enactments give this court jurisdiction.

Sir R. PHILLIMORE.—This is a novel exercise of jurisdiction on the part of this court, but after giving careful attention to the statutes cited, I am of opinion that the court has jurisdiction, and that the plaintiffs are entitled to a decree in the terms of their prayer. I shall make a decree accordingly.

Solicitors for the plaintiffs, *Deacon, Son, and Rogers*.

ADM.]

THE CHANONRY.

[ADM.]

Thursday, Jan. 23, 1873.

THE CHANONRY.

Collision—One vessel overtaking another—Regulations for Preventing Collisions at Sea—Lights and signals.

Where two steamships, bound in the same general direction, but on courses differing by one point, are steaming one behind the other, and one is overtaking the other, they are not crossing vessels within the meaning of Article 14 of the Regulations for Preventing Collisions at Sea, but the vessel which is behind the other is a vessel overtaking another within the meaning of Article 17 of the Regulations, and is bound to keep out of the way of the leading vessel.

Where one vessel during the night time is overtaking another within the meaning of Article 17 of the Regulations, although the leading vessel may be in such a position that the following vessel cannot see the regulation lights of the leading vessel, the latter is not bound, under ordinary circumstances, to give a signal, or to show a light to the following vessel.

In a collision case, where the plaintiffs establish a *prima facie* case that the defendants' vessel was overtaking their vessel within the meaning of Article 17 of the Regulations for Preventing Collisions at Sea, the onus of showing excuse for the collision is thrown upon the defendants. (a) This was a case of collision instituted on behalf of the owners of the screw steamship *Leverington*, against the screw steamship *Chanonry* and her owners intervening. The collision occurred in the

(a) The question of what is to be considered a following vessel may be of extreme importance. There have been few decisions on this point in this country. In the United States it has been in one case held that where two vessels were coming out of the Hudson River, their courses differing by nearly eight points, the hindmost vessel was to be considered a following vessel within the meaning of the rule: (*The Columbia*, 10 Wallace U. S. Sup. Ct. Rep. 246.) Perhaps the true principle of the rule is that wherever a vessel, by reason of her superior speed, is overtaking another, she cannot divest herself of the obligation to get out of the way of the foremost vessel because her superior speed must necessarily place the vessels at some period on crossing courses. It would not even be unreasonable to suppose that where the courses of two vessels are such that they would intersect each other at any angle less than a right angle, the hindmost vessel if going at a greater speed than the other would be bound to keep out of the way. There has, however, been no decision on this point, as vessels at sea, whose courses vary with eight points of the compass, having no common starting point, are usually treated as crossing vessels, unless their courses are almost identical, and vessels navigating a narrow channel are usually, if not meeting, going in the same general direction. Cases illustrating the application of the rule will be found in *Holt's Rules of the Road*, 307 and seq. (See also *The Rhode Island*, 10 Ott. U. S. Dist. Ct. (Southern Dist. of N. Y.), Adm. Rep. 506; affirmed on appeal, 1 Blackford's U. S. Circuit Ct. 2 Circ. 563; *The Governor*, Abbott's U. S. Dist. Ct. (Southern Dist. of N. Y.), Adm. Rep. 103; *Porterand v. The Bella Donna*, Newberry's (Dist. Courts) Adm. Rep. 510; *The Morning Light* 2 Wallace's U. S. Sup. Ct. Rep. 550; *Whitridge v. Dill*, 23 Howard's U. S. Sup. Ct. Rep. 448; *The Palatine*, ante p. 468.)

On the question of whether a vessel seeing another overtaking her is bound to show a light, it was held in the United States that a sailing vessel seeing a steamship approaching her in such a direction that her regulation lights were not visible to the steamship, was bound, in a thick and hazy night, to show a light so as to indicate her presence to the steamer: (*The Steamship Louisiana*, *Benedict's* (U. S. Dist. Ct., Southern Dist. of N. Y.) Reps. 371.)—En.

Bristol Channel between the Flatholm and Lavernock point, about a mile and a half N. W. by W. of the Flatholm Light. The Flatholm Light is a fixed light showing from different points a red and a white light; to vessels coming down the channel from the northward and eastward it shows a red light, whilst it bears from them any point between S. W. and S. by E. $\frac{1}{2}$ E.; from other points it shows a white light. The *Leverington*, a steamer of 679 tons register and 99-horse power, and manned by a crew of twenty-seven hands, left the docks at Newport on the evening of 4th Dec. 1872 at about a quarter to nine, in charge of a licensed pilot. When she got out of the river Usk and into the channel, the *Leverington* went ahead full speed at the rate of six or seven knots an hour on a S. W. by W. course which kept the Flatholm white light nearly ahead, but a little on the port bow. When her pilot sighted the Monkstone Beacon, her helm was starboarded a little, and her head brought to S. S. W., and she passed outside to the southward of the Monkstone Beacon. On clearing the Beacon the helm of the *Leverington* was ported, and she was put upon a W. N. W. course: she almost immediately lost the white, and sighted the red, light of Flatholm at the distance of about a mile. The pilot then sighted the red and white lights of the *Chanonry* bearing about N. E. from the *Leverington*. The *Leverington* held on her W. N. W. course for about twenty minutes, and had again got out of the red sector of the Flatholm Light, and into the white sector, and had just passed the Wolves when the *Chanonry* appeared to be approaching the *Leverington's* starboard quarter very rapidly, apparently under a starboard helm. The *Leverington's* helm was thereupon put hard-a-starboard, and the *Chanonry* was hailed to port, but no answer was given, although it was admitted the hailing was heard, and she came on and struck the *Leverington* on her starboard side just before the bridge. At the time of the collision the *Leverington's* head had been brought under her starboard helm to about W. The weather was clear, and the ships and the land could be seen at a distance of a mile without lights.

The *Chanonry*, a screw steamship of 578 tons register, 95-horse power, and manned by a crew of twenty hands all told, left Newport the same evening, laden with a cargo of railway iron, and bound for Genoa. She was in charge of a licensed pilot; and she was the fourth vessel to leave the docks after the *Leverington*, so that, as found by the court, she left about twenty or twenty-five minutes after that vessel. On entering the Channel the *Chanonry's* head was put S. W. by W., and her pilot soon afterwards sighted the white light of the Flatholm. The *Chanonry* was kept on this course, passing the Monkstone Beacon to the northward and westward and sighting the red light of the Flatholm. When the red light of the Flatholm bore S. by E. $\frac{1}{2}$ E. or thereabouts, her helm was starboarded, and her head brought to W. by N., the proper channel course. The *Leverington* was not seen by the pilot or crew of the *Chanonry* till six or seven minutes after the latter vessel's helm was starboarded. The pilot thought the *Leverington* was a ship at anchor without lights, he having already passed two vessels at anchor without lights. The two vessels were then about two ships' lengths from each other. Her helm was immediately put hard a port, and she came up

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THE CHANONRY.

[ADM.]

about a point, but she then struck the *Leverington* as described. The look-out on board the *Chanonry* did not come on duty until about five or six minutes before the collision.

The petition filed on behalf of the owners of the *Leverington* pleaded that "a good look-out was not kept on board the *Chanonry*," and that "those on board the *Chanonry* improperly neglected or omitted to comply with the 17th Article of the Regulations for Preventing Collisions at Sea." The answer filed on behalf of the owners of the *Chanonry* pleaded that "those on board the *Leverington* improperly neglected to keep the *Leverington* out of the way of the *Chanonry*," that "some time before the said collision, the helm of the *Leverington* was improperly ported"; that "before the said collision, the helm of the *Leverington* was not duly and promptly starboarded;" that "those on board the *Leverington* improperly omitted to blow the whistle of the *Leverington*, or to show a light, or to take any proper measures for warning those on board the *Chanonry* of the position of the *Leverington*, although from the relative position of the two ships the regulation lights of the *Leverington* were not visible from the *Chanonry*."

There was a cross case instituted by the owners of the *Chanonry* against the *Leverington*, and both causes were heard at the same time before the Judge assisted by Trinity Masters.

Butt, Q.C. (W. G. F. Phillimore with him), for the plaintiffs.—These vessels were not crossing. They were bound practically in the same direction, and therefore came within Article 17 of the Regulations. The *Chanonry* was overtaking the *Leverington* within the meaning of that rule. The *Leverington* was heading W.N.W., and the *Chanonry* W. by N. just before the collision. There was only one point difference between their courses. That difference cannot take them out of the rule. If they were crossing vessels, the *Chanonry* should not have ported; they should have starboarded and gone under our stern. Even three or four points' difference in the courses of two vessels ought not to make them into crossing vessels if one is going faster than the other, and overtakes the other. One vessel coming up behind another ought not to be allowed to rely upon her greater speed for the purpose of bringing the two vessels within the operation of the crossing rule. The real test is whether, if their speed had been equal, would their courses have intersected. The greater speed of the one cannot relieve her from the responsibility cast upon her by the rule as to following ships.

The Judge and Trinity Masters here retired to consult, and on their return

Sir R. PHILLIMORE.—After conference with the Elder Brethren, I am of opinion that the two vessels are within the following rule, namely, that one vessel overtaking another shall get out of the way of the other. A *prima facie* case has been made out on behalf of the plaintiffs, the owners of the *Leverington*, and the defendants have therefore the onus thrown upon them of showing excuse for the collision as in the case of a ship at anchor.

Clarkson (Milward, Q.C. with him), for the defendants.—The vessels could not have been following one another. At the time of the collision we, according to the evidence, were W. by N., and the *Leverington* was heading W. If this is true, there could have been no collision. The *Chanonry* must have starboarded or the *Leverington* ported

to have caused a collision at all. The *Chanonry* did not port, and the *Leverington* must therefore have starboarded. The *Leverington* ought to have whistled, or shown a light over her stern. [Sir R. PHILLIMORE.—Is there any authority requiring a vessel to show a light under such circumstances?] No. But by the common law, apart from any statutory provisions, such a precaution ought to have been taken when our vessel was seen approaching from such a direction that we could not see any of the lights of the *Leverington*. Such a precaution is required by the ordinary rules of the sea under Article 19; those were special circumstances calling for a departure from the ordinary rules as to ships' lights.

Butt, Q.C. for the plaintiffs.

Clarkson in reply.

Sir R. PHILLIMORE.—This is a case of collision instituted on behalf of the owners of the *Leverington* against the *Chanonry*. The collision occurred on 4th Dec. of last year in the Bristol Channel between the Flatholm and Lavernock Point. The *Leverington*, a screw steamer of 679 tons register and 99-horse power, manned by a crew of twenty-seven hands, left the docks at Newport in Monmouthshire on the evening of 4th Dec. with a cargo of railway iron, bound for Odessa. The *Chanonry* was a screw steamship of 578 tons register and 95-horse power manned by a crew of twenty hands all told, and also left Newport on the same evening, bound for Genoa with a cargo of railway iron. There was a considerable difference in the evidence as to the actual time when the two vessels left Newport, but I think the fair inference from the whole of the evidence on this point is that the *Leverington* left twenty-five or thirty minutes before the *Chanonry*. Both vessels were bound in the same direction, but the *Leverington* steered a course outside the Monkstone Beacon; the *Chanonry* went inside the Beacon. Whilst steering that course the *Leverington* was heading S.S.W.; she kept on this course till within three quarters of a mile of the Flatholm Light, when she ported eight points, which brought her to W.N.W.; she remained on this latter course till just before the collision, when she starboarded, bringing herself to W. at the time of the collision. The *Chanonry* was aware of the fact that the *Leverington* was ahead of her; and at the same time the *Leverington* knew that the *Chanonry* was following, and in fact the *Leverington* saw the *Chanonry* from the time she left the river Usk. The *Chanonry* steered S.W. by W. until she changed the Flatholm light from red to white, then she altered her course to W. by N. The first question the court has to decide is whether the *Chanonry* is to be considered a following vessel within the meaning of the 17th Article of the Regulations for Preventing Collisions at Sea, which article is as follows: "Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel." It was contended on behalf of the *Chanonry* that the vessels must be considered as crossing vessels within the meaning of the 14th Article, and on the part of the *Leverington* that the 17th Article applied. After consultation with the Elder Brethren, I have no hesitation in saying that the *Chanonry* must be treated as a following vessel. I agree with the remark made by Mr. Butt that she cannot evade the obligation imposed upon her as a vessel overtaking another by going so much faster than the

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THE BOTTLE IMP.

[ADM.]

Leverington that at some period she got on a course, which would, if continued, have carried her across the course of the *Leverington*. Another contention, strongly pressed by Mr. Clarkson, was that even if the *Chanonry* was to be considered as a following vessel, it was still incumbent upon the *Leverington* by the common law of the sea—not by statute law, but by the common law as founded upon common sense applied to nautical matters—to give some signal to warn vessels of her position, either by sounding her whistle, or showing a light to vessels astern. Although I am not disposed to hold that under no circumstances must the followed vessel give some such signal, yet I am bound to say that this is a course which should be rarely adopted, because it must be remembered that if fancy lights or signals, other than those provided by the regulations, are used they may mislead following vessels, and may occasion great difficulty in judging of the position or course of the vessel making the signal. I am of opinion that the necessity for exhibiting such a signal depends entirely upon the character of the night, and upon the circumstances of each particular case. After a careful survey of all the evidence I have come to the conclusion that vessels without lights could have been seen at the distance of half a mile on the night in question. According to the preliminary acts—which are documents affording most valuable information to the court on such subjects, because they are filed before the pinch of the case is known—it is stated on the part of the *Leverington* that the weather was "fine and tolerably clear," and on the part of the *Chanonry* that it was "slightly hazy, frosty." This makes it quite evident that the night was not dark; and this is supported by the *Chanonry's* evidence that those on board her saw the *Leverington* at the distance of half a mile. Other evidence bearing on this point is the question of speed. The *Chanonry* was going at full speed in a channel where there were many vessels at anchor, and, according to his evidence, her pilot actually thought that the *Leverington* herself was at anchor. Vessels must have been easily distinguished from on board the *Chanonry* to have justified her in going at such a speed in that place. The *Leverington's* evidence is consistent with this, as at no time could the *Chanonry* have seen her lights. On the whole I am quite clear that there were no special circumstances requiring the exhibition of a light as a peculiar signal on the part of the *Leverington*. It is also to be remarked that the *Chanonry* was not very carefully navigated; there was no look-out on the fore-castle till seven minutes before the collision, and, moreover, it was admitted that the hailing by the *Leverington's* crew to the *Chanonry* to put her helm to port and hard a port was heard on board the *Chanonry*, but that no answer was given to it. It was argued with great force that the *Leverington* must have ported or that the *Chanonry* must have starboarded to have brought them into the position in which they were at the moment of collision, and that, whereas the evidence of the *Chanonry* proves that she never starboarded, the *Leverington* must have ported. Now, looking to Article 17, and to the fact that I do not consider that the evidence on the part of the *Chanonry* has proved her case—that the *Leverington* ported—I am of opinion that the *Chanonry* is not discharged from the obligation cast upon her in this case, viz., that as the following vessel she

was bound to keep out of the way of the *Leverington*. This being so, I pronounce the *Chanonry* alone to blame.

Proctor for plaintiffs, C. Waddilow.

Solicitors for defendants, Ingledew, Ince, and Greening.

Thursday, Jan. 30, 1873.

THE BOTTLE IMP.

Collision—Fishing vessel attached to her nets—Onus of proof—Practice.

In a cause of damage on behalf of a fishing smack, injured by collision whilst attached to her nets, an allegation in the defendants' answer, that the plaintiffs neglected to comply with the provisions of the Sea Fisheries Act 1868, as to lights, throws upon the plaintiffs the onus of proof and the obligation to begin, contrary to the usual rule that a fishing vessel attached to her nets, being in the same position as a vessel at anchor, has the right to require a vessel coming into collision with her to begin and show excuse for the collision.

This was a cause of damage instituted on behalf of the fishing yawl *York*, against the hillybry sloop *Bottle Imp*, and her owners intervening. The petition of the plaintiffs alleged that on the 27th Aug. 1872, about 2 a.m., the *York* was riding head to wind attached to her nets, and stationary, about fifteen miles off the mouth of the river Humber, with the Spurn Light bearing W.N.W.; that she, in accordance with the regulations for preventing collisions at sea, duly exhibited a bright white light, and that a good look-out was kept; that the *Bottle Imp*, although hailed from the *York*, came into collision with that vessel and sank her. The petition charged the *Bottle Imp* with neglecting to keep clear of the *York*, and with not taking in due time measures for that purpose.

The defendants' answer, after setting out that the *Bottle Imp* had become unmanageable by the loss of her headmalls through the violence of the wind, alleged that "the *York* improperly neglected to exhibit the lights required by the Sea Fisheries Act 1868."

This was denied by the plaintiffs' reply.

The Sea Fisheries Act 1868 (31 & 32 Vict. c. 45), which is an Act to carry into effect a convention between Her Majesty and the Emperor of the French concerning the fisheries in the seas adjoining the British Isles and France, and to amend the laws relating to British fisheries, enacts (sect. 20) that Articles 13 & 14 of the Convention shall have the same force as if they were regulations respecting lights within the meaning of the Acts relating to Merchant Shipping. Article 13 provides that "boats fishing with drift nets shall carry on one of their masts two lights, one over the other three feet apart. These lights shall be kept up during all the time their nets shall be in the sea between sunset and sunrise."

E. C. Clarkson (Gibson with him), for the plaintiffs, submitted that the defendants ought to begin, as the *York* was attached to her nets and stationary, and therefore in the same position as if she was at anchor. The allegation in the answer does not say that the neglect contributed to the collision.

Butt, Q.C. (Gainsford Bruce with him), for the defendants.—Even if the *York* was practically in the same position as if she were at anchor, the

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defendants' answer charges her crew with neglect to exhibit proper lights. This is a specific charge against the plaintiffs, and they must therefore show that this neglect did not contribute to the collision. There was no need to aver to the answer that the neglect caused the collision; it is implied.

Sir R. PHILLIMORE.—As the plaintiffs are charged with neglect to exhibit the lights required by the Act, and the answer must be taken to imply that the neglect to exhibit those lights contributed to the collision, I think the plaintiff must begin. But it must be understood that I do not mean in any way to imply that, in the absence of such a charge, I should not hold that, inasmuch as the plaintiffs' vessel was attached to her nets, and in a similar position to a vessel at anchor, the plaintiffs were entitled to call upon the defendants to begin.

Proctor for the plaintiffs, H. C. Coote.

Solicitor for the defendants, Alfred Jones, Tindale and Grove.

V. C. MALINS' COURT.

Reported by T. H. CARSON, and F. GOULD, Esqrs.,
Barristers-at-Law.

Thursday, April 17, 1873.

HART v. HERWIG.

Foreign contract—Purchase of foreign ship—Specific performance—Injunction.

The court has power to grant specific performance of a contract to purchase a ship.

A., an Englishman, entered into a contract at Hamburg to purchase from B., a foreigner, a foreign ship, then on her homeward voyage to Cork, possession to be given on discharge of the cargo at any port whither she might be ordered.

The vessel was ordered to Sunderland and discharged her cargo.

The court granted to A. specific performance against B., who was out of the jurisdiction, and restrained the removal of the vessel from Sunderland.

THE PLAINTIFF Henry T. Hart, was a shipowner, and the defendant, Herwig, who was a German, living at Hamburg, was the owner of a foreign vessel called the *Hertha*, which, at the time of the agreement mentioned below was on a voyage from San Francisco to Cork. On the 16th Jan., the plaintiff and defendant entered into an agreement at Hamburg, for the purchase by the plaintiff of the vessel, the material part of which agreement was as follows:

Agreement made this day between C. W. Herwig, of Hamburg, as vendor, and H. T. Hart, of London, as purchaser, that the former, being the owner of the barque *Hertha*, agrees to sell, and the latter agrees to purchase, the said vessel, with her stores, provisions, and materials for the sum of 4750*l*. The vessel is expected from San Francisco, having left 11th October last, on or before, 25th or 30th April in Channel for orders to port of discharge, but the purchaser takes possession of the vessel immediately after the delivery of the homeward cargo at any place whither she may be ordered, the seller paying all expenses and charges that may be incurred up to the date of delivery of the ship. In case of the vessel arriving at her port of discharge in a damaged state, over and above ordinary wear and tear, or under average the seller to make corresponding allowance for the same.

HENRY THOMLINSON HART.
C. W. HERWIG.

Hamburg, 16th January, 1873.

The *Hertha* duly arrived at Cork, and on the de-

fendant's order proceeded to Sunderland as her port of discharge, where she arrived in the month of March 1873.

The plaintiff thereupon claimed to have the vessel delivered up to him on payment of his purchase money, after making a deduction in respect of damage which she had sustained above ordinary wear and tear, but the captain, on the defendant's instructions, refused to hand over the vessel except on payment by the plaintiff of the full purchase money. The captain also refused to allow the plaintiff to inspect the vessel, with a view of ascertaining the amount of the damage.

On the 5th April 1873 the plaintiff filed the bill stating that the defendant intended to move the vessel from the port of Sunderland to some port out of the jurisdiction, or otherwise to sell or dispose of her, and prayed specific performance of the agreement, and directions for ascertaining the damage the vessel had suffered, and that the defendant and his servants might in the meantime be restrained from removing or disposing of her. An interim order having already been granted, the plaintiff now moved for the injunction.

Cotton, Q.C. and Dauncey for the motion, cited *De Mattos v. Gibson* (4 De G. & J. 276; 32 L. T. Rep. O. S. 268; 33 L. T. Rep. O. S. 193). They also relied upon the Merchant Shipping Amendment Act 1862, sect. 3.

SECT. 3 is as follows:

It is hereby declared that the expression "beneficial interest," whenever used in the second part of the principal Act, includes interests arising under contract and other equitable interests; and the intention of the said Act is that, without prejudice to the provisions contained in the said Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees and without prejudice to the provisions contained in the said Act relating to the exclusions of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property.

Cosens-Hardy (Glasen, Q.C., with him) for the defendant.—The question turns upon sect. 3. of the Act. No contract can prevent the registered owner of a British ship from disposing of it to another person. Can it be otherwise where the owner is a foreigner and the ship a foreign vessel? If specific performance will not be granted, then the injunction will be refused. The jurisdiction of the court is purely personal, and the defendant is out of the jurisdiction. He cited—

Davis v. Park, 28 L. T. Rep. N. S. 295; 21 W. R. 136;

Liverpool Borough Bank v. Turner, 1 Mar. Law

Cas. O. S. 21; 3 L. T. Rep. N. S. 494; 1 Joh. &

Hem. 159;

Lacey v. Liffen 1 Mar. Law Cas. O. S. 262; 7 L. T.

Rep. N. S. 411; 4 Giff. 75;

1 White and Tu. Lead. Cas., 4th edit. 803.

THE VICE CHANCELLOR.—This is a motion to restrain the defendant from taking a ship from the port of Sunderland. The plaintiff, who is an Englishman, enters into a contract at Hamburg with the defendant, who is a German, in these terms. [His Honour read the contract.] I desire to be understood to say that wherever you enter into a contract to purchase a particular thing, whether it is a jar, or a horse, or a ship, and the purchaser attaches a particular value to it, he may

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have specific performance. It is argued that this court has no jurisdiction. According to our law, after the contract the plaintiff became the owner of the ship, and I shall assume that that is the law also of Germany until the contrary is shown. I am at a loss to see why the court may not grant specific performance of a contract to sell a ship as well as of any other thing. The plaintiff is entitled to sustain the injunction.

Plaintiff's solicitors, Parker and Clarke.

Defendant's solicitor, J. W. Hickin.

COURT OF QUEEN'S BENCH.

Reported by J. SACREY and M. W. MCKELLAR, Esqrs.,
Barristers-at-Law.

Nov. 21, 1872; Jan. 24, 1873.

WAUGH v. MORRIS.

Ship and shipping—Charter-party—Illegality—Order in council—Cargo to be taken from alongside—Cargo of hay—The Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70), s. 78.

By a charter-party made in France between the master of a ship and the agent of the defendant, the charterer, it was stipulated that the ship should proceed to Trouville, a port in France, there load a cargo of pressed hay, and proceed thence direct to London, and that all cargo should be brought and taken from the ship alongside. At the time the charter-party was entered into there was in existence an order in council, made under the authority of the Contagious Diseases (Animals) Act, sect. 73, prohibiting the landing in any port or place in Great Britain of hay brought from France. Neither party, however, knew, at the time, of the existence of this order in council, but the master of the ship was told by the defendant's agent that the consignees would require the hay to be delivered to them at a particular wharf in Deptford Creek. On arriving in the Thames the master of the ship heard of the existence of the order in council, and could not therefore proceed to the wharf and deliver the cargo. After some delay the defendant received the hay from alongside the ship into another vessel, and exported it. The shipowner having brought an action against the charterer to recover damages in respect of the detention of the ship,

Held, that there was no such illegality in the voyage as entitled the defendant to resist the claim.

Where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties know the law or not; but in order to avoid a contract which can be legally performed, on the ground that there was an intention to enforce it in an illegal manner, it is necessary to show the existence of a wicked intention to break the law.

THIS was an action brought by a shipowner against the charterer of his vessel, to recover damages for the detention of his vessel.

Declaration that the plaintiff was the owner of a certain ship called the *Castor*, laying at Trouville, whereof one W. Chappell was master, and thereupon a charter-party was made and entered into by and between the said W. Chappell and one W. Jacques, whereby it was, among other things, provided that the said W. Chappell should let to the said W. Jacques, who accepted the same, the said ship (except the

cabin, the lodgings of the crew, and the room necessary for the provisions, and sparestore), in good and due condition, staunch, and supplied with all the things necessary to navigate in safety, to load at Trouville (without exceeding what she could reasonably stow and carry), a full and complete cargo of pressed hales of hay, and that ten working days were to be allowed in full for loading and unloading, and the days on demurrage were to be paid day by day at 50s. per day, and that the lay days should begin on a certain day, to wit, on the 7th Oct. 1871; and the plaintiff says that the said W. Jacques shipped on board the ship, under the said charter-party, a certain cargo to be carried on board the said ship from Trouville aforesaid to London, and there delivered upon and according to the terms of a certain bill of lading, which was in the words and figures following, that is to say,

Shipped in good order and well conditioned, by W. Jacques, in and upon the good ship or vessel called the *Castor*, whereof is master for this voyage W. Chappell, and now riding at anchor in Trouville, and bound for London, about 17 tons of hay in bundles; 11 cases and hamper of wine and spirits; 3 boxes of clothes, being

Six days employed for loading the ship in Trouville.

W. JACQUES.
Received on account,
21, 1s.

W. CHAPPELL.

of whatever nature or kind aforesaid, excepted, unto order or to assigns, paying freight for the said goods, all conditions as per charter and disbursements, with primage and average accustomed. In witness whereof the master of the said vessel hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished, the others to stand void.

Dated in Trouville, the 13th Oct. 1871. Weight and conditions unknown; ship not accountable for condition of hay.

WILLIAM CHAPPELL.

And the plaintiff says that after the said cargo had been so received on board the said ship, the said W. Jacques indorsed the said bill of lading to the defendant, and upon and by reason of such indorsement, the property in the said cargo passed to the defendant, and the plaintiff says that divers, to wit, six of the ten lay days, were employed in loading the said ship at Trouville aforesaid, and the said cargo was carried on board the said ship from Trouville to London aforesaid, in accordance with the said charter-party and bill of lading, and all conditions were fulfilled, and all things done and happened, and all times elapsed necessary to entitle the plaintiff to have the said ship loaded and discharged within the said ten working days, according to the said bill of lading and charter-party, and to sue the defendant for the breaches hereinafter mentioned. Yet, the said ship was not loaded and discharged within the said ten working days, but was kept and detained for divers, to wit, eighteen days beyond the said ten days, contrary to the said charter-party, whereby the plaintiff lost the use of the said ship, and was put to great expense in providing food and wages for the crew thereof. And the plaintiff says, that though the said ship was kept and detained for divers, to wit, for eighteen days beyond the said ten days, whereby a large sum, to wit, the sum of 45*l*., became due and payable by the defendant to the plaintiff for and in respect of the demurrage of the said ship; yet the defendant did not pay the said sum, to wit, the sum of 45*l*., nor any part

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thereof, contrary to the said charter-party and bill of lading.

2. And for a second count, the plaintiff sues the defendant for that, before the making of the promise hereinafter mentioned, a certain cargo had been carried into a certain ship of the plaintiff, called *The Castor*, whereof one W. Chappell was master, from Trouville to London, to be delivered according to the terms of the bill of lading and charter-party in the first count mentioned, and at the time of the making of the promise hereinafter mentioned, the said ship with the said cargo on board was lying in the port of London, and thereupon, in consideration that the plaintiff, at the request of the defendant, would deliver to the defendant the said cargo, and would suffer the defendant to receive the same according to the terms of the said bill of lading and charter-party, the defendant promised the plaintiff that he would discharge the said cargo from the said ship, and receive the same within the time by the said bill of lading and charter-party provided, and the plaintiff says that he did deliver the said cargo to the defendant, and allowed him to receive the same, and all conditions were fulfilled, and all things done and happened, and all times elapsed, necessary to entitle the plaintiff to have the defendant perform his said promise, and discharge the said cargo from the said ship, within the said time, and to sue for the breach hereinafter mentioned; yet the defendant did not discharge the said cargo from the said ship, within the said time, but the said ship was detained for divers, to wit, eighteen days beyond the said time; whereby the plaintiff lost the use of the said ship, and a large sum, to wit, the sum of 45*l.*, became, and is due and owing to the plaintiff for the demurrage thereof. There were also the usual common counts.

Amongst other pleas the defendant pleaded seventh; as to so much of the first count of the declaration, as concerns the hay, parcel of the cargo in the said count mentioned; that Trouville, in the said charter-party and bill of lading in that count mentioned, is a place in the territory of the French Republic, and that the hay agreed on under and by virtue of the aforesaid charter-party and bill of lading to be loaded on board the said vessel of the plaintiff, was bay to be loaded at Trouville aforesaid, into a port or place in Great Britain, to wit, into the port of London, and to deliver the same there in accordance with the usage and custom of the said port; that is to say, to land the said hay at a proper landing place within the port of London, and to deliver the same when so landed there; and the defendant says that the hay, in respect of which the claim of the plaintiff in the said count for demurrage and damages for the detention of his ship is made, was the bay so agreed on by the said charter-party and bill of lading, to be loaded at Trouville aforesaid, and to be brought as aforesaid, for the purpose aforesaid, into a port or place of Great Britain, to wit, into the port of London, and the defendant says that before and at the time of the making of the said charter-party and bill of lading in the said count mentioned, and during all the time the said ship, with the said hay on board, was detained in the said port of London, as in the said count is alleged, there was in full force and unrepealed, a certain Act of Parliament, entitled the Contagious Diseases (Animals) Act 1869, and under and by virtue of the said Act a certain Order of Council, made by

the Lords of Her Majesty's most honourable Privy Council, bearing date the 9th March 1871, and being in the words and figures following, that is to say,

Order of Council (321).

At the Council Chamber, Whitehall, the 9th March, 1871.

By the Lords of Her Majesty's Most Honourable Privy Council.

Present: Lord Privy Seal, Mr. Secretary Bruce, Mr. Forster.

The Lords and others of Her Majesty's Most Honourable Privy Council, by virtue and in exercise of the powers in them vested under the Contagious Diseases (Animals) Act 1869 (in this order referred to as the Act of 1869), and of every other power enabling them in this behalf, do order, and it is hereby ordered as follows:—

1. This order shall take effect from and immediately after the 13th March, 1871, and words in this order to have the same meaning as in the Act of 1869.

2. Cattle brought from any place in the territory of the French Republic, or from any place in Belgium, shall not be landed at any port or place in Great Britain.

3. Cattle, sheep, or goods being, or having been, on board any vessel at the same time with any cattle brought from any such place, as aforesaid, shall not be landed at any port or place in Great Britain.

4. The following articles brought from any such place as aforesaid shall not be landed at any port or place in Great Britain.

Fresh meat, fresh hides, unsmelted fat, horns, manure, or hay.

(Signed)

ARTHUR HALLS.

And the defendant says that, at the time of making the said charter-party, and during the performance thereof, by loading at Trouville aforesaid the said hay, and bringing the same in the plaintiff's ship into the said port of London, for the purpose of landing the same within the said port according to the custom and usage of the said port, the plaintiff was a British subject owing allegiance to Her Majesty Queen Victoria, and was bound by the provisions of the said Act of Parliament and of the aforesaid order of council. Eighthly, The defendant as to so much of the first count of the declaration as concerns the hay, parcel of the cargo in the said count mentioned, repeats the seventh plea, leaving out all averments as to the usage and custom of the port of London, and instead thereof avers that the plaintiff, by the said charter-party and bill of lading in the said sixth plea mentioned, undertook and agreed in respect of a certain place in Great Britain, to wit, of the port of London, to bring the hay loaded, as in that plea is averred, into the said port, and to deliver the same there, which in respect of the port of London, is an agreement to land the said cargo in the said port, and to deliver it when so loaded.

On these, as well as the other pleas, issue was joined.

The case was tried at the sittings after Michaelmas Term, 1871, before Cockburn, C.J., at Guildhall. From the evidence it appeared that the charter-party was made in France, between Wm. Chappell, the master of the *Castor*, and W. Jacques, the agent of the defendant, the charterer; that by the charter-party it was stipulated that the cargo should be brought and taken from the ship alongside; that both Chappell and Jacques were ignorant, at the time the charter-party was made, that the Privy Council had made the order prohibiting the landing of hay at any port or place in Great Britain; that Jacques told Chappell that he was, on his arrival in London, to proceed to the Tramway Wharf, in Deptford Creek, where the consignees would require the cargo of hay to be delivered to them; that

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Chappell promised to go there on his arrival in London, but learned on his arrival in London of the existence of the order in council prohibiting the landing of hay, and therefore did not proceed, as originally intended, to the Tramway Wharf in Deptford Creek; that the vessel was consequently detained for eighteen days in the river Thames, after which period the defendant took the hay from alongside the vessel, and exported it to Belgium. On proof of these facts a verdict was entered for the plaintiff, leave being given to the defendant to move to set aside the verdict and to enter the verdict for the defendant, if the court should be of opinion that the facts were sufficient to establish the defence of illegality set up by the plea above set out. A rule nisi having been obtained to set aside the verdict and to enter a verdict for the defendant.

Butt, Q.C., and R. E. Webster, showed cause against the rule, and contended that the contract under the charter-party was a perfectly legal one. It is admitted that neither party to the contract knew of the existence of the order in council at the time the contract was entered into. If a contract is capable of being performed without the commission of an illegal act it is valid; and it is submitted that the present was capable of being so performed, as, in fact, it ultimately was. The order in council only prevents the landing of hay, and the contract was not to land, but only to bring and take from alongside. There was nothing in the order of council to make even a licence necessary in the case of transshipment: the licence actually given being merely a Custom House regulation for the protection of the revenue. In *Haines v. Bask* (5 Taunt. 521) it was held no answer to an action by a broker for commission for procuring freight that the charter-party procured was such that, if the charterer failed to obtain certain licences, the voyage would be illegal; and there are many other cases to a similar effect. In *Lewis v. Davison* (4 M. & W. 657) Lord Abinger, C.B., said: "I fully assent to the general proposition which has been urged, that an agreement to do an unlawful act cannot be supported in law. But it does not appear to me that that is necessarily the effect of the agreement in the present case; and when the act which is the subject of the contract may, according to the circumstances, be lawful or unlawful, it will not be presumed that the contract was to do the unlawful act, the contrary is the proper inference." In *The Teutonia* (ante, p. 214; L. Rep. 4 P. C. App. 171; 26 L. T. Rep. N. S. 48), a Prussian vessel shipped a cargo of nitrate of soda which was contraband of war, under a charter-party by which she was to proceed to Cork, Cowes, or Falmouth, at the option of the master, where he was to receive orders to proceed to any one safe port in Great Britain, or on the Continent between Havre and Hamburg, both included, and there deliver the cargo. The vessel only called at Falmouth, and received orders on the 11th July for Dunkirk, a French port, for which he at once set sail. On 16th July, off Dunkirk, he was informed by a French pilot, in official uniform, that war had been declared. The master thereupon put back to the Downs to make inquiries, and arrived there on 17th July, a Sunday, and could get no information. He was ordered by his owner not to go to Dunkirk, and on 19th July put into Dover. On the 19th July war was actually declared by France

against Prussia; and 23rd July the master refused to go to Dunkirk. On the 1st Aug. the consignors demanded the cargo at Dover without offering freight, but the master refused unless paid freight. It was held by the Privy Council that as there was no improper deviation or delay in not putting into Dunkirk in the first instance, the case was the same as if war had broken out when the vessel first arrived off Dunkirk, and, there being no breach in putting into Dover, the contract was not, under the charter-party, impossible of performance or dissolved by the outbreak of war, but was capable of being substantially performed. "The argument for the appellant," said Mellish, L.J., delivering the judgment of the Privy Council, "assumes that the breaking out of the war rendered the performance of the charter-party illegal, and that, therefore, the contract between the parties was dissolved; and there can be no doubt that the breaking out of the war did render it illegal for the *Teutonia* to enter any French port, but the question is whether, under the terms of this charter-party, the contract might not still have legally been performed by delivery of the cargo at such other of the ports mentioned in the charter-party as ports at which the cargo might be delivered. The substance of the contract between the parties is that the cargo may be delivered at any one of a great number of ports; that the consignee is to have the selection of the particular port, but that he is bound to select a safe port, i.e., a port at which the master can deliver the cargo and earn his freight; and the question is whether that contract is completely performed by the naming of a port at which it turns out in the event to be impossible to deliver." &c., even supposing that there was some kind of impossibility in the contract that would not necessarily exempt the defendant. In *Hill v. Idle* (4 Camp. 327) it was held that the consignee of a particular parcel of goods by a general ship, is liable to the owner for not taking them from the ship in a reasonable time, although the delay arose from the necessity for an order from the Treasury to land these goods, which the consignee used the utmost diligence to obtain.

Milward, Q.C., and MacLachlan in support of the rule.—The question is as to the intention of the parties, whether that was to do an illegal act; and their intention is to be collected not from the charter-party alone, but also from the evidence. Now the intention obviously was that the hay should not only be brought to London, but should be landed. In *Collins v. Blantern* (1 Smith's L. C. 310), the leading case on this subject, the contract was good on the face of it, the illegality being shown by evidence collaterally. In the notes to that case it is said: "The principle established in *Collins v. Blantern*, viz., that illegality may be pleaded as a defence to an action on a deed, has been so often recognised, and is so well settled as law, that it would be useless to enter upon any long discussion respecting it." [BLACKBURN, J.—In that case there was a wicked intention to frustrate the law; there was none such here.] *Ignorantia legis neminem excusat*. Sect. 78 of 32 & 33 Vict. c. 20, enacts that "the Privy Council may from time to time by order make such regulations as they think expedient for prohibiting or regulating the landing of any hay, straw, fodder, or other article brought from any place out of the United

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Kingdom, whereby it appears to the Privy Council contagion, or infection may be conveyed to animals, or for causing the same to be destroyed if landed. If any person lands, or attempts to land, any hay, straw, fodder, or other article in contravention of any such order, the same shall be forfeited in like manner as goods, the importation whereof is prohibited by the Acts relating to the customs, are liable to be forfeited, and the person so offending shall be liable to such penalties as are imposed on persons importing or attempting to import goods, the importation whereof is prohibited by the Acts relating to the Customs, without prejudice to any proceeding against him under this Act," &c. Under this power the Privy Council made an order prohibiting the landing of hay at any port or place in Great Britain, and this order was made before the charter-party was entered into, so that the contract contained in the charter was wholly illegal. [BLACKBURN, J.—But there was no intention to break the law of England, neither was there any contract which could be enforced to land the hay in Deptford Creek. COCKBURN, C.J.—If one of two innocent parties is to suffer, it would be rather hard that the shipowner should have to do so, who has performed his part of the contract.] If the charter-party is taken along with the direction to the master of the ship to take it to the wharf, and the master's assent, one must perceive the existence of a clear intention to land a cargo which was prohibited by the order in council. The contract was to put the hay over the ship's side in the river, i.e., to put it into lighters. Now any such attempt to land the hay would have been a cause of forfeiture. [BLACKBURN, J.—The agreement to deliver the hay into lighters does not show that the plaintiff knew what would be done with it afterwards. I see nothing illegal in transshipping the hay, so long as it was not landed.] In *Brereton v. Chapman* (7 Bing. 559) it was held that the lay days allowed by a charter-party for a ship's discharge are to be reckoned from the time of her arrival at the usual place of discharge, and not at the port merely, though she should for the purposes of navigation, discharge some of her cargo at the entrance of the port, before arriving at the usual place of discharge. In *Muller v. Gernon* (3 Taunt. 393) it was held that an order of council permitting the consignee of goods coming from an enemy's country without a licence, to land them here, on condition of immediately re-exporting them, does not so legalise the voyage as to enable the master of the ship to recover his freight. [COCKBURN, C.J.—The contract in that case was to land the goods, which was clearly illegal. BLACKBURN, J.—Such an illegality would no doubt make the contract void.] In *Forster v. Taylor* (5 B. & Ad. 887), in an action by a farmer to recover the price of fifteen firkins of butter sold by him to defendant, it appeared that the firkins were not branded with the Christian and surname of the cooper who made the vessel, or of the dairyman who sold the butter, as required by 36 Geo. 3, c. 88, and the court held that the provisions which required the vessel to be branded with the name of the cooper, seller, &c., being intended for the protection of the public against fraud, indirectly prohibited any sale of butter in vessels not properly marked; that the subject matter of this contract was in such a state, from the vessels not being properly marked, that the

sale of it was forbidden by Act of Parliament, and consequently that the contract of sale was void, and the plaintiff could not recover. [BLACKBURN, J.—That does not support your contention as to the parties in the present case, who innocently entered into a contract which it afterwards turned out could not be performed.] To perform the contract in the present case, as that contract was intended to be performed by the parties, was illegal. Why put a construction upon the contract which the parties never intended? In *Sterens v. Gourley* (7 C. B., N. S. 99), a contract for the erection of a building in contravention of the provisions of the Metropolitan Building Act (18 & 19 Vict. c. 122) was held void. *Cunard v. Hyde* (29 L. J. 6, Q. B.) is an authority to the same effect. In that case, it being provided by 16 & 17 Vict. c. 107, ss. 170, 171, and 172, that before any clearing officer permits any ship, wholly or in part laden with timber or wood goods, to clear out from any British port in North America or Honduras for any port in the United Kingdom, at any time after the 1st Sept. or before the 1st May in any year, he shall ascertain that the whole of the cargo is below deck, and shall give the master a certificate to that effect, and no master of such ship shall sail without such certificate; and the master is forbidden to place upon the deck any part of the cargo after he has received such certificate, and if he does so, or sails without such certificate, he is to pay a penalty; the plaintiffs, who were interested in the cargo of a ship, coming within the above provisions, about to set sail to the United Kingdom, gave orders for the insurance of the cargo after the 1st Sept., knowing at the time that part of the cargo was on deck, and intending that the vessel should sail after the 1st Sept. and before the 1st May with such cargo on deck, and the insurance was effected by the plaintiffs for the purpose of covering the said cargo, and the freight thereof, including the portion above deck. The ship having been lost, and an action having been brought upon the policy, it was held that the whole voyage was illegal, and that the plaintiffs could not recover. In *Elliott v. Richardson* (5 L. Rep. P. C. 744) an agreement by a shareholder in a company which was being compulsorily wound up, that in consideration of a pecuniary equivalent, he would endeavour to postpone the making of a call, or would support the claim of a creditor was held to be illegal as contrary to the policy of the Winding-up Acts. *Staines v. Wainwright* (6 Bing. N. C. 174) is an authority to the same effect. The master of the ship would have been bound to go to the dock named on his arrival in London: (*The Felix*, 3 Mar. Law Cas. O. S. 100; L. Rep. 2 Adm. 273.)

Cur. adv. vult.

Jan. 24, 1873.—The judgment of the court (COCKBURN, C.J., BLACKBURN and MELLOR, JJ.), was now delivered as follows by BLACKBURN, J.: This is an action brought by the owner of a ship against the charterers for detaining the ship, in which the plaintiff has obtained a verdict subject to leave to move to enter the verdict for the defendant, if the facts proved establish a plea of illegality. On the trial before the Lord Chief Justice, the material facts appeared to be that the charter-party was made in France, between the agents of the defendant and the master of the ship. By this charter-party it was stipulated that the ship should proceed to Trouville, a port in France, and there load a cargo

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of pressed hay, and proceed therewith direct to London, and a term in the charter-party was to the effect that all cargo should be brought and taken from the ship alongside. The defendant's agent verbally told the master that the consignee would require the hay to be delivered to them at a particular wharf in Deptford Creek, and that he should proceed there on his arrival in London, and this the master promised to do. On arriving in the Thames, the master proposed to proceed to the wharf, but then for the first time learned that by an order in Council, made under the authority of the Cattle Diseases Acts, France was declared to be an infected country, and it was made illegal to land in Great Britain any hay brought from that country. He could not, therefore, proceed to the wharf and there deliver the cargo, for that would have been landing the hay, and illegal. After some delay, the defendants received the cargo from alongside the ship in the river, into another vessel, and exported it. There was no legal objection to this being done, but during the interval, eighteen days beyond the lay days elapsed, and it was for this detention that the plaintiff recovered. It appeared that the order in council had been made and published before the charter-party was entered into, but that, in fact, neither the master of the ship nor the defendant's agents were aware that it had been made. A rule was obtained which was argued in Michaelmas Term before the Lord Chief Justice, my brother Mellor, and myself, when the court took time to consider. We are of opinion that the rule should be discharged. The charter-party provides that the cargo was to be taken from alongside; and that being so, the consignee might select any legal and reasonable place within the port, at which to take it from alongside. He by his agent in France named this wharf, which he supposed, erroneously, to be a legal place, and the master under the same mistake, assented to this, as indeed he would have no right to refuse if it had really been a legal place. But when it turned out that the defendants had named a place for the performance of the contract, where the performance was impossible because illegal, that did not put an end to the contract, if the performance of any other way was legal and practicable. In the present case the performance, by receiving the cargo alongside in the river without landing it at all, was both legal and practicable. See *The Teutonia* (ante, p. 214; L. Rep. 4 P. C. 172), a case which would have been precisely in point if the order in council rendering the landing illegal, had come into operation after the contract was made instead of before. It was on the fact that the order in council existed at the time the contract was made that the argument for the defendant was mainly grounded. It was said that the intention of both parties was that the hay was to be landed; that, therefore, they intended to violate the law, and that it may be shown by extraneous evidence that a contract on the face of it perfectly legal is void, because made with intent to violate the law; and that ignorance of the law makes no difference. But we think, in the first place, that it is a mistake to say that the plaintiff intended that the hay should be landed. He, no doubt, contemplated and expected that the hay would be landed, for, except under very unusual circumstances, hay is not brought into the Thames for any other object; but all that

the shipowner bargained for, and all that he can properly be said to have intended, was that on the arrival of the ship in London, his freight should be paid, and the hay taken out of his ship. If, unexpectedly, there had arisen a great demand for hay abroad, like that which existed when our army was in the Crimea, the consignee might have transhipped the hay, and exported it without the shipowner having the slightest ground for complaining that his intention was frustrated. We agree that a contract, lawful in itself, if it be entered into with the object that the law should be violated; if, as it is expressed in *Pearce v. Brooks* (L. Rep. 1 Ex. 213), it is done for the very object of satisfying an illegal purpose; or as it is expressed in *McKinnell v. Robinson* (3 M. & W. 442), "for the express purpose of the violation of the law." But in the present case the shipowner never did contemplate or believe that the defendant would violate the law. He contemplated that the defendant would land the goods, which he thought was lawful; but if he had thought at all of the possibility of the landing being prohibited, he would probably have expected that the defendant would in that case not violate the law. And he would have been right in fact in that expectation, for the defendant did not attempt to land the goods. We quite agree that where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not. But we think that in order to avoid a contract which can be legally performed on the ground that there was an intention to perform it in an illegal manner it is necessary to show that there was the wicked intention to break the law. And if this be so, the knowledge of what the law is becomes of great importance. No one could for a moment contend that if everything happening in France had happened within the jurisdiction of our country the plaintiff and defendant's agent could have been successfully indicted for a conspiracy to violate the law by landing these goods; for there would have been a want of *mens rea*. And it seems to us that the *mens rea* is as necessary to avoid a contract, which can be legally performed, because when it was made it was with the object of satisfying an illegal purpose, as it is to render the parties criminally responsible.

Rule discharged.

Attorney for plaintiff, Ingledeu, Ince, and Greening.

Attorney for defendant, Ashurst, Morris and Co.

COURT OF ADMIRALTY.

Reported by J. P. ASHURST, Esq., Barrister-at-Law.

Jan. 28 and Feb. 11, 1873.

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Salvage—Appeal from the Cinque Ports Commissioners—Tender—Pleading—Practice.

On appeal by the owners of a salvaged ship from a salvage award made by the Cinque Ports Commissioners, the appellants may, without filing pleadings, place upon the file of the court a tender, although no tender was made before the commissioners, and the respondents are bound to accept or reject a tender so made.

An appeal from an award of Cinque Ports Commissioners being in the nature of a rehearing,

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pleadings may be filed and new evidence given by the appellants, although at the imminent risk of costs; and, consequently, the question of the value of the salvaged property, although agreed before the commissioners, may be reopened on appeal.

This was an appeal from an award of the Cinque Ports Salvage Commissioners, made by them in a claim of salvage on behalf of the master and crew of the lugger *Victoria*, of Walmer, for services rendered to the French brig *Annette*. The value of the ship and cargo agreed upon before the commissioners was 8500*l.*; no tender was then made, and the commissioners made an award of 800*l.* From this award the owners of the *Annette* and her cargo instituted a cause of appeal in the High Court of Admiralty, and on Jan. 13, 1873, their proctor filed in the registry of that court, and served on the respondents' solicitors, the following notice of tender:—

"Take notice, that I have this day paid into the Bank of England, to the credit of the Registrar of the High Court of Admiralty of England in this cause, the sum of 100*l.*, which sum I hereby tender to your parties for their services proceeded for in this cause, together with costs due by law, thereby meaning taxed costs in this cause. Dated this 13th day of January, 1873.

H. G. STOKES.

It had been agreed between the parties that the appeal should be heard without pleadings or further evidence, and upon the record of the proceedings before the commissioners. On the 21st Jan., the respondents having taken no notice of the tender, the appellants' proctor moved the judge in Chambers to direct the respondents either to accept or reject the tender, but on the respondents' solicitors objecting that there was no power to make a tender under the circumstances the judge refused to make any order requiring the respondents either to accept or reject the tender, and intimated that any further question as to the tender should be argued in court. Thereupon the respondents' solicitors filed the following notice of motion:—

"We, Lowless, Nelson and Jones, solicitors for the respondents in this cause, will move the judge in court, by counsel, on Tuesday, 28th Jan. 1873, to direct that the tender of the appellants may be taken off the file of proceedings in this cause, on the ground that the appellants have no right to make such a tender, having the judgment of a competent court in their favour for an amount with which they are satisfied.

This motion now came on before the court.

E. C. Clarkson, for the respondents, in support of the motion. The appellants have no right on appeal to make a tender which was not made at the hearing before the commissioners. Payment into court and tender is in the nature of a plea, and can only be made in the court below. The court has refused to compel the plaintiffs to accept or reject the tender, and it is a question whether the tender should be allowed to remain upon the file, to act as a matter of prejudice in the mind of the court in considering whether the amount awarded is a proper salvage remuneration.

W. G. F. Phillimore, for the appellants, contra.—There is no dispute as to a salvage service having been rendered. The tender is made for the purpose of avoiding condemnation in costs. When a salvage award is reversed, the court will not ordinarily give costs.

The *David Luckie*, 9 Monthly Law Mag. 212;

The *Thomas and William*, 10 *Id.* 215.

A tender has been made in a similar case on appeal to this Court: (Pritchard's Admiralty Digest,

p. 107, note 16.) The argument as to appeals does not apply. This appeal is not from the magistrates but from the commissioners of the Cinque Ports, and is rather in the nature of a new trial, with certain facts already found, than an appeal (see 1 & 2 Geo. 4, c. 76, s. 4). (a) As to the argument that the appellants cannot tender because a tender is in the nature of a plea, it has been decided that in these appeals pleadings may be filed and fresh evidence may be adduced, although at the peril of costs. (*The Thomas Wood*, 1 W. Rob. 18.) In appeals from magistrates, the court refuses to admit fresh evidence, except for strong reasons, but can do so in its discretion (*The Generous*, 17 L. T. Rep. N. S. 552; L. Rep. 2 Adm. & Eco. 57; 3 Mar. Law Cas. O. S. 40), and there is also a discretionary power to admit fresh evidence on objection to the registrar's reports: (*The Flying Fish*, 12 L. T. Rep. N. S. 619; Lush. 436; 2 Mer. Law Cas. O. S. 221.) These cases show the distinction between the different classes of appeals. In the *Caledonia*, (b)

(a) Sect. 4. And be it further enacted, that in case the party or parties so claiming to be entitled to salvage or compensation for services rendered as aforesaid, or the party or parties who are to pay the same or their agents, shall be dissatisfied with such award and decision of the commissioners, it shall and may be lawful for either of them respectively, within eight days after such award is made, but not afterwards, to declare to the commissioners his or their desire of obtaining the judgment of some competent Court of Admiralty respecting the said salvage or compensation, &c.

(b) THE CALEDONIA.

THIS was an appeal from the Cinque Ports Commissioners (not reported). Salvage services were rendered on the 16th Jan. 1869, by the lugger *Seaman's Glory*, of Kingsdown, in the county of Kent, to the British barque *Caledonia*, whilst in distress near the Goodwin Sands. At the hearing before the commissioners, it was agreed on the statement made by the owners of the *Caledonia*, that the value of that vessel, her cargo and freight, were to be taken at 6370*l.* The commissioners heard the case on the written statements of the claimants and of the master of the *Caledonia*. Upon the deposition of the master of the *Caledonia*, made before the receiver of wreck, and upon oral evidence given before them, the commissioners awarded to the claimants the sum of 130*l.* From this award the salvors appealed to the High Court of Admiralty, filed in that court the certificate of proceedings before the commissioners, and on the 13th Feb. 1869, filed a petition, setting out the facts, and pleading *inter alia*:

"17. The aggregate value of the *Caledonia*, her cargo and freight, at the time of the aforesaid services, were represented by the owners thereof or their agents to be the sum of 6370*l.* and upon such representation the value thereof were agreed before the said commissioners at the sum of 6370*l.*, but they largely exceeded that sum."

The practice of the court up to this time had been for the appellants, by leave of the judge, to file proceedings subject to a condemnation in costs, should the court be of opinion at the hearing that such a course had been taken unnecessarily. About the time this appeal was instituted, however, the present learned judge had intimated that he should not allow pleadings to be filed or further evidence adduced on appeals, unless he was satisfied that such a course was absolutely necessary for doing justice to the parties. The respondents' proctors, having, on this ground, given notice to the appellants' solicitors that they should oppose the admission of the petition, the appellants' solicitors filed a notice of motion that they should "by counsel, on the 23d Feb. 1869, move the judge in court to direct that the plaintiffs may be at liberty to file a petition and to go into evidence in this cause." In support of this notice of motion, the appellants' solicitors filed an affidavit, stating that "the facts attending the salvage services of the appellants, and which form the subject of this cause, are not stated in such a full and sufficient manner in the said copy proceedings (before the commissioners) as to enable this

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it was held, that in an appeal from the Cinque Port Commissioners, it was competent to parties to file pleadings and give evidence, although evidence had been taken below. If pleadings can be filed a tender may be made. [Sir R. PHILLIMORE.—Do you not introduce a new element into the case so that you may escape costs?] The procedure below renders it impossible to make a formal tender. The parties are summarily brought before the commissioners, and the proceedings are of the shortest nature. Moreover, a tender below would not affect the question of costs, as the commissioners would, even if they did not exceed the tender in their award, give the amount of the tender with costs. There is a distinction between these appeals and those from County Courts, as in the latter cases a tender can be made formally below.

E. O. Clarkson, in reply.—If the tender is one which the parties need neither accept nor refuse, then it is unavailing. A tender below need not be made in court, but to the parties, and such a tender should have been made. The respondents have a right to maintain the award, and it is unjust to force upon them a new issue in the appellate court.

James P. Aspinall, as *amicus curiae*, referred the court to *The Lord Goderich* (10 *Monthly Law Magazine*, 217).

Cur. adv. vult.

Feb. 11.—Sir R. PHILLIMORE.—A not unimportant question of practice has been raised in this

honourable court properly to determine the amount to be awarded to the said appellants in respect of their said salvage services."

The respondents' solicitors thereupon filed a counter notice of motion, that they should "by counsel, on the 23rd Feb. 1869, move the judge in court (in the event of admitting the petition), to direct the 17th article thereof to be struck out."

The two motions came on for hearing at the same time, on the 23rd Feb. 1869.

E. O. Clarkson, for the appellants, cited *The Thomas Wood* (1 W. Rob. 18), and contended that on the authority of that case pleadings might be filed and evidence given.

R. A. Pritchard, for the respondents, objected to the petition, and also to the question of values being reopened, as they had already been agreed upon.

Sir R. PHILLIMORE held, that he was bound, on the authority of *The Thomas Wood* (ubi sup.), to admit the petition, but that the appellants adopted the course of opening pleadings to be filed at the imminent risk of costs; and, as to the 17th article of the petition, that, as he was bound to admit the petition, and so to allow a rehearing of the whole case, he was also bound to allow the plaintiffs, if they required it, to reopen the question of values.

June 8, 1869.—The appeal came on for hearing, and on the appellants tendering new evidence to be taken orally in court.

Butt, Q.C. (Pritchard with him) for the respondents, objected to the evidence being received on the appeal, unless it were shown that it was *noviter perreptum*.

Dr. Deane, Q.C. (Clarkson with him) for the appellants, submitted that the question had already been decided on the motion on the 23rd Feb. 1869; that appeals from Cinque Port Commissioners differed from other salvage appeals, and that, therefore, the law laid down in *The Omgerous* (17 L. T. Rep. N. S. 552; 1 L. Rep. 2 Adm. & Ecc. 18; 3 Mar. Law Cas. O. S. 40), did not apply, but that on the authority of *The Thomas Wood* (ubi sup.), such evidence must be admitted in these appeals.

Sir R. PHILLIMORE held that he had already decided the matter, considering himself bound by *The Thomas Wood*, and the evidence must be admitted.

The case was heard upon the evidence taken below, and upon new evidence given orally and by affidavit, and the award below was reversed, and 250*l.* awarded.

Solicitors for the appellants, *Lawless, Nelson, and Jones*.

Solicitors for the respondents, *Pritchard and Sons*.

case, both in chambers and in court before me—namely, whether in an appeal from the salvage commissioners a tender, not made before them, can on appeal be made in this court. The case of *The Lord Goderich* (10 *Monthly Law Mag.* 217), to which Mr. Aspinall, jun., as *amicus curiae*, was so good as to refer the court, seems to show that Dr. Lushington allowed such a tender to be made. I have looked at some other cases on the same subject, reported a long time ago in the *Monthly Law Magazine* during the interval in which the regular reports of the court were for a while superseded. It appears, therefore, that there is a precedent for such a tender, and on principle it is not objectionable. The object of making a tender is to affect the decision as to costs. The respondent is in possession of the judgment in the court below, and has a right, if he pleases, to rely entirely upon it. On the other hand, the appellant is entitled to contend that the court below has erred, not in awarding salvage at all, but in the amount of the award and to tender, as a corrective of their judgment, a smaller amount, and the appellate court, if it should be of opinion that the lesser sum is sufficient, may consider that the rejected proposal should affect the question of costs in the case before it. I therefore allow the tender to remain upon the file, and in future, overruling my decision in *Chambers*, I shall require the tender to be accepted or rejected, but in the present case I shall give no costs.

Proctor for the appellants, *H. G. Stokes*.

Solicitors for the respondents, *Lawless, Nelson, and Jones*.

Wednesday, Feb. 19, 1873.

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Collision—Interrogatories before petition—Disputed ownership—Practice.

The Court of Admiralty has power to order interrogatories to be administered to a defendant before the plaintiff has filed his petition.

When a cause of collision was instituted in personam against a defendant as owner of a ship, and the defendant interea appearance, alleging himself to be "improperly sued as one of the owners" of the ship, the Court of Admiralty allowed interrogatories to be administered by the plaintiff to the defendant for the purpose of ascertaining the ownership before the plaintiff's petition was filed. This was a cause of collision instituted on behalf of the owners of the ship *Northfleet*, and of certain of the owners of cargo lately laden on board that vessel, in personam, against "Robert McAndrew and others," the owners of the Spanish steamship *Murillo*. An appearance had been entered in this cause on behalf of Robert McAndrew, "improperly sued as one of the owners of the *Murillo*." No petition was filed, and the plaintiffs moved the court to direct the defendant Robert McAndrew to answer the following interrogatories:—

1. When did you first become connected with the steamship *Murillo*, and what was the nature of your first connection with that vessel?

2. Did not you or your firm, on and previous to the—Jan. 1873, act as managers or brokers in London for the steamship *Murillo*, and what was the nature of your connection with the said steamship at the aforesaid date?

3. Was not the steamship *Murillo* built by or purchased from Messrs. Randolph, Elder, and Co., under orders or directions from you or your firm; and, if not

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by whose orders and under whose directions was she built by and purchased from Messrs. Randolph and Co.? Was any contract entered into between you or your firm, or any person on your behalf, or on behalf of your firm, with the builders of the said ship or with any other person with reference to the building or purchase of the said ship? Give the state of every such contract or contracts. State fully your connection with the building or purchase of the said vessel?

4. Did you order or purchase the *Murillo* on your own account, or on account of yourself, or any other person, or entirely on account of the said vessel? State fully on whose account the *Murillo* was ordered to be built or purchased; and in case you allege that she was ordered, or built, or purchased, on account of persons other than yourself, state fully what instructions with reference to the building or purchasing of the vessel you received from such persons, or any persons on their behalf, and the date of such instructions, and whether the same or any of them, and if so which, by date, were in writing?

5. By whom, and through whom, and in what manner, was the *Murillo* paid for? State the date and amount of every payment made by you, or through your agency, to the builders of the *Murillo*, or any other person on account of the price of the *Murillo*.

6. State who provided the funds for the building or the purchase of the *Murillo*; and if the same were provided by more than one person, state the amounts provided by each person? Did you or your firm, either alone or in conjunction with any other person or persons, pay or advance any, and if any what part of such funds?

7. Have you or your firm been repaid the moneys so advanced by you or your firm respectively, or any and if any what part thereof, and if so how and when, and by whom and in what manner was every such payment made?

8. Had you, on or at any time before the—Jan. 1873, any beneficial interest in the said vessel? Are you still beneficially interested in the said vessel; and if not when did you cease to be beneficially interested in her?

9. Have not you or your firm, from time to time during the four years immediately prior to the aforesaid date, received or been credited with a proportion of the net earnings or profits made by the *Murillo*, or with sums of money in respect of or arising out of the said net earnings? Set forth an account of all moneys received by you or your firm to the use of yourself, either solely or together with other persons during the said period on account of or in respect of the earnings of the *Murillo*, and state under what agreement or arrangement you became entitled to such moneys, and if any such agreement or arrangement is contained in any letter or letter, or other written document or documents, set forth the date of such letters or documents respectively, and state the names of the parties to such agreement or arrangement. Have you not, or has not your firm, from time to time, received freight for goods carried in the *Murillo*, either in advance or on the delivery of such goods? Set forth a full account of the freight so received, with dates and items, and state to whom such freight was paid or credited by you or your firm. Set forth the names of the persons to whom you or your firm accounted for the said freight, and the sum paid or credited to each such person. Was any part of such freight paid or credited to you or retained by you to your own use?

10. Set forth to the best of your knowledge, information, and belief, the names and addresses of the persons who were, on the—Jan. 1873, the registered owners of the *Murillo*, and also the names and addresses of every person who was on the same date a beneficial owner of the said vessel, or who had any beneficial interest therein, or who on the said date was entitled to any interest in or proportion of the net earnings or profits from time to time made by the said vessel.

11. Have you not in your possession, or under your control or under the control of your firm, certain books of account containing entries relating to the building, purchase, cost, and enjoyment of the *Murillo*, and to the subsequent disbursements made on account of the vessel, and to the profits and earnings of the vessel, and to the division and apportionment of such profit and earnings? Set forth a list of such books, and of all ship's accounts and other documents in your possession relating to the *Murillo* or her earnings, and of all letters written by you or your firm to any of the registered or beneficial owners

of the *Murillo*, or to any of their agents, with reference to the purchase, sale, ownership, or earnings of the *Murillo*, or to your interest in the said vessel.

In support of their motion the plaintiffs filed an affidavit of one of the plaintiffs and of their solicitor, which stated that they had reason to believe that the collision and loss of the *Northfleet* had been caused by the *Murillo*; that the *Murillo* was registered as a Spanish vessel in the names of Spanish owners, and none of the registered owners had appeared in the cause; and their agents had refused to enter an appearance for them; that they had reason to believe that the defendant Robert McAndrew was scarcely a beneficial owner of the *Murillo*, or beneficially interested in her in such a way as to be liable as an owner for the collision, but that the defendant Robert McAndrew denied that he was an owner, having appeared, as before stated, then raising a preliminary objection apart from the question of collision; that they considered it of importance that this preliminary question should be settled at once, and before the expense of the trial incurred; that in consequence of the Spanish registration of the *Murillo*, which they believed to be nominal only, the facts as to the real ownership were difficult to ascertain, but that these facts were well known to Robert McAndrew, who was concerned in the building and purchase of the *Murillo*.

In answer to the plaintiff's affidavit, the defendant's solicitor filed an affidavit, stating that the plaintiff's solicitor was well aware, before instituting the cause, that the defendant denied that he was owner of the *Murillo*, as shown by a letter from the plaintiff's solicitor to the defendant; that from his, the defendant's solicitor's experience, there was no difficulty in obtaining the particulars of the ownership of any Spanish vessel, and that the assertion that the Spanish registration was nominal only, was a mere assumption.

W. G. F. Phillimore, for the plaintiffs, in support of the motion.—The defendant, by entering such an appearance, had raised the question of ownership, and these interrogatories are for the purpose of obtaining information on that point only. The defendants' affidavits give no reason why the plaintiffs should not have such information. The court has the same power to administer interrogatories as that possessed by any of the Superior Courts of common law. By the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 17; and by the Common Law Procedure Act 1854 (17 & 18 Vict. c. 125), sect. 51: "In all cases in any of the Superior Courts, by order of the court or a judge the plaintiff may with the declaration, and the defendant may with the plea, or either of them by leave of the court or a judge, may at any other time deliver to the opposite party or his attorney interrogatories in writing upon any matter as to which discovery may be sought," &c. This gives power to the court to order interrogatories at any time, and therefore before petition. In *The Mary* (L. Rep. 2 Adm. & Ecc. 319; 18 L. T. Rep. N. S. 891; 3 Mar. Law Cas. O. S. 136), the court declared that it would rather follow the practice of the Court of Chancery than that of the courts of common law, as to the form in which the interrogatories were to be framed, and these interrogatories are clearly such as would be allowed by the Court of Chancery.

R. E. Webster, for the defendant, contra.—The objection to these interrogatories is, that their

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main object is to obtain information so as to enable the plaintiffs to institute a suit against other parties, if it should become necessary. This the courts always discourage. This suit is practically against McAndrew alone, the names of the others not being set out. According to *The Mary* (*ubi sup.*), only such interrogatories should be allowed "as tend *bona fide* to support the case of the plaintiff, and to favour a complete inquiry into the truth of the issue which the court has to decide." These are not for the purpose of the suit against the present defendant, but for the purpose of grounding a suit against others. It is contrary to principle that interrogatories should be allowed before petition, because before petition the nature of the cause is not known, and the defendants are entitled to know it before they can be compelled to answer. The first and second interrogatories ought not to be allowed, as they seek information to which the plaintiff is not entitled. The others are objectionable, because they are of a "fishing" character, and are not directed only to the one question in the case, viz., who is the owner of the ship?

Sir R. PHILLIMORE.—If I could see that the defendant, who must be presumed to have knowledge upon the subjects about which he is to be interrogated, would be injured by the administration of these interrogatories, I should order them to be curtailed or refuse to allow them. I cannot see that such is the case. I cannot see that the interrogatories have any other object than that of ascertaining the truth as to the facts. The test to be applied is, whether the interrogatories are for the purpose of ascertaining certain facts which the plaintiff has a right to be informed about. If these interrogatories were put in general or technical language, or in other words, if the only question asked was, whether the defendant was the owner of the *Murillo*, the defendant might find some way of evading the question; whereas, as the questions are here put, they cannot be evaded, and must elicit information. As I have said, if I could see that these interrogatories had any other object than that of obtaining proper information, I should order them to be amended, but I cannot think that they have any such object. I am also of opinion that it is entirely competent to the court to order interrogatories to be administered before a petition is filed, so long as the court shall be of opinion that such interrogatories are necessary to elicit facts in the cause, and are within the scope of the object for which interrogatories are allowed. Looking at the mode in which these are framed, I am of opinion that on the whole these interrogatories are within the scope of that object. Nor are they in the category of fishing interrogatories. I cannot, therefore, see how I can refuse to admit them.

Solicitors for the plaintiff, *Watsons, Bubb, and Walton*.

Solicitors for the defendants, *Lowless, Nelson, and Jones*.

March 18, 19, 20, 21, and May 7, 1873.

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Collision—Jurisdiction—Ship belonging to Khedive of Egypt—Position of Khedive—Rights of sovereigns—Exemption from process—Proceeding in rem—Trading—Waiver of rights.

The Khedive of Egypt is not a sovereign prince, and is, therefore, not entitled to claim the exemption

for himself and his property from the ordinary process of the courts of this country, which is, by international law founded upon the comity of nations, awarded to foreign sovereigns.

*A sovereign prince is exempted from the jurisdiction of the tribunals of a state in which he happens to be, absolutely so far as his person is concerned, and, with respect to his property, at least so far as that is connected with the dignity of his position, and the exercise of his public functions; no proceeding in rem can be instituted against the property of a sovereign prince if the res can in any fair sense be said to be connected with the *jus cogens* of the sovereign, but other property of a sovereign may be proceeded against in rem.*

A sovereign prince by engaging in trade may waive the privilege which he otherwise possesses of being exempt from the jurisdiction of the tribunals of a state in respect of the property so engaged.

A ship belonging to a foreign sovereign, but used by him as a merchant vessel for trading purposes, is liable to be proceeded against in rem in the Admiralty Court for damage done to another ship by collision.

Seems, that mail packets, although the property of a government, are not exempt from the ordinary process of the tribunals of a foreign state, unless expressly exempted by treaty.

This was a cause of collision instituted in rem against the steam ship *Charkieh* on behalf of the Netherlands Steamship Company, the owners of the steamship *Bataavier*, and on behalf of the master, crew and passengers thereof, proceeding for their money, clothes and private effects. The cause was instituted and the ship arrested on Oct. 21, 1872. No appearance having been entered, the plaintiffs applied to the court on Nov. 12 for leave to file a petition in general terms; but it having been suggested to the court that the *Charkieh* formed part of the navy of the Ottoman Empire, the judge ordered the motion to stand over, and directed the registrar to write to the Turkish Ambassador the letter set out in the judgment. To this letter no reply was sent. On Nov. 19 the application for leave to file a petition was renewed; but, in the meanwhile, the *Charkieh*, being the property of His Highness Ismael Pacha, the Khedive of Egypt, an application was made to the Court of Queen's Bench to restrain the High Court of Admiralty from proceeding in the cause on the ground that no cause could be instituted in a municipal court against the property of a sovereign prince, as the Khedive was alleged to be, and the learned judge of the Admiralty Court refused to allow the cause to proceed until the result of the proceedings in the Court of Queen's Bench were known. The Court of Queen's Bench, however, refused to grant the prohibition, holding that the High Court of Admiralty should decide in the first instance whether it had jurisdiction or not: (see ante p. 533; L. Rep. 8 Q. B. 197; 28 L. T. Rep. N. S. 190.) An appearance was thereupon entered in the High Court of Admiralty, under protest, for the Khedive and for Admiral Latiff Pacha, Minister of Marine of the Government of Egypt. The petition on protest filed on behalf of the defendants was as follows:

1. The *Charkieh* is an iron screw steamship of 1615 tons gross measurement, with engines of 350 horse-power, and is manned by a crew of about ninety men.

2. Before and until the year 1870 the *Charkieh* was the property of an Egyptian Trading Company. In the said year 1870 the said company was dissolved.

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3. At the time of the dissolution of the said company, and in the said year 1870, the *Charkieh* was purchased by the Egyptian Government. From the time of the said purchase, until, and at the time of the collision hereinbefore mentioned, and thence until and at the time of the institution of this suit and the arrest of the said steamship therein, the *Charkieh* has always been and still is the property of His Highness Ismail Pacha the Khedive of Egypt, as reigning sovereign of the State of Egypt, and during all the time aforesaid has been and still is a public vessel of the Government and semi-sovereign state of Egypt.

4. From the time when the *Charkieh* became the property of His Highness the Khedive, as sovereign prince of Egypt, as hereinbefore alleged, the said steamship has been and still is a ship of the Egyptian branch of the Imperial Ottoman Navy, and is entitled to carry and does use and carry the Ottoman naval pendant, and the Ottoman naval ensign, which are used by all the ships of the Egyptian Navy, as distinguished from Egyptian merchant vessels.

5. The *Charkieh* is officered by Egyptians, with the exception of an acting commander, sailing master, and engineers, who are Europeans. The said Egyptian officers hold commissions from His Highness the Khedive, and are in the naval service of the Egyptian Government. The said European officers are respectively under contracts to serve the Egyptian Government.

6. All the said officers and crew of the *Charkieh* are appointed by, and are under the control of the defendant under protest, Latif Pacha as Minister of Marine of the said Government of Egypt, and the said steamship ordinarily and was at the time of the said arrest, under the orders and control of the said Minister of the Marine. For some time before the *Charkieh* left Egypt for England as hereinbefore mentioned, the said steamship was under the control and orders of the Egyptian Minister of the Interior, and was employed by him as a government packet, carrying the mails and passengers and cargo between Alexandria and Constantinople.

7. In the month of September, 1871, the *Charkieh* was despatched from Alexandria to England, for the purpose of being repaired, and the defendant under protest, Latif Pacha, as such Minister of Marine, issued under his seal proper credentials as to her ownership and the service upon which she was engaged. The said credentials are contained in a document in the Arabic and French language, of which a copy and translation is annexed hereto.

8. For the purpose of lessening the expense occasioned to the Egyptian Government, by sending the *Charkieh* to England as aforesaid, certain cargo was brought by the said steamship to England. With the same object the said steamship had, before her arrest in this suit, been advertised as about to sail from London to Alexandria carrying cargo.

9. All freights and passage money whatever which the *Charkieh* has earned in the aforesaid employment as a packet of the Egyptian government or on her voyage to England have been and are ultimately received by and accounted for to the said Minister of the Interior of Egypt, and from part of the public revenues of Egypt. Any freight earned by the said steamship on her said return voyage to Alexandria will be in the same way received on account of the said Minister of the Interior.

10. On or about the 19th day of October, 1872, this *Charkieh* which had completed her repairs and was returning from a trial trip of her machinery, came into collision with the said steamship *Batavier* in the River Thames.

11. On or about the 21st day of October, 1872, this Cause of Damage, No. 6290, was instituted in this honourable court on behalf of the Netherlands Steamship Company, the owners of the said steamship *Batavier*, and others against the said steamship *Charkieh*. On the same day the *Charkieh* was arrested by virtue of a warrant issued out of this honourable court, and has since remained and still remains under such arrest.

The petition concluded by praying "the right honourable the judge to declare that this honourable court has no jurisdiction to entertain this suit, and that the plaintiffs cannot prosecute the same

therein, and that the said steamship is not liable to the arrest and process of this honourable court, and to order the said ship to be released from such arrest, and to dismiss the said suit and to condemn the plaintiffs therein in the costs of these proceedings."

The translation of the document, referred to in the seventh article of the petition on protest, was as follows:

Egyptian Ministry of Marine.

NOTICE.

The steamship *Charkieh* belonging to the government of the Khedive, of the burden of 1615 tons, and of 350 horse-power, with two masts, leaves this day Alexandria for London, under the command of captain Jovani Anderlich, by the order of His Highness the Khedive, for the purpose of being repaired there, and in obedience to the orders given to us we give notice to the public of the departure of the said ship under the flag of the Ottoman empire.

We request all officers, civil and military, of every state, whether friendly or allied, all officials and all others whom it may concern, to render help and assistance wherever need may be, as the rules of the sea require, during the voyage to London and back, and during the time while the said ship shall remain in London.

Alexandria.

Thursday, 28 Gamed Aer, 1288,
or 14 September, 1871.

Signed

LATIFF PACHA,
Minister of the Marine of Egypt.

The plaintiffs filed the following answer:

1. They deny the truth of the several allegations contained in the petition on protest filed in this cause, save the allegations contained in the 10th article thereof, which they admit to be true.

2. The steamship *Charkieh* proceeded against in this cause is built, fitted, and equipped solely for the purpose of carrying cargo and passengers, and not in any way as a ship of war, and before and until the year 1870 and whilst she is alleged by the defendant to have belonged to an Egyptian trading company, she was used for the purpose of trade and profit as a merchant vessel, and the said ship was from the time she is alleged by the defendant to have been purchased by the Egyptian government and until she was despatched from Alexandria in the month of September, 1871, used in like manner by her owners whomsoever for the purpose of trade and profit as a merchant vessel.

3. Before the *Charkieh* was despatched from Alexandria in the month of September, 1871, for this country, she was put up at Alexandria by the owners whomsoever in the ordinary way as a general ship to carry cargo to London, and a large quantity of cargo was shipped on board her at Alexandria by divers persons, and accepted by her master and owners whomsoever for carriage to London for freight to be paid for such carriage, and bills of lading for such cargo of an ordinary mercantile character, containing provisions and stipulations for the protection as well of the shipowner as of the owners of the goods, were in the ordinary way signed and delivered by or on behalf of her owners whomsoever.

4. The *Charkieh* came to England with her said cargo as and upon the footing of an ordinary merchant vessel, and neither the master of the *Charkieh* nor her owners whomsoever at any time until after she was arrested in this suit claimed that she should be treated otherwise than as an ordinary merchant vessel, and she was in fact treated, and by her master and owners whomsoever without objection enforced to be treated in all respects as an ordinary merchant vessel, and on her said arrival she received on board a British custom-house officer in the usual way as a merchant vessel, and was reported inwards by her master, and paid light and tonnage and other dues in the ordinary way as a merchant vessel.

5. At the time of the collision between the *Charkieh* and the *Batavier* in the said petition mentioned the *Charkieh* had been entered outwards at the custom-house in the ordinary way as a merchant vessel, to load cargo for Malta and Alexandria as a merchant vessel, and had been put and publicly advertised with the

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authority of her owners whomsoever as one of a regular line of vessels to carry goods and passengers to Malta and Alexandria. The exhibit hereto annexed, marked A, is a true copy of such advertisement. The *Charkieh* had on board at the time of the said collision a quantity of cargo which had been laden on board her for carriage to Malta or Alexandria on her said then proposed voyage, and which was being used to ballast her on her trial trip in the said petition mentioned.

6. The plaintiffs submit that even if the *Charkieh* was at the time of the said collision the property of the Khedive or the Government of Egypt, yet that she is subject to the jurisdiction of this honourable court, and liable to process in this suit.

7. The plaintiffs further allege and submit that His Highness Ismael Pacha, the Khedive of Egypt, as reigning sovereign of the semi-sovereign state of Egypt is not such a reigning sovereign as to entitle him or the Government of Egypt to have accorded to the *Charkieh*, by the comity of nations or otherwise, the privileges or immunities of a public vessel of war of an independent sovereign or state, or the privilege of freedom from arrest and process in this suit.

The exhibit referred to in Art. 5 of the answer is the handbill printed by the charterer of the *Charkieh*, and is set out to the judgment.

The following reply was then filed on behalf of the defendants under protest:—

1. Save as appears by the petition on protest filed in this case, they deny the allegations contained in the paragraphs 2, 3, 4, 5, and 7 of the answer of the plaintiffs thereto.

2. Referring to paragraph 4 of the said answer, they say that after the arrival of the *Charkieh* in England in the year 1871, and long before the collision between the *Charkieh* and the *Batavier* in the petition mentioned, application was made on behalf of His Highness the Khedive of Egypt to the Lords Commissioners of the Admiralty of our Sovereign Lady the Queen to appoint a surveyor to supervise the repairs of the *Charkieh*, as being an Egyptian Government vessel, and not an ordinary merchant ship, and that the said Lords Commissioners, recognising the *Charkieh* as a vessel of the Egyptian Government as aforesaid, appointed such a surveyor, and the repairs of the *Charkieh* were effected under his supervision.

3. They submit that the allegations in paragraphs 2, 3, 4, and 5 of the said answer of the plaintiffs in this suit do not, if they are true, show that this honourable court has jurisdiction to entertain this suit, or that the said plaintiffs can prosecute the same therein.

The plaintiffs concluded by denying the truth of the allegations contained in the 2nd article of the reply, and saying that such article was irrelevant and immaterial.

The facts as stated in the pleadings were substantially proved. The additional facts will be found set out in the judgment, except as follows. The *Charkieh* was not fitted as a man-of-war, but only as a mail steamer carrying goods and passengers. She had been in the Egyptian mail service since 1870. Previous to that year she had been the property of a trading company called the Azeeziah Mossarah Company. The Khedive had held shares in this company, which then carried the mails from Alexandria to Constantinople. In 1870 the Khedive purchased all the steamships and material of the company, and continued to carry on the line. The *Charkieh*, whilst the property of the company, had carried the flag of the Imperial Ottoman Navy, and also a pennant, and continued to do so after she became the property of the Khedive. The Ottoman Empire has only two flags, one for Government ships, the other for merchant ships. Egypt has only the flag of the Ottoman Empire.

March 18, 19, 20, 21, 1873.—Butt, Q.C. (Cohen and

Gibson with him) for the Khedive.—There are five propositions for the consideration of the court; first, the Khedive of Egypt is a sovereign prince, and, as such, is entitled to the privileges accorded to sovereign princes in the courts of foreign countries; secondly, the rights, privileges, and immunities accorded in this country to a foreign sovereign prince are not less than those accorded to a foreign ambassador; thirdly, foreign ambassadors are not liable to be sued in this country, and their goods are not liable to seizure; fourthly, no difference arises because the sovereign or ambassador engages in trade; fifthly, no difference arises because this proceeding is in rem and not in personam.

As to the first point, it is the duty of the judge in every court to take notice of public questions which affect the Government of this country, and one of those questions is whether the Government of this country has recognised Egypt as a sovereign state. The court must take the fact as it really exists, and, if necessary, can inform itself of the fact by application to the Foreign Office: (*Taylor v. Barclay*, 2 Sim. Ch. Rep. 213, 220.) The status of the Khedive of Egypt is not a matter of evidence. In *Taylor on Evidence* (4th edit., vol. I, p. 3) it is said, "every sovereign recognises, and, of course, the public tribunals and functionaries of every nation notice, the existence and titles of all the other sovereign powers in the civilised world." In very recent times applications (*Jooe* 12, 1866, and *Jao*, 16, 1867) have been made to the Court of Common Pleas for prohibitions to restrain the Lord Mayor's Court from proceeding in a suit entitled *Mulandis v. Ismael Pacha* (a), who is the present Khedive. The prohibitions went on the ground that he was a sovereign prince. In *Wheatoo's International Law* (8th edit., by Dana, Part I., Chap. II., §§ 36, 37) after pointing out that several semi-sovereign or dependent states are recognised by the public law of Europe, it is said, "Egypt had been held by the Ottoman Porte, during the dominion of the Mamelukes, rather as a vassal state than as a subject province. The attempts of Mehemet Ali, after the destruction of the Mamelukes to convert his title as a vassal prince into absolute independence of the Sultan . . . produced the convention concluded at London the 15th July 1840 . . . to which the Ottoman Porte acceded. In consequence of the measures subsequently taken by the contracting parties for the execution of this treaty, the hereditary Pashalik of Egypt was finally vested by the Porte in Mehemet Ali, and his lineal descendants, on the payment of an annual tribute to the Sultan as his suzerain . . . (§ 37.) Tributary states, and states having a feudal relation to each other are still considered as sovereign, so far as their sovereignty is not affected by this rela-

(a) In these suits the plaintiff attempted to attach moneys in the hands of persons in the City of London but belonging to the Khedive, to satisfy a claim made by the plaintiff against the Khedive, for the breach of a contract by which the Khedive, in consideration of a certain sum paid by the plaintiff, undertook to allow the plaintiff to receive the taxes of Egypt. The contract was made in Egypt, and the prohibitions went, no cause being shown, on the two grounds that the contract was not within the jurisdiction of the Mayor's Court, and that the Khedive was a sovereign prince, and could not be sued in the courts of this country. See the judgment in the present case.

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tion." An action brought against Mehemet Ali, formerly Khedive of Egypt, by a M. Solon, for services in founding a school at Cairo was dismissed by the Tribunal Civil de la Seine, on the ground that the French tribunals have no jurisdiction over foreign governments, thus clearly recognising him as a sovereign: (See Phillimore's International Law, vol. ii., p. 138, 2nd edit.) [Sir R. PHILLIMORE.—One test of sovereignty has always been the power to send and receive ambassadors.] Not an absolute test. There may be states which would be considered sovereign and yet send no ambassador. I submit that the status of the Khedive is such that the court is bound to treat him as a sovereign prince.

Then, secondly, are the rights of a sovereign in a foreign country as great as those of his ambassador? and, thirdly, what are the rights of a sovereign or of his ambassador? In Vattel's Law of Nations (by J. Chitty, p. 486, § 108) it is laid down that a sovereign has at least the same rights as his ambassador and the same immunity from process. In Wheaton's International Law (by Dana, § 95) it is said, "the person of a foreign sovereign, going into the territory of another state, is, by the general usage and comity of nations, exempt from the ordinary local jurisdiction . . . he is not amenable to the civil or criminal jurisdiction of the country where he temporarily resides." So also it is said that an ambassador is exempt from the local jurisdiction, and that "his residence is considered as a continued residence in his own country, unmixed with that of the country where he locally resides." The law of this country is stated in Stephens' Blackstone (vol. 2, p. 320, 6th edit.), where it is said that an ambassador, as he represents the person of his master, owes no objection to any laws but the laws of his own country, and his actions are not subject to the control of the private law of the state in which they are appointed to reside; and, further, that in respect to civil suits, neither an ambassador nor any of his train, or *comites*, can be prosecuted for any debt or contract in the courts of that kingdom to which he is sent. If, then, this ship had been the property of an ambassador, no proceedings could have been had against him in respect of this vessel, and no proceeding can, therefore, be had against a sovereign prince. See also, Grotius, *De Jure Belli et Pacis*, Lib. ii. c. 18, sects. 4 & 5; Fœlix, *Traité du droit International Privé*, Lib. ii. Tit. ii. chap. 2, sect. 4. In *The Duke of Brunswick v. The King of Hanover* (6 Beavan 1; affirmed on appeal to the House of Lords, 2 H. of L. Cas. 1), it was decided that a sovereign prince was not amenable to English courts of justice, although he was also a peer of England, provided that the act complained of was not done by him in his capacity of a British subject. Lord Langdale, in delivering judgment, draws an analogy from the rights of ambassadors, and holds that a sovereign, like an ambassador, is, with regard to acts connected with his function, exempt from suit. In *De Haber v. The Queen of Portugal* (17 Q. B. 171; 20 L. J. 488 Q. B.) it was forcibly said by Lord Campbell, that a sovereign is to be considered as entitled to the same protection, immunity, and privileges as the minister who represents him, and it was held that a sovereign cannot be cited in a municipal court for any complaint against him in his public capacity; moreover, in that case, it was held that the award-

ing of a foreign attachment by the Lord Mayor's Court against the goods of the defendant was an excess of jurisdiction, on the ground that the defendant was a foreign potentate. [Sir R. PHILLIMORE.—The authorities cited show that a sovereign is entitled to the same privileges as his ambassador; but do they put his position any higher?] I submit it is clear that a sovereign is entitled to all these privileges, and also that a sovereign is, equally with his ambassador, entitled to freedom from any suit in our municipal courts.

Fourthly, I proceed to show that ambassadors, and therefore sovereigns, may trade without being liable to process. On this the statute of 7 Anne, c. 12, is conclusive; it makes all process against ambassadors or other public ministers of foreign princes absolutely null and void. (a) If the *Charkie* had been an ambassador's yacht she would have been part of his goods and chattels, and the seizure of her would have been a contravention of the statute. No distinction can be drawn between an ambassador's yacht and vessels possessed by him for the purposes of trade. They are all goods and chattels within the words of the statute. [Sir R. PHILLIMORE.—If an ambassador were to institute a suit, you would contend that under the statute his goods could not be seized for costs if he lost.] Certainly, because he could be compelled to give security before being allowed to proceed. The terms of the section would cover his goods even if he were a trader. Sect. 3 says nothing about an ambassador who trades being out of the operation of the statute, but sect. 5 expressly says that his servant may not trade and claim exemption. Hence it may be fairly contended that the Legislature intended an ambassador to be exempt from process even if trading. In *Barbuit's case* (Cas. Temp. Talbot, 281) the person claiming exemption had a commission as agent of commerce for the King of Prussia, which was accepted by the Government; the commission was not directed to the King, but empowered Barbuit to assist Prussian subjects in their commerce; the defend-

(a) This Act, after declaring void all proceedings hitherto taken against the Russian ambassador, proceeds:—

"Sect. 3. And to prevent the like insolencies for the future, be it further declared by the authority aforesaid that all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other public minister, of any foreign prince or state, authorised and received as such by her Majesty, her heirs or successors, or the domestic, or domestick servant of any such ambassador or other public minister, may be arrested or imprisoned, or his goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever."

Sect. 4 provides for the punishment of persons issuing process against ambassadors, &c.

"Sect. 5. Provided, and be it declared, that no merchant or other trader whatsoever, within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or public minister, shall have or take any manner of benefit by this Act; and that no person shall be proceeded against as having arrested the servant of an ambassador or public minister, by virtue of this Act, unless the name of such servant be first registered in the office of one of the principal secretaries of state, and by such secretary transmitted to the sheriffs of London and Middlesex for the time being, or their under-sheriffs or deputies, who shall upon receipt thereof hang up the same in some public place in their offices where all persons may resort and take copies thereof, without fee or reward."

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ant was a trader and did not claim exemption for 10 years after his suit had been instituted. Lord Talbot said: "Though this is a very unfavourable case, yet if the defendant is truly a public minister, I think he may now insist upon it; for the privilege of a public minister is to have his person sacred and free from arrests, not on his own account, but on account of those he represents; and this arises from the necessity of the thing, that nations may have intercourse with one another in the same manner as private persons, by agents, when they cannot meet themselves. And if the foundation of this privilege is for the sake of the Prince by whom an ambassador is sent, and for the sake of the business he is to do, it is impossible he can renounce such privilege and protection; for by his being thrown into prison the business must inevitably suffer." [Sir R. PHILLIMORE:—The ground of the decision, as you read it, is that he, if an ambassador, would be free from personal arrest as his services would be required.] The decision goes beyond that, as the whole question turns upon the fact that bringing a suit at all against an ambassador is a *coactio* independently of arrest. But I rely mainly on this case to show that ambassadors may trade without being liable to process for it further said: "Then the question is, whether the defendant is such a person as 7 Anne c. 12 describes, which is only declaratory of the ancient universal *jus gentium*; the words of the statute are (ambassadors or other public ministers) and the exception of persons trading relates only to their servants, the parliament never imagining that ministers themselves would trade." This clearly shows that the defendant would have been exempt though trading if he had been held a minister and not a consul. See also

Triquet v. Bath, 3 Barrows, 1478.

Healthfield v. Chilton, 4 Barrows, 2016.

In *Taylor v. Best* (14 C.B. 487, 519) it is expressly laid down that "if the privilege does attach it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the proviso in the 7 Anne c. 12 sect. 5 in the case of an ambassador's servant." The minister there, however, was held to have assumed to the jurisdiction. [Sir R. PHILLIMORE: I do not understand the reasoning. How is that consistent with the argument that, his privilege not being personal but being that of his sovereign, he cannot waive it, or with the argument that he is exempt for the purpose of enabling him to do his duty as ambassador? If he can attend, he is subject to all process of the court.] There must be some cases in which an ambassador ought to be able to waive his privilege, as where he commits a personal wrong upon another. But the case is an authority for the proposition that an ambassador does not affect his privilege by trading. In the *Magdalena Steam Navigation Company v. Martin*, (2 Ell. & Ell. 94; 28 L. J. 310, Q. B.) it is laid down that the public minister of a foreign state, accredited to and received by the sovereign of this country, having no real property in England and having done nothing to discontinue him to the general privileges of such public minister, cannot while he remains such public minister, be sued against his will in this country in a civil action; although such action may arise out of commercial transactions by him here, and although neither his person nor his goods be touched by the suit. This decides in effect that a suit may not even be insti-

tuted against an ambassador as no suit can take place without a violation of the maxim of Grotius: "*Omnis coactio abesse a legato debet*" (*De jure Belli et Pacis*, lib II, c. 18 sect. 9.) An imperial ship of war cannot be proceeded against in this court. *The Prins Frederik* (2 Doda, Adm. Rep. 451) is an authority neither way, but if a royal yacht could not be proceeded against, *a fortiori* a ship of war is exempt. [Sir R. PHILLIMORE: This ship is not recognised as the property of the Ottoman Government. The Turkish Ambassador has not objected to my jurisdiction.]

Cohen followed on the same side.—On the fifth point, no suit in any court can be maintained against a foreign sovereign for any delict or tort committed by him or his servants. It can make no difference whether the proceeding is *in rem* or *in personam*. When there is a lien upon the property of a foreign sovereign in this country which is in the possession of a British subject, then, for certain reasons distinct from the considerations in the present case, the Court of Chancery will restrain the British subject from parting with the property till the claim is satisfied, and will under certain circumstances declare the plaintiff entitled to relief out of a fund in the hands of British subjects if placed there for the specific purpose of paying the claim. But no arrest of property is allowed when it is in the possession of the sovereign or his servants, nor will the courts interfere to control the acts of a foreign sovereign.

Smith v. Weymouth, L. Rep. 8 Eq. 198, 214; 20 L. T. Rep. N. S. 724;

Gladelton v. Ottoman Bank, 1 H. & M. 505; 8

L. T. Rep. N. S. 162; 32 L. J. 228, Ch.;

Larivière v. Morgan, L. Rep. 7 Ch. App. 550; 26

L. T. Rep. N. S. 339, 850.

In *The United States v. Wilder* (3 Sumner's U. S. Circuit Ct. First Cir., Rep. 308) Mr. Justice Story held that a lien for general average existed against U. S. goods, but that again proceeded upon the ground that it was property not in the possession of privileged persons. If the status of the Khedive is such that he could not be arrested, that is a test, and shows him a sovereign, as there is no other case in which a person is always privileged from arrest. It has been shown that the Khedive has Ministers of Marine, Interior, and Finance, and levies taxes; he issues commissions, and has a legally established government. This in itself is conclusive, but it would be improper for us to go further into the question of his status. A summary of the relations of Egypt to foreign powers is given in Phillimore's *International Law* (vol. 1, p. 129, 2nd ed.) A state may be sovereign although tributary: (Vattel's *Law of Nations*, by J. Chitty, Book I., §. 7.) The true test is whether its head is the sovereign to whom the obedience of the nation is habitually owing. Now, as to the liability of a sovereign prince. In Phillimore's *International Law*, vol. 2, p. 135, it is said: "The practice of English courts, both of equity and common law, has been in favour of the privileged exemption of sovereigns to all matters of private contract"; and the cases of *The Duke of Brunswick v. King of Hanover* (*ubi sup.*) and *De Haber v. The Queen of Portugal* (*ubi sup.*) establish the proposition that by the practice of our courts where property, as in this case, is used for the purposes of the state, and is in possession of the state, foreign sovereigns are exempted from all legal process. Lord Campbell, in his judgment in the latter case, disapproves of the doctrine laid down by

Bynkershoek (*De Foro Legatorum*, chap. 4; *Opera Omnia*, vol. 2, p. 151, Leyden 1767) that the goods of a sovereign may be seized in a foreign country; and he also says that the same view as the court then took was held by Lord Stowell in *The Prins Frederik* (*ubi sup.*). In *Gladstone v. Musurus Bey* (1 H. & M. 495; 32 L. J. 155, Ch.; 7 L. T. Rep. N. S. 477) it was held that the Courts of Chancery could not make an order against an ambassador, and in *Munden v. The Duke of Brunswick* (10 Q. B. 656) a plea to the jurisdiction was held bad because it did not allege that the Duke was reigning sovereign at the time of action brought or plea pleaded; hence on it being shown to a court that the person sued is a sovereign prince, he cannot be proceeded against. In the United States it has been held that the exemption from process extends not only to men-of-war but to all vessels which are national property:

The Schooner Exchange v. McFaddon, 7 Cranch U. S. Sup. Ct. Rep. 116;
Briggs v. Light Boats, 11 Allen's (83 Massachusetts) Rep. 157, 185, 186.

In the latter case it was said (p. 186) that "the exemption of a public ship of war of a foreign Government from the jurisdiction of our courts depends rather upon its public than its military character." As post vessels are clearly used for state purposes they would be within the exemption.

Now judgment, or even a writ of summons, is in the nature of a command given by the Sovereign of the State in whose court the suit is instituted to a subject. Can Her Majesty command a foreign sovereign who is not a subject? The court cannot enforce judgment against or even summon a foreign sovereign. No action or proceeding consequently lies against a sovereign prince for delicts or torts, or even crimes. If a delict is committed by a sovereign prince, it becomes a political question. As no action lies on contract in respect of private transactions, no action for a tort will lie. If the *Charieh* had been chartered so as to be demised to the charterer, perhaps there would have been no defence; but the real question is: whose servants are the crew? If the shipowner continues to have control over those who navigate the ship and so retains possession of the ship, he alone is responsible if he can be proceeded against.

MacLachlan on Shipping, p. 310;
The San Cloud, Bro. & Lash, 4, 15.

These ships belong to the Khedive in his public capacity, and are Government vessels as much as if they were men-of-war. [Sir R. PHILLIMORE.—I do not remember any case where mail packets have been distinctly held to be Government vessels.] Vessels of a Government used for carrying mails are used for a public purpose. There might have been a question of estoppel if the action had been in contract, on the ground that the ship was held out as a trader; but there can be no estoppel in an action in tort. [Sir R. PHILLIMORE.—Then in a salvage suit you would contend that salvors could proceed against the cargo only?] No doubt; no claim could be made against the ship. If the trading even were for the benefit of the Khedive, the old cases holding that he would be liable are over-ruled by *The Magdalena Steam Navigation Company v. Martin* (2 Ell. & Ell. 94; 28 L. J. 310, Q. B.). Here, however, there was no trading, even in the sense of those cases,

because the trading was only incidental to the ship coming here for repairs. Her real employment was that of a Government mail-packet, and it is a rule that the accessory follows the principal. There is no real distinction between men-of-war and other Government vessels. The only distinction drawn by the best writers on international law is between public and private vessels.

Ortolan, *Regies, Internationales, et Diplomatiques de la Mer*, Vol. I., pp. 207, 208, 209.
Wheaton's *Int. Law*, by Lawrence, pp. 208-9.

Salvage suits are not instituted against men-of-war, because the court has no jurisdiction over Government ships. The property of Government cannot be arrested. Nor are salvage suits ever instituted against post-vessels. (Sir R. PHILLIMORE.—Does not that arise because it is so stipulated in the various treaties on postal conventions? You have given me no authority for saying that a Government ship chartered to a private individual does not lose the privilege.) That depends upon the question whether a suit *in rem* will lie. The object of the charter-party is to provide for the carriage of goods from port to port; it does not transfer the property in and gives no control over the ship. The charterer acquires no right of action for breach of the charter party, but he ought if he mistrusts the Khedive, to obtain security for its fulfilment.

There is no distinction between proceedings *in rem* and *in personam* where a Government is concerned: (*Briggs v. Light Boats*, *ubi sup.*) Assuming that no action lies *in personam*, then no action lies *in rem*. The right to proceed *in rem* is only a right to enforce an obligation for which the ship is considered a security: (*The Bold Buccleugh*, 7 Moore, P.C.C. 267). But here the obligation itself is not enforceable. An action *in rem* only lies where the owners themselves are liable; unless the owners are personally liable no suit can be brought *in rem* against the ship.

The Druid, 1 W. Rob. 391;
The Halley, L. Rep. 2 P. C. 193; 18 L. T. Rep. N. S. 879; 3 Mar. Law Cas. O. S. 131;
The Thetis, 22 L. T. Rep. N. S. 272; 3 Mar. Law Cas. O. S. 357.

Milward, Q.C. for the plaintiffs.—The facts clearly show that the vessel was used for trading purposes. To establish exemption the defendants must show that any government may set itself up as a trading corporation and yet not be responsible for salvage claims, nor under the bills of lading they may issue. In *The Magdalena Steam Navigation Company v. Martin* (2 Ell. & Ell. 94; 28 L. J. 310, Q. B.) there was no trading in the right sense. The company were trading, but not the shareholder. The action was to recover a call due on the winding-up of the company, and the objection was taken on demurrer; there was, therefore, no waiver of privilege. The object, moreover, in that case was to arrest the person of the foreign minister if he did not pay; that was an interference with the dignity of an ambassador. The judgment turns upon his having no real property in this country, and being considered as out of the country. Lord Campbell practically adopts the exception given by Bynkershoek (*De Foro Legatorum*, chap. 14) that the goods of an ambassador who is engaged in commerce are liable to seizure, only such being exempted as belong to him in his character of ambassador. This shows there is an exception to the rule of exemption, and the present

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case, I submit, falls within that exception. In *Taylor v. Bast* (14 C. B. 489) the only decision was that the foreign minister, having appeared to the action, and allowed the proceedings against him to continue through several stages, could not at that period raise the question of privilege. Moreover, the judgment there leaves it doubtful whether the privilege of an ambassador extends to prevent his being sued in the courts of this country, or only to protect him from process, which may affect the sanctity of his person or his comfort and dignity; a proceeding *in rem* clearly does not affect his person, and that is there shown to be allowable in all courts where the civil law prevails.

Kent's Commentaries, vol. 1, p. 45, 11th edit.;
Wiquet, *L'Ambassadeur et ses fonctions*, vol. 1,
Book 1, § 28, p. 426.

There is nothing in *Barbuit's Case* (Cases Temp. Talbot 281) which affects the question, as the doctrines there laid down about ambassadors are mere *obiter dicta*, the proceeding being against a consul. In none of the cases cited was there any act on the part of the sovereign or ambassador which could be construed into a waiver of his privilege before the cause of action arose. Here the Khedive had abandoned his privilege, if it existed, by becoming a trader. The result of all the authorities is that the act of trading *per se* would allow the arrest of all the property of an ambassador which does not belong to him in his *status* as ambassador. The statute 7 Anne c. 12 does not alter the law, it is merely declaratory. *Melanidis v. Ismael Pacha* (*ubi sup.*) is no authority, as the rules were made absolute by consent, and moreover the cause of action was not within the jurisdiction of the Mayor's Court, even if the proceeding was against a sovereign. The French case cited from Phillimore's International Law (vol. 2, p. 138) only shows the extraterritoriality of a sovereign government, and not that Egypt is a sovereign state.

I submit that the Khedive is not a sovereign. He holds his rights in consequence of an European convention, on the basis of which the Sultan afterwards issued a firman constituting the Pashalik of Egypt: (see *Convention concluded between the Courts of Great Britain, Austria, Prussia, and Russia, and the Sublime Ottoman Porte for the pacification of the Levant. Signed at London the 15th July 1840*; 5 Hertielet's Treaties, pp. 535, 544). Thereby all the laws of Turkey are to be applicable to Egypt, and the taxes are to be collected by the Khedive as Delegate of the Sultan; the army and navy are to be considered part of the forces of the Ottoman Empire. Recently the Khedive was prevented by the Sultan from raising a fleet or borrowing money without leave: (see *The Annual Register*, 1869, p. [273]. [Sir R. PHILLIMORE.—The English Government has entered into treaties with the Barbary States, which are much in the same position. See Martens et De Cusey, *Recueil des Traites*, vol. 2, pp. 311, 401.] No doubt. That was *ex necessitate* on account of the difficulty of enforcing rights through Turkey at that time. A sovereign state is a nation or people which governs itself independently of foreign power, or whose government is not so bound by express compact with another state that the government is legally affected by its connection with the other: (Wheaton, by Lawrence, chap. Part I, 2, § 12). The Sultan has reserved to himself the power of life and death over his Egyptian subjects:

(Phillimore's International Law, vol. 1, p. 130, 2nd edit.), and Egypt could not even be classed among semi-sovereign states. It has become a mere hereditary pashalik, paying an annual tribute to the Sultan as suzerain. This vessel carries the Turkish flag, and yet her owner claims that he is a sovereign prince. The fact of the Turkish ambassador not interposing shows that the vessel is not considered in Turkey as used for Government purposes.

The Duke of Brunswick v. The King of Hanover (*ubi sup.*) clearly recognizes the principle that the status of a ruler does not determine the quality of his acts, but that the quality of his acts must be examined to determine the question of liability. If an act is done by a sovereign out of the scope of his authority as prince, he is liable as a private person. Here, the act of the Charkieh was the act of the Khedive as a private person. The *ratio decidendi* in *Briggs v. Light Boats* (11 Allen's Massachusetts Reps. 186) was that the vessels were used for public purposes, and the case does not therefore apply, nor for the same reason is the passage from Ortolan, *Regies Internationales et Diplomatie de la mer* (vol. 1, p. 209), of any avail. Postal vessels are never considered as Government vessels, nor entitled to the same exemption as vessels of war, except when it is so expressly provided by treaty, and the numerous treaties on this subject show that Government vessels employed for other than man-of-war purposes are considered by all nations as subject to the jurisdiction of the courts of every country. (See *Postal Treaties with Belgium* of Oct. 17 and 24, 1834, par. 9, and Oct. 19, 1844, par. 7; 7 Hertielet's Treaties, p. 81; *Postal Treaty with France* of Sept. 24, 1856, par. 5; 10 Hertielet's Treaties, pp. 108, 110). Vattel speaking of ambassadors says (by Chitty, Book 4, chap. 8, § 113), "Everything, therefore, which directly belongs to his person in the character of a public minister,—every thing which is intended for his use, or which serves for his own maintenance and that of his household,—every thing of that kind, I say, partakes of the minister's independency, and is absolutely exempt from all jurisdiction in the country. Those things, together with the person to whom they belong, are considered as being out of the country." (§ 114.) But this exemption cannot extend to such property as evidently belongs to the ambassador under any other relation than that of minister. What has no affinity with his functions and character, cannot partake of the privileges which are solely derived from his functions, and character. Should a minister, therefore (as has often been the case) embark in any branch of commerce, all the effects, goods, money, and debts, active and passive, which are connected with his mercantile concerns,—and likewise all contests and lawsuits to which they may give rise—fall under the jurisdiction of the country. And, although, in consequence of the minister's independency, no legal process can, in those law-suits, be directly issued against his person, he is, nevertheless, by seizure of the effects belonging to his commerce, indirectly compelled to plead in his own defence."

Klüber, *Droit des Gens*, vol. 1, § 210.

Martens, *Précis du Droit des Gens*, vol. 2, § 217.

Phillimore's International Law, 2nd edit., vol. 1, p. 398 et seq. par. 343-348, 350, 351.

Wheaton's International Law, by Lawrence, Part II., chap. 4, § 9, pp. 192-199.

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This doctrine is clearly applicable to a sovereign also. In *Wheaton* (p. 199) it is said, "A prince by acquiring private property in a foreign country may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as, so far, laying down the prince and assuming the character of a private individual; but he cannot be presumed to do this with respect to any portion of that armed force which upholds his crown and the nation he is intrusted to govern." This proposition, for which I contend, shows that if a prince trades he cannot claim exemption in the same way as for his armaments of war. *The Schoener Exchange v. McFaddon* (7 Cranch, U. S. Snp. Ct. Rep. 116) and *The Prins Frederik* (2 Dods. 451) both proceed upon the ground that the vessels were men-of-war, and the distinction drawn between public armed ships and private trading vessels, although possessed by a sovereign, is clearly apparent by the arguments and judgments. In *The Santissima Trinidad* (7 Wheaton's U. S. Snp. Ct. Rep. 283) an attempt was made to show that foreign prize vessels were exempt from the jurisdiction of the courts on the ground that they were captured for a foreign sovereign, and that no sovereign is answerable for his acts to the tribunals of another state; but it was held that such a claim could not be sustained except for the public capturing ship herself, and her armament, and munitions of war. Mr. Justice Story there said (p. 353) that if a sovereign "happens to hold a private domain within another territory, it may be that he cannot obtain full redress for any injury to it, except through the instrumentality of its courts of justice" and that the exceptions to the rule that all persons and property are subject to the jurisdiction, "are such only as by common rule and public policy have been allowed in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights." Comity and usage of nations have never given exemption to the property of a sovereign used in trade, and a ship coming to British ports for such a purpose does not enter on the implied understanding (which creates the privilege), that she shall be exempt from the jurisdiction of the courts.

Clarke v. New Jersey Steam Navigation Co., 1 Story's U. S. First Circuit Rep. 531, 542;
The Ticonderoga, Swabey's Adm. Rep. 215;
Hodgkinson v. Fernie, 2 C. B., N. S., 415.

E. C. Clarkson followed on the same side.—First as to the status of the Khedive; he has no power to send ambassadors nor to levy war; the Porte grants the *exequatur* to foreign consuls at Alexandria and Cairo, and gives operation to treaties of commerce which concern Egypt by its firman addressed to the Pacha: (see *Twiss* on the Law of Nations, part I, p. 94, § 66). Unless the Khedive can show that he would not be amenable to the jurisdiction of the Sultan's courts at Constantinople, he has failed to establish his privilege against being sued personally here, and he holds no better position than any other Turkish pacha; his position is analogous to that of Lord Baltimore, who was by letters patent proprietor and hereditary governor of Maryland, and yet could be sued on a contract relating to his possessions in Maryland in the English courts: (*Penn v. Lord Baltimore*, 2 White and Tudor's L.C. in Equity p. 923, 4th edit.) Assuming the Khedive, however, to be a sovereign

there is no analogy between his position and that of an ambassador. An ambassador holds his rights not as his own, but for and on behalf of the sovereign whom he represents, and cannot, therefore, without the consent of his sovereign, waive those rights. A sovereign, on the other hand, having rights as his own, may waive them and submit to the jurisdiction of local tribunals.

2 *Phillimore's International Law*, 2nd edit. p. 180, par 143, 144;

Woolsey, on *International Law*, p. 152, 157.

A court in this country will order security for costs to be given by a sovereign who has been engaged in commercial transactions, and who, residing abroad, does not, but will not so order against an ambassador residing here:

The Duke of Montellano v. Christin 5 M. & S. 503;

The Emperor of Brazil v. Robinson, 5 Dowd, 522.

If an ambassador had licence from his sovereign to trade, he would be in an analogous position to his sovereign, and it could not then be contended that he would not be amenable to the jurisdiction. Suppose an ambassador accredited to England were whilst passing through France to stay and trade, would he not, despite the rule which ordinarily would exempt him, be subject to the French tribunals?

Wheaton's International Law, by Dana, § 246;

Twiss, on the *Laws of Nations*, part I, § 205.

A sovereign by entering into trade, contracts that he will submit himself and his property to the jurisdiction of local tribunals, and he has no cause of complaint if the jurisdiction is exercised. If there had been damage done to the cargo of the *Charkieh* by the negligence of her master or crew, an action would have lain, as I submit, under the Admiralty Court Act 1861 (24 Vict. c. 10) sect. 6, against the ship. If, again, instead of sending this ship, the Khedive had forwarded a cargo by another vessel, and had attempted to stop in transitu, he could have been made a defendant to an interpleader summons. Under the Supplemental Customs Consolidation Act 1855 (18 & 19 Vict. c. 96) sect. 25, this vessel might have been boarded by a custom house officer four leagues from the English coast, and no complaint could have been made, as she was ostensibly a trader. If she had carried passengers elsewhere than to the Mediterranean, she would have required a clearance under the Passenger Acts; (18 & 19 Vict. c. 119, s. 50; 26 & 27 Vict. c. 51, s. 13.) A foreign trading ship comes to this country not as of right, but under an implied licence, granted upon condition that she will submit to the jurisdiction of the authorities here. This ship must have come here under such a licence and under such terms because she was a trader. A state is only recognized in international law as a political body, not as a trading corporation, and if it undertakes the latter capacity, it cannot be considered as entitled to greater privileges than other trading corporations.

Butt, Q.C., in reply.—The object of the postal treaties cited was not to give exemption from arrest, but to prevent cargo being carried into ports free of duty. The exemption arises not from the packets carrying mails, but from their being Government property. As to the question of waiver, all the authorities cited have treated a waiver by a sovereign and by an ambassador as the same thing. *The Duke of Montellano v. Christin* (*ubi sup.*), shows that an ambassador may waive his privilege, but a sovereign stands on a different

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footing. He may enforce a contract, but it cannot be enforced against him. The fact that the Khedive, if a sovereign prince, would have no just cause of complaint, does not affect the question, as his privilege is a right, which he may claim, and which cannot be abandoned except by his express consent. In the *Prins Frederik* (ubi sup.) and in the *Swift* (1 Dods. Adm. Rep. 320, 339) there was trading, but that did not take away the privilege. The question of how much trading will destroy the privilege cannot be tried in an English court. The sovereign is the sole judge of his own acts. Moreover, it is by no means clear, that at the time of the collision that there was any trading. She was not earning freight, but was here for the purpose of repairs. Her ordinary employment of carrying the mails was no more trading than the carrying of mails by English Government packets. The postal charges of this country are part of the revenue of the Crown, and yet it could not be said that her Majesty was a trader by reason of her vessels carrying the mails. The right to exemption depends not upon the opinion of jurists, but upon the statute of 7 Anne, c. 12, and that statute is imperative in the exemption it gives to the goods of ambassadors, and consequently of sovereigns. The mere want of power to send an ambassador is not conclusive of the non-sovereignty of the Khedive, it is only one of the criteria of his position. *Cur. adv. vult.*

May 7.—Sir R. PHILLIMORE.—This is a cause instituted on behalf of The Netherlands Steamship Company, the owners of the steamship *Batavier*, and on behalf of the master, crew, and passengers thereof, against the screw steamship *Charkeiah* and her freight, for damages arising out of a collision between the *Batavier* and the *Charkeiah* in the river Thames, on the 19th Oct. 1872. This cause was instituted and the *Charkeiah* was arrested by a warrant from this court on the 21st Oct. No appearance was at that time entered on behalf of the owners of the *Charkeiah*, but in the month of November an application was made on behalf of his Highness Ismael Pacha, Khedive of Egypt, to the Court of Queen's Bench for a prohibition to restrain this court from proceeding further in the suit, and a rule nisi was granted, which rule was, after argument, on the 23rd Jan. 1873, discharged. It appears from the report that the Court of Queen's Bench expressed no opinion upon the question which it was sought to raise on the application for a prohibition, deciding only that the question was one upon which the court was specially qualified to adjudge. Since this decision an appearance has been entered under protest for his Highness Ismael Pacha, the Khedive of Egypt, the owner of the *Charkeiah*, and Admiral Latif Pacha, Minister of Marine of the Government of Egypt. The pleadings on protest have been filed; they consist of a petition on behalf of his Highness the Khedive, an answer on behalf of the owners of the *Batavier*, a reply, and a conclusion. The petition concludes with a prayer to this court, to declare that it "has no jurisdiction to entertain this suit, and that the plaintiffs cannot prosecute the same therein, and that the said steamship is not liable to the arrest and process of this honourable court, and to order the said ship to be released from such arrest, and to dismiss the said suit, and to condemn the plaintiffs therein in the costs of these proceedings."

The principal averments of fact and law in

the petition are the following: That the *Charkeiah* is the property of his Highness Ismael Pacha, the Khedive of Egypt, as reigning sovereign of the State of Egypt, and is a public vessel of the government and semi-sovereign State of Egypt. In support of this proposition certain matters of fact connected with the history of this vessel are set forth in the succeeding articles. It is alleged that "from the time when the *Charkeiah* became the property of his Highness the Khedive, as sovereign prince of Egypt," she has been "a ship of the Egyptian branch of the Imperial Ottoman Navy," entitled to carry and carrying "the Ottoman naval pendant and the Ottoman naval ensign, which are used by all the ships of the Egyptian navy as distinguished from Egyptian merchant vessels." The designation "Egyptian navy" appears to me, for reasons hereafter to be stated, inaccurate. It is further alleged that the *Charkeiah* is officered by Egyptian officers holding commissions from the Khedive "in the naval service of the Egyptian government;" that the officers and crew are appointed by the Minister of Marine of the Government of Egypt, and the ship was under his control at the time of her arrest. That some time before she left Egypt for England she was "under the control and orders of the Egyptian Minister of the Interior, and was employed by him as a government packet, carrying the mails and passengers and cargo between Alexandria and Constantinople." That in September, 1871, she was sent to England to be repaired with proper credentials. That for the purpose of lessening expense she brought cargo to England, and, at the time of her arrest, was advertised to carry cargo back to Alexandria. That all freights and passage money carried by her were received and accounted for by the Egyptian Minister of the Interior as part of the public revenues of Egypt. That she had completed her repairs and was returning from a trial trip when the collision happened; and I may observe here that she had a small portion of the cargo which she was to carry to Alexandria then on board. The answer, in substance, sets up that the *Charkeiah* came to England on the footing of an ordinary merchant vessel, and was so treated without objection in all respects by the proper public authorities in England. That she was regularly advertised as a merchant vessel when about to leave Alexandria for England, and when again about to return, on the former occasion carrying cargo on the terms of ordinary bills of lading. It appears from the evidence that she was chartered to an English subject for the voyage to Alexandria. The answer further submits that the Khedive "is not such a reigning sovereign as to entitle him or the Government of Egypt to have accorded to the *Charkeiah* by the comity of nations or otherwise the privileges or immunities of a public vessel of war or of an independent sovereign or state, or the privilege of freedom from arrest and process in this suit."

Not much oral evidence has been given in this case. The first witness had the rank of a Pacha and held a commission as rear-admiral, granted by the Porte. He had been sent to England by the Khedive to superintend the repairs of this vessel. I collected from him that there is at present a fleet of six or seven vessels belonging to the Khedive, all engaged in ordinary commerce, "taking" (to use the words of the witness) "cargo, specie, passengers, everything," and all employed in the same

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service, mail vessels between Alexandria and Constantinople. It appears that the same vessels belonged before to a private merchant company, and were sold to the Khedive. The *Charkieh* carried the flag of the Imperial Ottoman navy. It appears that there is a flag used for Egyptian merchant vessels, but no flag of the Egyptian navy, as pleaded. A person of the name of Anderlich is acting commander, with no naval rank, and not a subject of the Khedive. The Khedive appoints to no higher rank than that of captain in the navy, the Sultan appointing all higher officers, and similarly in the army. Mr. Jackson deposed that his firm acted as brokers for the *Charkieh*; that he chartered the *Charkieh* back to Alexandria, and caused handbills to be printed, of which the following is a specimen:—

Regular line of screw steamers to Malta and Alexandria. Will be promptly despatched to follow the *MAHALLA*, the remarkably fine first-class screw steamer, *CHARKIEH*, A. 1, for Malta and Alexandria. Has excellent accommodation for passengers. 1167 tons register. 1200 horse power. Loading in Millwall dock.

JOHN ANDERLICH, Commander.

All goods received by special agreement, and must be sent alongside at least two clear days before the date of clearing, and must be distinctly marked with the name of the port for which they are destined, or the ship will not be responsible for the delivery of the same. Barges will be laden as quickly as possible to suit the convenience of stowage; but if delay occurs, from any cause whatever, the owners will not be responsible for detention of craft. Engagement of goods are subject to there being room in the vessel when they come alongside.

For freight or passage apply to

W. E. BOTT & CO., 9 Buller-street; or to G. L. JACKSON & SONS, 18, Buller-street.

Mate's receipts (if any) required in exchange for bills of lading, which must be obtained of Cooke and Lloyd, 51, Fenchurch-street.

He said that the *Charkieh* on the arrival here was entered by him at the custom-house, like an ordinary merchant vessel; that he stated that, as the ship belonged to the Khedive, he had no register to produce, and the excuse was admitted; that he paid light, pilotage, and tonnage dues. O'Connor, a custom-house officer, was examined. He boarded the *Charkieh* at Gravesend, and went up with her to the docks, where he left her in charge of the custom-house authorities.

From these averments in the pleadings, and these facts in the evidence, the following questions arise:—(1.) Is the international status of the Khedive that of a sovereign prince of Egypt? (2.) Is he entitled by virtue of that status to claim the exemption of this ship from the jurisdiction of this court? And (3.) If he be entitled to this privilege, has he waived or forfeited it? I proceed to consider these questions in their order, and, first, as to the international status of his Highness the Khedive. Very scanty evidence as to this status of the Khedive was produced before me at the hearing of the case. I was told by the counsel for his Highness that it was considered improper to offer evidence upon this subject; that it was my duty to take official cognizance of that status, and to obtain, by reference to the Foreign Office, any information which I might think necessary. Whether this was, or was not, the right course on the part of the counsel to adopt, I do not now stop to inquire. I have endeavoured to inform myself, and have had recourse to the following sources of knowledge: (1.) The general history of the government of Egypt. (2.)

The firmans which contain the public law of the Ottoman empire on this subject. (3.) The European treaties which concern the relations between Egypt and the Porte. (4.) The answer which the Foreign Office has furnished to an inquiry which I thought it my duty to make.

In the first place, some reference to the past as well as the present political history of Egypt seems necessary in order to ascertain whether, at any time since the Mahomedan conquest, that country has possessed the character of an independent state; because, in weighing the effect of doubtful facts and circumstances arising out of the vicissitudes of national life, it might fairly be considered that such a character once possessed might more easily revert, than, having had no previous existence, be for the first time created. The conquest of Egypt was effected by Amer, the general of the Caliphs, in 638 A.D., and from the death of Caliph Omar, in 644 A.D., it continued to be a province of the Arab empire under a governor appointed by the Caliphs. This nominal subordination to the Caliphs appears to have continued while the government *de facto* was in the hands of various dynasties, who reigned under the title of Soldan or Sultan of Egypt. The last sultan of the Memlook dynasty of Egypt, which had been established about 1250 A.D., was overthrown in 1517 A.D., by Selim I., the Ottoman Sultan of Constantinople. About this time the last of the Caliphs in Egypt died; and the caliphate of Egypt came to an end, and the title of Caliph was thenceforward assumed by the Sultan of Constantinople. Although Selim I. abolished the dynasty of the Memlooks, he preserved an aristocracy of that race under the authority of the Viceroy, nominated by the Porte and designated Pacha of Egypt. By this new constitution, twenty-four Beys were created; and the obligation was imposed of sending tribute to Constantinople, and of furnishing 12,000 men in time of war. This quasi-republic, composed of a Memlook aristocracy, was not wholly abolished till after the period of the French invasion at the close of the last century. During this interval, however, successful chieftains continually revolted from the Porte, and the more powerful of the Beys exercised absolute dominion over the country. In 1747, A.D., Ibrahim Kehia seized upon the supreme authority and declared the independency of Egypt. In 1758, A.D., Ali Bey, not the least remarkable of those warriors who rose to the surface in these troubled times, possessed himself of the Government of Egypt, and ruled over that country some time with an appearance of deference to and a recognition in the abstract of the sovereignty of the Porte, up to the period of 1774, A.D., when his eventful career was ended. In 1798, A.D., the invasion of Egypt by Bonaparte took place under the pretext of delivering Egypt from the Memlooks. In 1801, A.D., the victories of England once more restored Egypt to the dominion of the Porte. In 1806, A.D., an important epoch begins. In that year Mahommed Ali obtained from the Sultan a legal nomination to the Pashalik of Egypt, the actual authority of which he was already exercising. After the departure of the English from Alexandria and the massacre of the Memlook Beys, Mohammed took the command of forces, previously sent by him into Arabia, to subdue the sect of the Wahabees. During the interval between this period and 1831, A.D., he possessed an army of 60,000 men, a con-

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siderable navy, established a *de facto* empire from Sennar and Kadosan over all Syria to Adana, a part of Cilicia at the foot of Mount Taurus, and ruled over the island of Candia. The Porte, struggling with the rebellion of the Pacha of Janina, not subdued till 1822, A.D., and the uprising of the Greeks, whose liberties were established by the battle of Navarino in 1827, A.D., opposed a sifil, underhand, and feeble opposition to the continued practical aggression, however disguised in language, of its great subject. Between the Battle of Navarino (1827 A.D.), and the treaty, presently to be mentioned, of 1833, A.D., an important portion of Egyptian history intervenes, having a more immediate and direct bearing upon the question of public and international law, which I am called upon to decide. Mohammed Ali, on being refused the Pachalic of Acre by the Porte, found various pretexts for the invasion of Syria, on the actual possession of which, it was manifest, the supremacy of the Porte or of the Khedive of Egypt would depend. In 1831, A.D., the Egyptian army and Ibrahim Pacha passed the frontier. As soon as the Porte was apprised of this event, an order was immediately despatched to Mohammed Ali to recall his troops. To these and other orders he turned a deaf ear. An official declaration of war against him, preceded by a religious anathema or public declaration, that he and his sons were rebels, and out of the pale of Musselman law, did not stop his course. In May 1832 Acre was captured by his troops. Not long afterwards all Syria was conquered for him by Ibrahim, his general and son. The armies of the Porte were routed and destroyed, and the advance of the conqueror upon Constantinople was only prevented by the intervention of the great European Powers. Nevertheless by a kind of convention usually called the treaty of Kütahia, (a) between the Sultan and Mohammed, the latter obtained a great addition of power and territory; for he retained possession of Syria and the passes of Mount Taurus or the district of Adana. He undertook indeed to pay tribute for Syria, as well as for Egypt; but with his army and navy untouched, and with these possessions, the Pacha of Egypt was allowed to remain, in fact, more powerful than his nominal master at Constantinople.

Here I will pause a moment to consider the law applicable to the facts as now stated. What were the relations at this epoch existing between the Khedivs and the Porte, and what was the nature and character of the authority of the former, so far as foreign states are connected with these considerations? Did they entitle the Khedive to the privilege of the sovereign of an independent state? These are questions which must be answered, like all others appertaining to international jurisprudence, by a reference to usage, authority, and the reason of the thing. Many accredited writers and jurists have drawn a distinction, which seems not to have escaped the framer of the Khedive's petition on protest now before me—between a sovereignty absolute and pure, and that less complete and perfect dominion to which the name of *half-sovereignty* (demi-sovereign) has been given. I am inclined to think that the sovereignty of a state in the latter category may be entitled to require from foreign states the con-

sideration and privileges which are unquestionably incident to the ruler of a state who is in the former category. There are also certain acts of feudal homage, or, as jurists say, *servitutes juris gentium*, which do not dissentile the state obliged to them to an international existence as a separate state. Some examples of half-sovereignties are to be found in history. Some of the smaller states (half-sovereign) of the German confederation, before it was virtually destroyed by Napoleon's confederation of the Rhine, and formally extinguished by the abdication of the Emperor Francis in 1806, also furnished examples of *status cum immunitate imperii*—to borrow the expression of Grotius (*De Jure Belli et Pacis*, Lib. 2, c. 15, s. 7-1)—but entitled to be treated as states by foreign powers. The old feudal relations of the Dukes of Burgundy, Normandy, and Brittany to France did not, I believe, prevent these princes from being considered as sovereigns at home and abroad, and from being entitled to be represented by ambassadors at foreign courts. Other instances might be mentioned, in which neither the payment of tribute, as in the case of the kingdom of the Two Sicilies to the Pope, continued till 1818, A.D., or of the King of Hungary to the Sultan, from the reign of Ferdinand the First till the treaty of Silyatorok in 1606, A.D., nor other acts of purely feudal homage, such as the presentation of the white palfrey presented to the Pope by the King of the Two Sicilies, dissented the representative of a state in these conditions to the enjoyment abroad of the privileges usually accorded to a foreign sovereign or his representatives. It has been well said by a commentator on Marten's work:—"La souveraineté extérieure n'est autre chose que l'indépendance de l'état vis-à-vis des autres." (Notes on l. 1, ch. iii. § 23, of "Marten's *Précis du droit des Gens*," 2nd ed. Vargé, t. 1, p. 103). It may, however, be that, if such a *status* existed *de facto*, it would not be the province of the tribunals of a foreign state to look beyond the fact, or to inquire minutely or at all into the history of its establishment. International law has no concern with the form, character, or power of a state; if, through the medium of a government, it has such an independent existence as to render it capable of entertaining international relations with other states. An apt illustration of this position is furnished by the *status* accorded by European Powers in more modern times to what were once commonly called the Barbary States. They had practically shaken off the Ottoman dominion. Bynkershoek describes them as "*civitates quæ certam aedem atque ibi imperium habent, et quibus non nunc pax esse nunc bellum, non seems ac eam aliis gentibus, quinque propterea ceterorum principum jure esse videntur.*" (*Quæst. Jur. Pub. B. 1, c. 17*). And in the year 1801 Lord Stowell fully adopted this position, and asserted that the African States had long ago acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal communities; and he remarked that, although their notions of international justice differ from those which we entertain, we do not on that account venture to call in question their public acts—that it is to say, that although they are perhaps on more points entitled to a relaxed application of the principles of international law, derived exclusively from European custom, they are nevertheless treated as having the rights and

(a) See Testa, *Recueil des Traité de la Porte Ottomane*, vol. 2, p. 354.—Ed.

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duties of states of the civilized world: (*The Helena*, 4 C. Roh. Adm. Rep. 5.) It is to be observed, however, that the court proceeded upon the principle that a nation with whom we had regular treaties, was *de facto* acknowledged without a formal recognition to have what jurists have termed the right of a political personality (Klüber, *Droit des Gens moderne de l'Europe*, § 21), that is the position of a state in the great commonwealth of nations.

If, at this period, I had been obliged to decide whether the Pacha of Egypt was entitled to the privilege of a sovereign in this country, my decision would have been influenced by a regard to the *de facto* sovereign rights apparently exercised at this period by his Highness; and perhaps the analogy of an European state having absolute dominion over its own subjects with feudal subordination to another state might have been cited with effect. Though, even in this crisis of the history of Egypt, when the independence of that country was so nearly established, it must be observed that no attempt appears to have been made on behalf of the Pacha to exercise the principal international attribute of sovereignty, namely, the *ius legationis*, to be represented by an ambassador or diplomatic agent at the court of foreign sovereigns, nor is there any reason to believe that such an attempt, if made, would have been successful.

But in the interval between 1833, A.D., and 1841, A.D., the scene is greatly changed. The actors remain, but play very different parts. Nor is it unimportant to observe, with reference to the question immediately before me, that the stream of Egyptian political history, however inmiscible the characters of the individual Mahomedan and Christian may be, has ever since this epoch been greatly affected by the currents of European diplomacy. I pass by earlier treaties and the treaty of Unkiar Skelessi in 1833, A.D., (a) which placing Turkey under the protectorate of Russia, has been superseded by a later treaty. Mohammed Ali and Ibrahim in 1834, A.D., pursued the scheme of uniting all the provinces belonging to the Caliphate under their Government; but discontents arose among the natives of Syria, which were not appeased by the disarmament of the Druses and of the population generally. These discontents revived the hopes of the Sultan, and in 1839, A.D., he sent another army into Syria, which was defeated at Nizib. But in 1840, A.D., Mohammed Ali was made aware that the European powers would not allow an Arab empire to be established on the ruins of the Ottoman state. England sent an agent to warn the Pacha of his danger, and in answer to a statement of his rights, the following language was used. "I have to instruct you," said Lord Palmerston (in a despatch bearing date Feb. 25, 1840) to Colonel Hodges, the agent employed, "on the next occasion on which Mohammed Ali shall speak to you of his rights, to say to his Highness, that you are instructed by your Government to remind him that he has no rights except such as the Sultan has conferred upon him; that the only legitimate authority which he possesses is the authority which has been delegated to him by the Sultan over a portion of the Sultan's dominions, and which has

been entrusted to him for the sole purpose of being used in the interest and in obedience to the orders of the Sultan; that the Sultan is entitled to take away that which he has given; that the Sultan may probably do so if his own safety should require it; and that if in such case the Sultan should not have the means of self-defence, the Sultan has allies, who may possibly lend him their means."—(*Correspondence relating to the affairs of the Levant*, presented to Parliament in 1841. Part I., p. 592.) And on the 18th July 1840, Lord Palmerston wrote to Colonel Hodges as follows: "You will see that orders have been given to the British fleet to act at once, by cutting off the communication between Syria and Egypt, and by helping the Syrians. If Mehemet Ali should complain of this, and of its being done without notice, you will remind him civilly that we are the allies of the Sultan in maintaining his allegiance, and to assist the Sultan against those of his subjects who are in revolt against him, as Mehemet Ali is; and that Mehemet Ali, not being an independent sovereign with whom the Four Powers have any political relations, these powers are not bound to give him any notice of their intended proceedings": (*Ibid*, pt. II., p. 5.) And again, on the 14th Sept. 1840 Lord Palmerston wrote, "with reference to your dispatch of the 17th Aug., I have to instruct you to state in writing to Mehemet Ali, if the state of things should render it necessary to do so, that Egypt is a portion of the dominions of the Sultan; that British subjects have certain rights and privileges as to the security of their persons, property, and commerce in all parts of the Ottoman Empire, by virtue of treaties concluded between the British Crown and the Porte; and that any subject of the Sultan, whether in a state of obedience to, or of revolt against, the authority of the Sultan, who should take upon himself in any way or in the slightest degree to molest British subjects, or to interfere with the exercise of their rights and privileges, would incur a heavy and most serious responsibility" (*Ibid*, pt. 2, p. 137). These passages from the despatches of the English Secretary for Foreign Affairs were not adverted to in the argument of counsel, I suppose, however, that, after such reference, it could not be contended that if at this epoch the question now before me as to the claim of the Khedive to be treated by England as a sovereign prince had arisen, such a claim could have been maintained in this court.

Have events subsequent to this epoch made this claim, then untenable, capable of being sustained? Surely not; for the principles of international policy enunciated in these despatches were fully carried into execution by the convention of 15th July 1840, (a) by which Austria, England, Prussia, and Russia concurred in the determination to protect the Porte by coercive measures, if necessary, against the Pacha. Whether the Pacha should be a sovereign prince or a subject, however powerful, of the Porte, seems to have depended on the result of this war. But the consequence of this European intervention was the rapid overthrow of the Pacha's power in Syria; after which the Sultan issued to the Pacha the

(a) Martens, *Nouveau Recueil de Traités* (Muhard), vol. xi., p. 655; *State Papers*, vol. xx., p. 1170; *Leurs, Annuaire Historique Universel*, 1834, App. p. 123.—Ed.

(a) See 5 *Hertault's Treaties*, pp. 535, 544; *State Papers*, vol. xviii., p. 342; *Muhard, Nouv. Recueil de Traités*, vol. I., p. 156.—Ed.

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firmans of 13th Feb. 1841, to which I will presently refer, and which, with the other firmans bearing on this subject, will be found in the appendix to this judgment. In 1849 Mohammed Ali, having ceased to rule on account of imbecility in the preceding year, died, and was succeeded by Abbas, who died in 1854; to him succeeded Saad, who died in 1863, and to him succeeded the present Khedive. In 1866, 1867, 1869, circumstances induced the Porte to issue additional firmans: (See appendix to judgment.) In these documents, as well as in the firman of 1841, are to be found the existing relations between the Porte and the Pacha of Egypt, now called the Khedive. The principal and most important of these relations may be said to form part of the present public law of Europe.

The first firman of 13th Feb. 1841 (of which I have only the French translation) begins by reciting the act of submission (*l'acte de soumission*) by the Pacha (see Annual Register, 1841, p. 285), and the experience which he has acquired during the time he has occupied the position of "Gouverneur de l'Egypte," and proceeds:—"Je t'accorde le gouvernement de l'Egypte dans ses anciennes limites, avec le privilège additionnel de l'hérédité." Certain conditions are added as to the succession of his heir in the direct male line, on the failure of which the Porte is to confer the government on some other person: (*Correspondence relating to the affairs of the Levant*, pt. 3, pp. 436, 437). And then follows this important qualification (p. 437): "Bien que les Pachas d'Egypte aient obtenu le privilège de l'hérédité ils doivent cependant être considérés quant à la préséance comme étant sur un pied d'égalité avec les autres Vizirs, ils seront traités comme les autres Vizirs de ma Sublime Porte, et recevront les mêmes titres que l'on donne aux autres Vizirs quand on leur écrit." All the treaties concluded, or to be concluded, between the Porte and friendly powers "seront complètement mis à l'exécution dans la province de l'Egypte aussi"; so also the fundamental laws contained in the *Hatti-Sheriff* of Gublandé (3 Nov. 1839. *State Papers*, vol. 31, p. 1239). All taxes are to be imposed and received in the name of the Sultan, and "attendu que les Egyptiens aussi sont les sujets de ma Sublime Porte," certain regulations are to be made to prevent their being harassed by the manner of their imposition. The amount of annual tribute is to be fixed. The army is not to exceed 18,000 men, "mais vu que les troupes de terre et de mer de l'Egypte sont instituées pour le service de ma Sublime Porte, il sera permis en temps de guerre de les porter au nombre qui aura été jugé convenable par ma Sublime Porte." The troops are to carry the same colours as those of the Porte. In the firman of 27th May 1860, which settled the mode of succession to the Pashalik, the Sultan speaks of the acts of the Viceroy "depuis la nomination au gouvernement général de l'Egypte, qui est l'une des provinces les plus importantes de mon Empire." In the firman of 15th June in the same year the Sultan settled the mode of appointing a Regency in case of the Viceroy dying before his son had attained the age of eighteen years. The firman of 8th June 1867 is addressed "to my illustrious Vizier Ismail Pacha, who now holds the rank of Grand Vizier, with the title of 'Khedive' of Egypt." It again refers to the fundamental laws which are to be observed in Egypt as

well as in other parts of the dominions of the Porte, but allows the Viceroy to frame certain regulations, and then proceeds (here I have only the English translation):—"In like manner, whilst all the treaties of the Sublime Porte must be respected in Egypt, an exception is made only as regards the customs duties, and as regards foreigners, in matters relating to the police, postal and transit services, for which full powers are given to thee to enter into special arrangements with foreign agents. But such arrangements must not take the form of treaties or conventions having any political signification or purport. And in the event of their being inconsistent with the principles laid down above, or opposed to my original sovereign rights, it will be necessary to note them as null and void." On 21st April 1861 a treaty of commerce and navigation between Her Majesty and the Sultan was signed at Kanlida. (a) By the 20th Article it is provided that "The present treaty shall receive its execution in all and every one of the provinces of the Ottoman empire; that is to say, in all the possessions of his Imperial Majesty the Sultan, situated in Europe or in Asia, in Egypt and in the other parts of Africa belonging to the Sublime Porte, and in Servia, and in the United Principalities of Moldavia and Wallachia." (See Hertzelet's *Treaties*, vol. xi., pp. 561, 567.) I have been informed that the British Consul General in Egypt does not obtain an *esquadrator* from the Viceroy, but on his appointment obtains the *berat* or *esquadrator* from the Porte. The result, then, of the historical inquiry as to the status of his Highness the Khedive is as follows: That in the firmans, whose authority upon this point appears to be paramount, Egypt is invariably spoken of as one of the provinces of the Ottoman empire. That the Egyptian army is regulated as part of the military force of the Ottoman empire. That the taxes are imposed and levied in the name of the Porte. That the treaties of the Porte are binding upon Egypt, and that she has no separate *jus legationis*. That the flag for both the army and navy is the flag of the Porte. All these facts, according to the unanimous opinion of accredited writers, are inconsistent and incompatible with those conditions of sovereignty which are necessary to entitle a country to be ranked as one among the great community of states. Against this array of negative proof is to be set the solitary circumstance that the office of the Khedive is hereditary. It requires but little consideration to see that this peculiarity cannot affect the question. Egypt remains a province of an empire, and does not become an empire, because her Viceroy is hereditary. The Viceroy does not become a sovereign prince because his sovereign permits him to transmit the vicereignty to his descendants in the direct male line. The hereditary character does not confer on the holder, in this case, the right of making war and peace, of sending an ambassador, or of maintaining a separate military or naval force, or of governing at all, except in the name and under the authority of his sovereign. The hereditary character of the vicereignty may make the viceroy the chief subject of the Porte, but he is still a subject prince, and not a sovereign prince or reigning sovereign even "of a semi-sovereign

(a) See *Archives Diplomatiques*, 1961, vol. 4, page 5.—Ed.

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state," according to the terms of the petition on protest. (a)

I have one more observation to make before I leave this branch of the subject. It cannot be urged in favour of the exemption of the *Charkieh*, that, though she may have been erroneously claimed as a public vessel of the Egyptian government, it is substantially the same thing if she be a public vessel of the Ottoman government, of which the government of Egypt is a part; because at the very beginning of these proceedings I directed the Registrar to write the following letter to the ambassador of the Porte:—

Admiralty Registry, Doctor's Commons,
12th Nov. 1872.

Your Excellency.—I am directed by the Judge of the High Court of Admiralty to apprise you that a cause of damage on behalf of the owners of a vessel called the *Batarier* has been instituted in this court against a vessel called the *Charkieh* or *Charkish*. The Judge, having received an intimation that the vessel so proceeded against is alleged to belong to the royal navy of the Ottoman Empire, and therefore not amenable to the jurisdiction of this court, desires that your Excellency should be informed of the institution of the suit in question, in order that the proper legal steps may be taken for establishing the fact that the vessel does belong to the Ottoman navy, if such be the case.—I have the honour to be, &c.,

H. A. BATHURST,
Assistant Registrar.

His Excellency Musurus Pacha,
Ambassador Extraordinary and Plenipotentiary
from the Ottoman Empire,
1, Bryanston Square.

No answer has been sent to this letter, and no intervention of any sort has taken place on behalf of the Porte.

Thereupon this argument occurs:—It cannot be denied that for the abuse of the privilege of the sovereign or the ambassador some remedy must be found. It has been shown that the Khedive has six or seven ships acting as merchantmen, for whom he claims the same privilege as for the *Charkieh*; and the number may be indefinitely increased. It has been said that the remedy is to be found in the application to the sovereign to abate the abuse. Any such application must be made in the present instance to the Porte. But the ambassador of the Porte asserts no such claim. It is the governor of a province of the state that insists upon the privilege. To communicate directly with the governor in this matter would be to derogate from the dignity of his Sovereign, and to place in the rank of a Sovereign a governor whom his own sovereign has placed in the rank of a subject.

Lastly, no treaty ever having been made with

His Highness, no ambassador ever received from or sent to him, British consuls in Egypt receiving no *assecurator* from him, there being, in other words, no *de facto* recognition of His Highness as a sovereign by our Government, has there been any recognition *de jure* of him in this capacity? The Court of Chancery, when a plaintiff averred in his bill that a certain republic in Central America had been recognised as an independent government, put itself in communication with the Foreign Office, and after such communication declared itself authorised to state that the republic in question had never been recognised by the Government of this country, and on the ground that what was pleaded was "historically false" allowed a demurrer to the bill: (*Taylor v. Barclay*, 2 Sim. 221.) I have communicated with the Foreign Office, and have received the following answer to my questions, viz.: "That the Khedive has not been and is not now recognised by Her Majesty as reigning Sovereign of the State of Egypt." "He is recognised by Her Majesty's Government as the hereditary Ruler of the Province of Egypt under the supremacy of the Sultan of Turkey."

Upon all these facts I have arrived at the conclusion that, independently of any other consideration, His Highness the Khedive has failed to establish his claim to exempt his vessel from the process of the Court. I am not deterred from arriving at the conclusion by the alleged precedents which have been cited to me. The first is a French decision, which was cited to me from Phillimore's *International Law*, Vol. II., p. 138. It was delivered by the Tribunal Civil de la Seine, which tribunal carries with it a respectable though not an overwhelming authority. That tribunal declined to entertain an action against Mehemet Ali, as Viceroy of Egypt, for 100,000 francs, alleged to be due to M. Solan for his services respecting a school at Cairo. The defence was conducted principally upon the ground that a foreign government (gouvernement étranger) could not be sued in an action of this description, which appears to have been founded on an attachment of goods belonging to the Egyptian Government, and I observe that the principal ground on which the judgment is rested is as follows: "Attendu que toutes les expressions de la demande lui donnent le caractère personnel et révèlent qu'elle est dirigée contre le gouvernement Egyptien, et non contre un particulier." The judgment does not seem to me to go beyond the principles that an action will not lie against a foreign government in a matter of state policy; and it may well be that the Egyptian Government in this matter were exercising functions coming within the scope of the authority which the Porte has delegated to the Viceroy. Some other judgments (three apparently) were cited from cases not reported before the Common Pleas in 1866 and 1867. (*Melanidis v. Immanuel Pacha*, *ubi sup.*) An application was made to the court on behalf of the Pacha of Egypt to prohibit proceedings in the Mayor's Court. This case appears to me clearly to have turned upon a question relating to the authority of the Mayor's Court. A rule nisi having been obtained, and no case subsequently having been shown, the rule was made absolute as a matter of course. In the other cases prohibition was applied for upon two grounds—want of jurisdiction in the Mayor's Court, and the Pacha's being a Sovereign Prince; and in these cases, as in the other, no opposition having been

(a) If a newspaper telegram is to be relied upon, the Sultan, on June 11, 1873, granted to the Khedive a new firman, which confirms all the former privileges extended to the Egyptian Government respecting the interior administration of Egypt; and further gives power to the Khedive to conclude commercial treaties with foreign Powers, to conclude conventions for settling the relations between foreigners and the Egyptian Government, to provide by every means for the defence of Egypt, and to maintain as many troops as he may deem necessary for the purpose; the Khedive is only required to obtain the authority of the Porte before acquiring any iron-clad war vessels. (See this *Times*, June 16, 1873.) How far this will alter the position of the Khedive is too large a question to discuss here, but it seems probable that one result will be that the Khedive will acquire, to some extent at least, the *jus legationis* for the purpose of concluding the treaties and conventions mentioned. If so he would acquire a condition of sovereignty upon which great stress is laid by the learned judge in the admirable judgment now reported.—En.

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made, the rule was granted as a matter of course, without any argument or appearance on the other side. I cannot find anything in these alleged precedents which ought to obstruct the conclusion at which I have arrived and which I have stated.

But I am unwilling to leave the elaborate argument which has been addressed to me on the other parts of the case without the expression of my opinion; and I will proceed to consider in the second place whether, assuming the Khedive to be entitled to claim exemption as a Sovereign Prince, he is entitled by virtue of that status to claim the exemption of this ship from the jurisdiction of this court. In order thoroughly to examine this question as to the Immunity of Sovereign Princes and their representatives from the jurisdiction of the tribunals of the state in which they happen to be, and to avoid the consequences of a false theory on this subject, it is expedient to state with precision the foundation upon which this privilege rests. Upon principles of general jurisprudence the presence of a person or of property within the limits of a state founds the jurisdiction of the tribunals of that state. "Subjunctio autem," as Bynkershoek says, "duplex est, altera personarum, altera rei, in imperio quo de agitur sita, et ex utraque forum sortimur." (*De Foro Leg.* c. 2, Opera Minora, edit. 1730, p. 435). The sovereign prince or his representative is exempted from the operation of this principle, absolutely so far as his person is concerned, and with respect to his property at least so far as that property is connected with the dignity of his position and the exercise of his public functions. Upon what grounds is this exemption allowed? Not upon the possession on behalf of the sovereign of any absolute right in virtue of his sovereignty to this exemption; such a right on his part would be incompatible with the right of the territorial sovereign; and not, as is sometimes carelessly said, upon the ground that he and his property are to be considered as still remaining in his own territory. This is indeed the fiction of law expressed in the term "extritoriality," by which the nature of the immunity is illustrated; but it is illogical and inaccurate to consider it as the ground of that immunity. The true foundation is the consent and usage of independent states, which has universally granted this exemption from local jurisdiction in order that the functions of the representative of the sovereignty of a foreign state may be discharged with dignity and freedom, unembarrassed by any of the circumstances to which litigation might give rise. Bynkershoek says:—"Quod legati fori prescriptione tantum, non ratio est, ne impediantur legatio, hoc est, ne legati persona principi suo fiat intus; at intus non erit, bonis detentis, intus non erit, quamvis in foro nostro litiget, quamvis vincatur, quamvis ea ipsa bona, pignori capta, in causam iudicati, distrahantur, et inde satisfiat creditoribus. Non ex personae, sed ex bonorum subiectione id iudicium subiecit, idque perinde agatur, atque si legatus apud nos legatus non esset." (*De Foro Leg.* c. 16, p. 512). The same doctrine is laid down in the case of *The Schooner Exchange v. McFaddon* (7 Cranch, U. S. Sup. Ct. Rep. 116), decided in 1812 by the Supreme Court of the United States, and the case of *The Santissima Trinidad* (7 Wheaton, U. S. Sup. Ct. Rep. p. 352) decided by the same tribunal in 1822. As far as my researches have extended, I cannot find any coun-

try in which this immunity has been carried to a greater length or more favourably considered than in England, from the time at least of the passing of the statute 7 Anne, cap. 12, in the year 1708, to the decision of the Queen's Bench in 1859 in the case of *The Magdalena Steam Navigation Co. v. Martin* (2 Ell. & Ell. 94; 28 L. J., Q. R. 310). The cases principally relied on before me have been *Barbui's* case in 1734, decided by Lord Chancellor Talbot (*Os. temp. Talb.*, 281), as to which it is enough to state the observation of C. J. Erie, in the *Magdalena Steam Navigation Co. v. Martin*: "All that is said about an ambassador in the judgment in that case is extra-judicial. The decision was that the applicant, being only a consul, was not entitled to the privilege, whatever that might be of an ambassador." The cases of *Triquet v. Bath*, decided by Lord Mansfield in 1764 (3 Burr. 1478), *Heathfield v. Chilton*, decided by the same authority in 1767 (4 Burr. 2016), are, both of them, remarkable for Lord Mansfield's observations upon the statute of Anne. In the first case he observes: "This privilege of foreign ministers and their domestic servants depends upon the law of nations. The Act of Parliament of 7 Anne, c. 12, is declaratory of it. All that is new in this Act is the clause which gives a summary jurisdiction for the punishment of the infractors of this law." And in the second case he says: "The privileges of public ministers and their retinue depend upon the law of nations, which is part of the common law of England; and the Act of Parliament of 7 Anne, c. 12, did not intend to alter, nor can alter, the law of nations." But, in truth, the whole law upon this subject, so far as English decisions are concerned in it, will be found completely exhausted in the arguments and decisions in the cases of *Taylor v. Best*, decided by the Court of Common Pleas in 1854 (14 C. B. 437) and the *Magdalena Steam Navigation Co. v. Martin* (2 Ell. & Ell. 94), decided by the Court of Queen's Bench in 1859. In the former case the court held that a secretary of Legation might voluntarily abandon his privilege, and that in a case where he was sued jointly with others and appeared to the process, and allowed the suit to go on to an advanced stage without offering any objection, and where there did not appear to be any intention on the part of the plaintiff to interfere with either the person or the property of the ambassador, and where the action might proceed to its ultimate termination without any such molestation or interference, they could not give effect to a claim of privilege. In the second case the defendant pleaded his privilege as envoy, and, among other things that he had not waived or disintitiled himself to the exemptions appertaining to a public minister. He had been a shareholder in a certain company, at the winding-up of which he was called upon to contribute in respect of his shares. Lord Campbell delivered an elaborate judgment, which concluded in these words: "It certainly has not hitherto been expressly decided that a public minister duly accredited to the Queen by a foreign state is privileged from all liability to be sued here in civil actions, but we think that this follows from well-established principles, and we give judgment for the defendant." The judgment was mainly founded upon the principle laid down by Grotius (*De Jure Belli et Pacis*, lib. 2, c. 18, § 9), *Omnis exactio abesse a legato debet*;

and it was holden that the service of process upon him and the necessities of a defence could not take place, to use Lord Campbell's words, "without *coactio*." Bynkershoek agrees with the opinion of Grotius expressed in the general terms just cited, but appears to differ from Lord Campbell as to what would amount to *coactio*, and to say the least of it to doubt very much whether the *ius coactio* could be so considered. The result of these decisions appears to me to be that the ambassador is personally exempt from the service of all process in a civil cause and from any action which renders such service necessary. I should observe here that the argument in behalf of the defendant has been conducted upon the principle that the law as to the privileges of the ambassador applies with equal force to the sovereign, and I agree with the proposition. "Major non est sanctitas," says Bynkershoek, "mandatarii quam mandantis, si res suas ipse velit agere." (*De Foro Leg.* c. 3, p. 445). But how is the argument to be applied to this case, in which the person claiming the rights of a sovereign can neither send nor receive an ambassador?

The conclusion, however, to which I have come, as to the privileges of an ambassador by no means disposes of the question now before me. It remains to be considered whether there may not be a proceeding *in rem* (a mode of proceeding which courts of Admiralty have adopted from the civil law) against property of the sovereign or ambassador, which is free from the objections fatal to the other modes of procedure which I have mentioned. It is worthy of observation that the counsel for the ambassadors in the cases both of *Taylor v. Best* and *The Magdalena Steam Navigation Company v. Martin* were careful to guard themselves from saying that such a suit might not be instituted. "All the authorities," says Mr. Wille, who certainly would have omitted no point in favour of his client, "cited on the other side may be explained by observing the distinction between our laws and the laws of those countries where the civil law obtains. There is nothing in this country analogous to the proceeding of those courts *ad fundandam jurisdictionem*, except the proceeding by what is called foreign attachment in the Lord Mayor's Court of London. Where the civil law prevails, the proceeding may be had against the person of the defendant if within the jurisdiction, or, if not, against his goods or his lands, if any, and the suit may go on without in any way touching the person; the proceeding is *in rem*." And Sir Fitzroy Kelly, counsel for the ambassador in the last case, seems to have admitted that proceedings taken *in rem* would stand upon a different principle. So Bynkershoek, "Sollicit in regionibus, ubi ob bona convenimus, et ex eorum arresto forum sortimur, nullas dubita, quin et legatorum bona arresto detineri, et per hoc ipsi in *jus vocari* possint. Bona dico, sive immobilia, sive mobilia, dummodo neque ad personam ejus pertinent, neque tanquam legatus possideant, uno verbo, sine quibus legationem recte obire potest. Hoc tamen, ob personarum sanctitatem, temperamento, ne quid plus capiatur quam legatus debet, et ne quid quod ille non civiliter possidet, et si quod captum est, queratur, ad legati personam minusve pertinet, necne semper pro legato benignior fiat interpretatio." (*De Foro Leg.* c. 16, p. 510.) In the judgment in *Taylor v. Best*, Jervis, C.J. uses

this language: "It is said—and perhaps truly said—that an ambassador or foreign minister is privileged from suits in the courts of the country to which he is accredited, or, at all events, from being proceeded against in a manner which may ultimately result in the coercion of his person, or the seizure of his personal effects necessary to his comfort and dignity, and that he cannot be compelled *in invitum*, or against his will, to engage in any litigation in the courts of the country to which he is sent. But all the foreign jurists hold that if the suit can be founded without attacking the personal liberty of the ambassador, or interfering with his dignity or personal comfort, it may proceed. Various passages have been cited to show that in countries where the civil law prevails, and where jurisdiction can be founded by a proceeding *in rem* in the first instance, where there are houses or lands which are immovable, that may be taken to found the jurisdiction, the suit may proceed. Moveable goods, too, which are unconnected with the personal comfort and dignity of the ambassador may be taken for the same purpose." And in *The Magdalena Steam Navigation Company v. Martin*, Lord Campbell, after quoting the authority of Bynkershoek, says: "In countries where there may be a citation by seizure of goods, if an ambassador loses his privilege by engaging in commerce, he not only may be cited, but all his goods unconnected with his diplomatic functions may be arrested to force him to appear, and may afterwards, while he continues, be taken in execution on the judgment." I think, therefore, that I am not prevented from holding, what it appears to me the justice of the case would otherwise require, that proceedings of this kind *in rem* may, in some cases at least, be instituted without any violation of international law, though the owner of the *res* be in the category of persons privileged from personal suit.

In the passage from Bynkershoek which I have already cited, it will appear what kinds of property cannot, in the case of a sovereign or ambassador, be subject to a proceeding *in rem*; and the principles to be collected from various other passages in his great work, *De Foro Legatorum*, combine to establish this proposition of international law, namely that a proceeding *in rem* cannot be instituted against the property of a sovereign or ambassador if the *res* can in any fair sense be said to be connected with the *jus corona* of the sovereign, or the discharge of the functions of the ambassador. Upon these principles ships of war cannot be seized by a creditor of the sovereign to whom they belong; and we learn from Bynkershoek that three vessels belonging to the King of Spain, having been seized by his creditors in the port of Flushing in 1668, were ordered to be released by the States-General, it being suggested that the remedy of the creditors was to obtain an order for reprisals from the state: (*De Foro Legatorum*, c. 4, p. 448.) It is, however, by no means clear that a ship of war to which salvage services have been rendered may not *jure gentium* be liable to be proceeded against in a Court of Admiralty for the remuneration due to such services. It is very remarkable that Lord Stowell declined to pronounce any opinion upon this point in the case of *The Prince Frederik* (2 Doda 451), though it appears that he had upon principles of English law previously declined to entertain a suit of this kind attempted to be instituted by a British subject against a British man-of-war: (*The Comus*,

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2 Dods. 464.) On the same principle the American Court has holden that a lien allowed by the law against a private person cannot be enforced against a vessel the title of which has vested in the United States: (*Briggs v. Light Boats*, 11 Allen, 93 Massachusetts Rep. 157.) Upon the same principle, in *Wadsworth v. The Queen of Spain* (17 Q. B. 171) and *De Haber v. The Queen of Portugal* (17 Q. B. 196), proceedings in foreign attachment instituted against property belonging to these sovereigns in their public capacity by the holders of Spanish and Portuguese bonds were stayed by prohibition. In *The United States v. Wilder* (3 Sumner's U. S. First Cir. Rep. 313) a question arose whether property belonging to the government was liable to make contribution in a case of general average. Mr. Justice Story said: "It is said that in cases where the United States are a party, no remedy by *ex re* lies against them for the contribution; and hence the conclusion is deduced that there can be no remedy in *rem*. Now, I confess that I should reason altogether from the same premises to the opposite conclusion. The very circumstance that no suit would lie against the United States in its sovereign capacity would seem to furnish the strongest ground why the remedy in *rem* should be held to exist." And again, "I cannot therefore but think that the circumstances that the United States can in no other way be compelled to make a just contribution of its share in the general average, so far from constituting a ground to displace the lien created by the maritime law, does in fact furnish a strong reason for enforcing it." The learned judge then referred to the cases of *The Comus* (2 Dods. Adm. Rep. 464) and *The Prince Frederik* (2 Dods. Adm. Rep. 451), and observed: "A distinction was taken in that case, which indeed has been often taken by writers on public law, as to the exemption of certain things from all private claims; as, for example, things devoted to sacred, religious and public purposes; things *extra commercium et quorum non est commercium*, that distinction might well apply to property like public ships of war, held by the sovereign *jure coronæ*, and not be applicable to the common property of the sovereign of a commercial character, or engaged in the common business of commerce." And again he says: "In the case of *The Schooner Exchange* (7 Cranch Rep. 116) it was considered by the court that the ground of exemption of the ships of war of a foreign sovereign coming into our ports from all process was founded upon the implied assent of our government. But it was not decided that the other property of a foreign sovereign, not belonging to his military or naval establishment, was entitled to a similar exemption." A strong illustration of the distinction between the jurisdiction in *rem* and in *personam* is supplied by the decision of Mr. Justice Story in the case of *Clark v. New Jersey Steam Navigation Company* (1 Story's U. S. First Circuit Rep. 528). "The real point of controversy," he says, "whether the respondent, being a corporation created by and having its corporate existence and organisation in the state of New Jersey, is, as a foreign corporation, liable to a suit in *personam* in the Admiralty in this district, not directly, but indirectly through its attachable property here, so as to compel the appearance of the corporation to answer the suit, or at all events to subject the property attached to the final judgment and decree of the court. The

whole argument turns upon this proposition, that there is a distinction between the case of a private person and that of a corporation. The former is suable in the Admiralty by process of attachment, in a suit in *personam*, against his property found in the district, although he may not personally be found within the district; whereas a corporation is liable to be sued only in the state where it has its corporate existence, and from which it derives its charter, and not elsewhere, although its property may be found in the district where the suit is brought." Then follow these significant words: "If the present were a suit in *rem* against the property to enforce a right of property or a lien, or to subject it, as the offending thing"—the expression is remarkable—"as in cases of collision, to the direct action of the court, the case could not admit of any real doubt; for in all proceedings in *rem*, the court having jurisdiction over the property itself, it is wholly unimportant whether the property belongs to a private person or to a corporation, to a citizen or to a foreigner, to a resident or to a non-resident, to a domestic or to a foreign corporation. In each and in every such case the jurisdiction is complete and conclusive."

I am disposed to hold that, within the ebb and flow of the sea, in the case of salvage the *obligatio ex quasi contractu* attaches *jure gentium* upon the ship to which the service has been rendered, and in the case of collision the *obligatio ex quasi delicto* attaches *jure gentium* upon the ship which is the wrong-doer, whatever be her character, public or private, and such, I think, was the inclination of Lord Stowell's mind in the case of the *Prince Frederik*, and in the case of the *Swift* (1 Dods. Adm. Rep. 339), to which I will presently advert. But it is not necessary in the present case to travel to this goal, because a nearer one is at hand. This ship cannot claim exemption as a ship of war. She carries indeed the flag of the Porte, but she is not equipped in any sense for war, nor does she pretend to be so. Apart from the question of liability *jure gentium*, to which I have adverted, I am not prepared to deny that the private vessel, for instance, the yacht of the Sultan, though equipped for pleasure and not for war, would be entitled by international comity, operating (at least so long as it is not withdrawn by the State conceding it) as international law, to the same immunity as a ship of war; though *dicta* to the contrary may be found in some of the writings of some jurists. But it seems to me idle to contend, in the face of the evidence before me, that these six or seven ships are not trading vessels, to all intents and purposes, though they carry mail bags. But again I am not obliged to predicate this character of all these vessels; the one before me is actually chartered to a British subject, and has been by him publicly advertised like any other merchant vessel to carry cargo, for which he is to receive the freight. That this cargo is liable to a lien for salvage has not been denied; but suppose under the 24 Vict. c. 10 the owners of the cargo were to bring a suit in *rem* against the ship for damage to the cargo, must that suit be dismissed, and justice so far denied, because the ship was only chartered, and was not, according to the technical term of English law, demised to the British subject, and therefore remains the property of the Khedive? Such has been necessarily the contention of the counsel for the

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Khediye. I cannot assent to it; the mere statement appears to me to carry with it a refutation of the argument.

It was ingeniously argued by Mr. Cohen that it mattered not whether the suit was *in rem* or *in personam*; because the object of the *jus in rem* was to enforce the *jus in personam* and the cases of *The Druid* (1 W. Rob. 399) and *The Thetis* (3 Mar. Law Cases, O.S., 358) were cited in support of this proposition. But this argument in its relation to the present case appears to me fallacious. The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiation between Governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state; and if the suit takes a shape which avoids this inconvenience, the object both of international and of ordinary law is attained;—of the former, by respecting the personal dignity and convenience of the sovereign; of the latter, by the administration of justice to the subject.

The universally acknowledged exceptions to the general rule of the sovereign's immunity when examined prove the truth of this proposition. For instance, the exemption from suit is admitted not to apply to immovable property. One reason may be that the owner of such property has so incorporated himself into the jural system of the state in which he holds such property, that the argument of general inconvenience to states from allowing the exemption outweighs the argument from convenience on which the exemption in other matters is bottomed. But another reason surely is that which seems to be suggested by Jervis C. J., in *Taylor v. Best*, that such a suit can be carried on without the necessity of serving process upon the sovereign, or of interfering in any way with such personal property as may be requisite for the due discharge of his functions. The exemption must be taken away for one of three reasons, either those which I have suggested, or, a third, that the acquisition of immovable property amounts to a waiver of privilege. Take another instance: the sovereign who is plaintiff in a suit cannot escape from the necessity of answering interrogatories, and being subject to the service of process, and to counter-demands, such as the *reconventiones* of the Roman law; which law justly says, "Qui non cogitur in aliquo loco judicium pati, si ipse ibi agit, cogitur excipere actiones et ad eundem iudicem mitti." (Dig. 1 v. t. 1-22.) So the Court of Chancery has decided that, though it will not make an order against an ambassador who does not submit to its jurisdiction, yet it will restrain a third party from giving to him a fund, the right to which is in dispute, notwithstanding his title to the fund may be absolute in law: (*Gladstone v. Musurus Bey*, 32 L. J., N.S., Ch. 155; 7 L. T. Rep. N. S., 477.) So, quite recently, in 1872, in the case of *Larivière v. Morgan* (L. Rep. 7 Ch. App. 550), Lord Chancellor Hatherley decided that where a foreign government has made a contract in this country, and has lodged money in the hands of agents in this country for payment of the sums to become due under the contract, he would not refuse relief to the contractor because the contract was with a foreign

government, nor because the foreign government would not appear before him; and he ordered the agents to bring the money into court, to be paid out to the contractor on his proving that he had performed his part of the contract. All these instances of exception from the general rule of the Sovereign's immunity seem to be founded upon the principle which I have stated: and, if so, why should not such proceedings *in rem* as have been instituted in this case be in accordance with international law? For it must be remembered that this is the law which I have to apply to this suit. No disrespect is shown, no injustice is done to the sovereign, while justice is done to the private suitor.

Thirdly, assuming again that the Khedive has a *status* which entitles him to the privilege claimed, has he by his conduct waived or forfeited that privilege? In the case of *The Swift* (1 Dods. Adm. Rep. 339), Lord Stowell had to consider whether the king was bound by the Navigation Acts; and after stating some of the difficulties attending the solution of this question, he says:—"The utmost that I can venture to admit is, that if the king traded, as some sovereigns do, he might fall within the operation of these statutes. Some sovereigns have a monopoly of certain commodities, in which they traffic on the common principles that other traders traffic: and, if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffic to the general rules by which all trade is regulated." Bynkershoek, when he wrote his celebrated treatise "*De Foro Legatorum*," complained (cap. xiv. *de legato mercatore*) that in his day the privilege of the ambassador had been greatly abused to cover the trade of the merchant. I must say that if ever there was a case in which the alleged sovereign (to use the language of Bynkershoek) was "*strenuus mercatorem agens*," or in which, as Lord Stowell says, he ought to "traffic on the common principles that other traders traffic," it is the present case; and, if ever a privileged person can waive his privilege by his conduct, the privilege has been waived in this case. It was not denied, and could not be denied, after the evidence, that the vessel was employed for the ordinary purposes of trading. She belongs to what may be called a commercial fleet. I do not stop to consider the point of her carrying the mails, for that was practically abandoned by counsel. She enters an English port and is treated in every material respect by the authorities as an ordinary merchantman, with the full consent of her master; and at the time of the collision she is chartered to a British subject, and advertised as an ordinary commercial vessel. No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorise a sovereign prince to assume the character of a trader, when it is for his benefit, and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character; while it would be easy to accumulate authorities for the contrary position (see especially Klüber, *Europ. Völkerrecht*, § 210, and authorities cited in note).

Upon all grounds therefore, namely, First, that his Highness the Khedive, however exalted his position and distinguished his rank, has failed

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to establish that he is entitled to the privileges of a sovereign prince, according to the criteria of sovereignty required by the reason of the thing, and by the usage and practice of nations as expounded by accredited writers upon international jurisprudence. Secondly, that on the assumption he is entitled to such privilege, it would not oust the jurisdiction of this court in the particular proceeding which has been instituted against this ship. And, thirdly, that assuming the privilege to exist, it has been waived with reference to this ship by the conduct of the person who claims it. I pronounce against the protest, and I think I must in justice to the suitor give him the cost of these proceedings. Having regard to the importance of the case, if any leave of the court be required in order to appeal from this decision, I will readily give the requisite permission.

Protest overruled.

APPENDIX.

Firman du 13 Février 1841.(a)

L'acte de commission que tu viens de faire, les assurances de fidélité et de dévouement que tu as données, et les intentions droites et sincères que tu as manifestées tant à mon égard que dans les intérêts de ma Sublime Porte, sont parvenues à ma connaissance souveraine et m'ont été fort agréables. En conséquence, et le rôle et la sagacité qui te caractérisent, ainsi que l'expérience et les connaissances que tu as acquises dans les affaires de l'Égypte pendant le long espace de temps que tu as occupé le poste de gouverneur de l'Égypte, donnant lieu à croire que tu auras acquis des droits à la faveur et à la confiance que je t'accorde, c'est-à-dire, que tu en connaîtras toute la portée et toute la reconnaissance que tu devras en avoir, que tu t'appliqueras à faire en sorte que ces dispositions passent à tes fils et à tes neveux, je t'accorde le gouvernement de l'Égypte dans ses anciennes limites telles qu'on les trouve dans la carte qui t'est envoyée par mon Grand Vizier actuellement en fonctions, munie d'un cachet, avec le privilège additionnel de l'hérédité et avec les conditions suivantes :

Déormais, quand le poste sera vacant, le gouvernement de l'Égypte échoira en ligne droite, de l'aîné à l'aîné, dans la race masculine parmi les fils et les petits-fils. Quant à leur nomination, elle se fera de la part de ma Sublime Porte. Si jamais le destin voudra que la ligne masculine soit éteinte, comme dans ce cas ma Sublime Porte devra conférer le gouvernement de l'Égypte à une autre personne, les enfants mâles ou des filles des gouverneurs de l'Égypte n'auront aucun droit, aucune capacité légale à la succession au gouvernement. Bien que les Pachas d'Égypte ayant obtenu le privilège de l'hérédité, ils doivent cependant être considérés, quant à la préséance, comme étant sur un pied d'égalité avec les autres vizirs, ils seront traités comme les autres vizirs de ma Sublime Porte, et recevront les mêmes titres que l'on donne aux autres vizirs quand on leur écrit. Les principes fondés sur les lois de sûreté de la vie, de la sûreté de la propriété, et de la conservation de l'honneur, principes consacrés par les ordonnances saluaires de mon Hatti Shérif de Gallabat(b), sont les traités conclus et à conclure entre ma Sublime Porte et les puissances amies, seront complètement mis à exécution dans la province de l'Égypte aussi ; et tous les règlements faits et à faire par ma Sublime Porte seront aussi mis en pratique en Égypte, en les conciliant le mieux qu'on pourra avec les circonstances locales et les principes de la justice et de l'équité. En Égypte, tous les impôts, tous les revenus, seront perçus et recueillis en mon nom souverain ; attends, cependant, que les Égyptiens aussi

sont les sujets de ma Sublime Porte, et afin qu'un jour ils ne soient pas vexés, la dime, l'a droite, et les autres impôts qui seront perçus, le seront conformément au système équitable adopté par ma Sublime Porte, et l'on prendra soin de payer, dès que le temps de paiement sera venu, sur les droits de douane, sur la capitation, sur les dîmes, sur les revenus et les autres produits de la province de l'Égypte, le tribut annuel dont le quantum est inséré et précisé dans un autre firman impérial(c). Étant d'usage d'envoyer tous les ans d'Égypte des vivres ou nature aux deux Villes Saintes, on continuera à envoyer à chaque endroit séparément les vivres et les autres objets, quels qu'ils puissent être, qui y ont été envoyés jusqu'à présent. Comme ma Sublime Porte après la résolution d'améliorer la monnaie, qui est l'âme des opérations de la société, et de le faire de manière à ce que désormais il ne puisse y avoir de variation ni dans l'aloï, ni dans le prix, je permets que l'on batte monnaie en Égypte ; mais les monnaies en or et en argent que je te permets de battre porteront mon nom, et seront tout-à-fait semblables, sous les rapports du titre, des prix et de la forme à celles que l'on frappe ici.

En temps de paix, 18,000 hommes suffiront pour le service intérieur de la province de l'Égypte ; il ne sera pas permis d'en augmenter le nombre. Mais vu que les troupes de terre et de mer de l'Égypte sont instituées pour le service de ma Sublime Porte, il ne pourra en temps de guerre, de les porter au nombre qui aura été fixé convenable par ma Sublime Porte. On a adopté le principe que les soldats employés dans les autres parties de mes états serviront pendant cinq ans, au bout duquel terme ils seront échangés contre des recrues. Cela étant, il faudrait qu'à cet égard l'on suivit le même système en Égypte aussi. Mais par rapport à la durée du service, on s'adaptera aux dispositions des habitants, en observant à leur égard ce que l'équité exige. Il sera envoyé chaque année à Constantinople 400 hommes pour remplacer d'autres. Il n'y aura aucune différence entre les marques distinctives et les drapeaux des troupes qui seront employées là, et les marques distinctives et les drapeaux des autres troupes de ma Sublime Porte. Les officiers de marine Égyptiens auront les mêmes marques distinctives de grades, et les Égyptiens auront les mêmes pavillons que les officiers et les bâtiments d'ici.

Le Gouverneur d'Égypte nommera les officiers de terre et de marine jusqu'au grade de Colonel. Quant aux nominations aux grades supérieurs à celui de Colonel, c'est-à-dire de Pachas Miri Itri (Généraux de Brigue) et de Pachas Ferik (Généraux de Division), il faudra absolument en demander la permission, et prendre mes ordres là-dessus. Dorénavant les Pachas d'Égypte ne pourront pas faire construire des bâtiments de guerre sans en avoir demandé la permission de la Sublime Porte, et en avoir obtenu une autorisation claire et positive.

Attends que chacune des conditions arrêtées comme ci-dessus est adhérente au privilège de l'hérédité, et une seule d'elles n'est pas exécutée, ce privilège de l'hérédité sera aussitôt aboli et annulé. Telle étant ma volonté suprême sur tous les points ci-dessus énoncés, toi, tes enfants et tes descendants, reconnaissez de cette haute faveur souveraine, vous vous empresserez toujours à exécuter scrupuleusement les conditions établies, vous vous garderez bien d'y contrevenir, vous aurez soin d'assurer le repos et la tranquillité des Égyptiens en les mettant à l'abri de toutes leçons et de toutes vexations, vous ferez des rapports ici, et demanderez des ordres sur les affaires importantes qui concernent ces pays là, étant à ces fins que le présent firman impérial qui est orné de mon rescrit Souverain a été écrit et vous est envoyé

Imperial Firman to the Viceroy of Egypt, settling the Mode of Succession to the Pashalik, and granting certain Privileges.(b)

(Après les titres d'usage.) (27th May 1866.)

Ayant pris connaissance de la demande que tu m'as soumise, et dans laquelle tu me fais connaître que la modification de l'ordre de succession établi par le Firman

(a) See Leur, *Annuaire Historique Universel*, 1841, App. p. 127, where is given a document almost identical with this, entitled, "Hatti-Sheriff du Sultan qui confère à Méhémet-Aly l'hérédité du gouvernement de l'Égypte, moyennant certaines conditions," but the date is there Feb. 18, 1841.—Ed.

(b) See *State Papers*, vol. xxi., p. 1239; Leur, *Annuaire Historique Universel*, 1839, App. p. 102, where the document is given under date of Nov. 3, 1839.—Ed.

(c) See Nonveau Recueil Général de Traités de Martens, Samwer, vol. xv., p. 490, where is given, "Firman adressé en 1841, par le Sultan au vice-roi d'Égypte, fixant le tribut à payer."—Ed.

(d) See *State Papers*, vol. lvi., p. 1167; *Archives Diplomatiques*, 1866, tom. 4, p. 170.—Ed.

adressé, en date du mois de Behiul-Akhir, 1257, (a) à son aïeul Mehmed Ali Pacha pour lui conférer le Gouvernement à titre d'hérédité de la Province d'Egypte, et revêtu de son Hatt Imperial, et la transmission de succession de père en fils en ligne directe et par ordre de primogéniture seraient favorables à la bonne administration de l'Egypte et au développement du bien-être des habitants de cette Province : Appréciant d'autre part, dans toute leur étendue, les effets que se sont faits dans ce but depuis la nomination au Gouvernement-Général de l'Egypte, qui est l'une des Provinces les plus importantes de mon Empire, ainsi que la fidélité et le dévouement dont tu n'as cessé de faire preuve à mon égard, et voulant te donner un témoignage éclatant de la confiance pleine et entière que je t'accorde, j'ai décidé que dorénavant le Gouvernement de l'Egypte, avec les territoires qui y sont annexés et qui en dépendent, et avec les Caïmans de Sévakiu et de Mousawa, sera transmis à l'ainé de tes enfants mâles, et, de la même manière, aux fils aînés de tes successeurs : Que si, en cas de vacance, le Gouverneur-Général ne laisse aucun enfant mâle, la succession sera transmise à l'ainé de ses frères, et à défaut des frères à l'ainé des enfants mâles du plus âgé parmi ses frères décédés. Telle sera désormais la loi de succession en Egypte.

En outre, les conditions contenues dans le Firman susmentionné sont et demeurent à tous jamais en vigueur comme par le passé : chacune de ces conditions sera constamment observée, et le maintien du privilège qui découle de ces conditions dépendra de l'observation intégrale de chacune des obligations qu'elles impliquent. Les immunités accordées plus récemment par mon Gouvernement Impérial, concernant la faculté du Gouvernement-Général d'Egypte de porter jusqu'à 30,000 hommes l'effectif de ses troupes, de maintenir la différence entre le titre des monnaies frappées en Egypte en mon Gouvernement Impérial, et celui des autres monnaies de mon Empire, et de conférer les grades civils de mon Gouvernement jusqu'à celui de Sanik (second rang de la première classe), sont également confirmées. La règle qui interdit la succession des descendants mâles des filles des Gouverneurs est maintenue comme par le passé.

Le tribut de 80,000 bourses payé par l'Egypte au Trésor Impérial est porté à 150,000 bourses, à partir du mois de Mars de l'année 1266, à raison de 100 piastres la livre Ottomane, c'est-à-dire à 75,000 livres Ottomanes par an. Mon Hatt Imperial étant émané à l'effet de mettre à exécution les conditions qui précèdent, le présent Firman, portant en tête mon écriture Impériale, a été rédigé par ma chancellerie Impériale, et s'est été délivré.

Tu dois, de ton côté avec la loyauté et le zèle qui te caractérisent, et en profitant des connaissances que tu as acquises des conditions de l'Egypte, consacrer tes soins à assurer à ces populations une tranquillité et une sécurité entières ; et, reconnaissant la valeur du gage que je viens de te donner de ma faveur Impériale, t'attacher à l'observation des conditions établies ci-dessus. Ecrit le douzième jour du mois de Moharem de l'an de l'Hégire, 1263 (May 27, 1866).

Imperial Firman to the Viceroy of Egypt, settling the Mode of appointing a Regency on his dying before his Son has attained the age of 18 years.

(15th June, 1866.)

Dans le but de garantir, de toutes manières, le nouvel ordre de succession au Gouvernement de l'Egypte, ainsi qu'il fut établi par un autre Firman Impérial, il est mentionné ci-dessous le mode d'après lequel l'on est tenu de procéder à l'institution de la tutelle du Gouvernement de l'Egypte, lorsque dans l'éventualité de la mort de son Gouverneur, son fils aîné et héritier se trouverait être encore en bas âge.

Dans l'éventualité de la vacance du Gouvernement, et lorsque l'héritier du Gouvernement serait en bas âge, c'est-à-dire, qu'il aurait moins de 18 ans, le Firman d'investiture sera toute de même émané. Cependant, jusqu'à ce qu'il arrive à l'âge de 18 ans, si le Gouverneur se trouverait avoir déjà établi un tuteur et un conseil de tutelle pour le Gouvernement moyennant un testament cacheté par lui, et par deux hauts fonctionnaires de l'Egypte en service actif, comme

(a) This is the firman of Feb. 13, 1841, given above.—Ed.

témoin, ce tuteur et ce personnel de tutelle saisiront immédiatement les rênes de l'administration, et procéderont à diriger le Gouvernement. En même temps, comme ils en référeront à ma Sublime Porte, un Firman Impérial en sera émané, les confirmant à leur place. Si, d'un autre côté, survient une vacance du Gouvernement susdit sans qu'il soit pourvu à l'institution d'une telle tutelle, le Conseil de tutelle étant composé des Chefs de l'Administration de l'Intérieur, de la Guerre, des Finances, des Affaires Etrangères, de la Justice, du Chef des Troupes et des Commissaires des Provinces Egyptiennes, on procédera à l'élection, parmi les susdits fonctionnaires, d'un Conseil de tutelle de la manière suivante :—

Les susdits fonctionnaires réuniront immédiatement, et choisiront parmi eux-mêmes un tuteur à l'unanimité, ou à la pluralité des voix. Si, cependant, les voix se partagent entre deux candidats, la préférence sera donnée à celui des deux qui occuperait les plus importantes fonctions dans le Gouvernement. Le degré d'importance est établi dans l'ordre indiqué ci-dessus. Ainsi, vient d'abord le Chef du Département de l'Intérieur, après celui de la Guerre, et ainsi de suite. Le tuteur étant ainsi élu, et les autres Membres d'étant constitués en Conseil de tutelle, ils prendront au mains le Gouvernement, et ils s'empresseront de rapporter à ma Sublime Porte l'institution du tuteur et l'institution du Conseil de tutelle. Ce choix sera confirmé de notre part par un Firman Impérial.

Dans le cas qu'il arrive que l'ex-Gouverneur ait nommé un tuteur et un Conseil de tutelle, ce tuteur et ce Conseil ne saurait être changés avant que le terme de la tutelle ne soit expiré. De même dans la seconde alternative, c'est-à-dire, lorsque l'institution du tuteur a lieu par la réunion des hauts fonctionnaires du Gouvernement, l'on ne pourra non plus changer le tuteur ainsi nommé. Lorsque un Membre du Conseil de tutelle vient à mourir, on choisira un autre à sa place parmi les hauts fonctionnaires du Gouvernement, et si le tuteur lui-même vient à mourir, on choisira un à sa place de la manière susdite, dans le Conseil de tutelle, substituant à celui-ci un des hauts fonctionnaires du Gouvernement. Lorsque l'héritier arrive à l'âge de dix-huit ans étant alors majeur, il saisira les rênes de l'Administration et gouvernera comme son prédécesseur. Ceci étant confirmé par ma volonté Impériale et revêtu de mon Hatt-Sherif, le présent Firman fut conséquemment émané le 2 Safar 1265 (15 June 1866).

Firman addressed to the Viceroy of Egypt, dated 3 Razer 1264 (June 8, 1867). (a)

(Translation.)

To my illustrious Vizier Ismail Pacha, who now holds the rank of Grand Vizier, with the title of "Khdiv" of Egypt, and who is decorated with the orders of the Medjidie and Osmanie of the First Class in diamonds. May God perpetuate his glory, and increase his power and prosperity (b).

Be it known on the arrival of this my Imperial Firman, that, as is also mentioned in my Firman granting the privilege of hereditary succession to the Vice-royalty (Kidivist) of Egypt, those fundamental laws which are in force in other parts of my dominions shall be maintained and respected in Egypt. Now by fundamental laws are meant all those principles laid down in the Imperial Rescript of Gulhaneh (c) But, inasmuch as the internal administration of the Province, and consequently its financial, material, and other interests, are confided to the Government of Egypt, in order to preserve and extend those interests, it is permitted to that Government to frame such regulations as may seem necessary in the form of "special Tanzimat for the interior." In like manner, whilst all the treaties of the Sublime Porte must be respected in Egypt, an exception is made only as regards the customs duties, and as regards foreigners in matters relating to the police, postal, and transit services, for which full powers are given to thee to enter into special arrangements with foreign agents. But such arrangements must not take

(a) A French translation of this firman is given in Archives Diplomatiques, 1868, tom. II., p. 452.—Ed.

(b) A whole string of epithets, applied to all Pashas holding the rank of Vizier, is omitted.

(c) See State Papers, vol. xxi., p. 1230.—Ed.

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the form of treaties or conventions having any political significance or purport. And in the event of their being inconsistent with the principles laid down above, or opposed to my original sovereign rights, it will be necessary to hold them as null and void (a). Wherefore the question of conformity or non-conformity to these principles in matters where a doubt exists as regards Egypt must be referred to my Sublime Porte previously to such arrangements being concluded. And when in the manner explained above any special arrangements are entered into concerning the customs duties in Egypt, information thereof must be transmitted to my Sublime Porte. Also, when any conference respecting commercial treaties takes place between my Government and other powers, in order that the commercial interests of Egypt may be attended to, the opinions of the Egyptian Administration shall be consulted thereon. In proclamation of which this my Imperial Firman, dated 5 Sefer 1284, is now addressed to thee.

Firman addressed to the Viceroys of Egypt, November 29, 1869.

(Après les trois d'usage.)

Il est superflu de dire combien ma sollicitude est grande pour la prospérité de l'importante Province d'Égypte, et pour l'accroissement du bien-être et de la sécurité de ses habitants. Tout en consacrant une attention sérieuse au maintien intact des privilèges intérieurs accordés à l'Administration Égyptienne, il est de mon devoir de surveiller en même temps le strict accomplissement des obligations de cette administration, soit envers ma couronne, soit envers les habitants de la province. En conséquence, j'ai accepté les éclaircissements que tu as donnés et les engagements que tu as pris relativement aux armes et aux bâtiments de guerre, ainsi qu'à l'égard des relations extérieures de la province, par la lettre que tu as écrite, (b) sous la date du 10 Djémadi-ul-Ewel, 1286, en réponse à celle que mon Grand Vîzir t'avait adressée, par mon ordre souverain, le 15 Rébi-ul-Akhir, 1284. (c) Seulement la question financière d'un point vital pour tous les pays, à la quantité des impôts est supérieure aux moyens des contribuables, on si les produits de ces impôts, si bien d'abord affectés aux besoins réels du pays, sont absorbés par des dépenses infructueuses, on s'expose incontestablement à des pertes et à des dangers inséparables. Il en résulte pour le Souverain du pays le droit sacré et imprescriptible de surveiller avec sollicitude cet important objet; et, pour qu'il ne subsiste plus aucun doute ni malentendu à cet égard, j'ai décidé de te donner les éclaircissements suivants, qui seront également portés à la connaissance de tous.

Ainsi, suivant les conditions fondamentales que servent de base à l'Administration Égyptienne, tous les impôts et redevances doivent être répartis et perçus en mon nom. Je ne saurais donc consentir en aucune manière à ce que les sommes provenant de ces impôts soient employées autrement qu'à aux besoins réels du pays, et à ce que les habitants soient chargés de nouveaux impôts sans une nécessité légitime et reconnue. Ma volonté absolue est donc que les soins et ton zèle les plus incessants soient dirigés vers ces deux importantes objets, aussi bien que la nécessité que mes sujets d'Égypte soient toujours traités avec justice et équité. De même, les emprunts à l'étranger engageant pour de longues années les revenus du pays, je ne saurais admettre que, sans que tous les détails des raisons qui peuvent y faire recourir n'aient été soumis à mon Gouvernement Impérial, et sans que mon autorisation n'ait été préalablement obtenue, des sommes prélevées sur les revenus de l'Égypte soient affectées au service d'un emprunt. Ma volonté est donc qu'en aucun temps il ne soit fait d'emprunt qu'après que la nécessité absolue d'y avoir recours aura bien été établie, et mon autorisation préalable obtenue. Tu conformeras désormais tes actes et ta conduite aux termes formels de mon présent Firman Impérial, qui est en tout point conforme aux droits et aux devoirs respectifs, ainsi qu'à nos précédents.

Le 22 Chaaban, 1286.

(a) "Non avenes" is more literal.

(b) The letter of explanation from the Khedive will be found in the *Annual Register*, 1869, p. 273.—Ed.

(c) The letter of the Grand Vizier to Khedive will be found in *Archives Diplomatiques*, 1869, tom. III, p. 132.—Ed.

Solicitors for the Khedive, McLeod and Watney.

Solicitors for the plaintiffs, Clarkson, Son, and Greenwell.

ADMIRALTY COURT OF THE CINQUE PORTS.

Reported by J. P. ARNALL, Esq., Barrister-at-Law.

Friday, Feb. 14, 1873.

(Before Sir R. J. PHILLIMORE.)

THE VIVID.

Collision—Ships moored—Foul berth.

Where a vessel, taking up a berth to discharge, gives another a foul berth, the former vessel has no right to require that the latter shall take more than the ordinary and usual precautions against bad weather, and the latter having taken such precautions, will not be responsible for the damage to the former resulting from a collision which might have been prevented by further, but unusual, precautions.

This was a cause of collision instituted on behalf of the owner of the schooner *Victor*, against the schooner *Vivid*, and her owner intervening. The plaintiffs' petition stating the facts was as follows:—

1. On the 4th Aug. 1872, the *Victor*, a schooner of seventy tons register, belonging to the port of Folkestone, manned by a crew of four hands all told, left West Hartlepool laden with a cargo of coals, and bound for Hythe, in the county of Kent.

2. The *Victor* arrived in safety off Hythe about midnight on the night of the 8th Aug., and brought up, the wind being light from the W. S.W., and the weather very fine. About 8 a.m., on the morning of the 9th Aug., William Deerham, the acting pilot, came on board, and the *Victor's* boat having been got out, she was towed to within a quarter of a mile of the beach, and about a mile to the westward of Hythe, at which spot she was brought up about 9 a.m.

3. Vessels discharging coals at Hythe come in at high water, and as the tide falls they take the ground, and the coals are discharged into carts alongside as long as the tide will permit. The carts when loaded are drawn up by a stationary steam engine. There is a sea wall facing the beach, opposite the place where the vessels discharge, and there are two gaps or openings in this sea wall, through which the loaded carts are so drawn up as aforesaid.

4. When the *Victor* had been towed into the position in the second article mentioned, the said William Deerham left the vessel and put down a buoy to mark the spot where the anchor should be let go. On heaving the vessel the buoy was placed opposite the easternmost gap or opening.

5. The *Vivid*, the vessel proceeding against in the said cause mentioned, arrived at Hythe, laden with a cargo of coals, on the morning of the said 9th Aug., at about 10 a.m., and brought up at about a quarter of a mile from the beach. Both the *Victor* and the *Vivid* weighed anchor at the same time, about 1 p.m., for the purpose of beaching, and the *Vivid* took up the berth which had been assigned for the *Victor*, namely, that opposite to the easternmost gap or opening, and thereupon those on board the *Victor* were compelled to beach the vessel opposite to the western gap or opening, but at the request of Joseph Tibbe Horton, the owner of the *Vivid*, the *Victor* was hauled off again and beached nearer to the *Vivid*, a little to the westward of the easternmost gap or opening, so that the steam engine could work the coals from both vessels at the same time.

6. The *Victor* was duly and properly moored with her head towards the beach, having a warp fastened to a capstan on the sea wall, an anchor out astern on the port side with eighty fathoms of chain, running from the port hawsepipe, and a spring chain, forty-five fathoms in length, from the port quarter, and a kedger anchor and warp from her starboard quarter. The *Vivid* was also

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moored with her head towards the beach, and during the 9th Aug. coals were worked from the vessels in the usual way.

7. On the night of the 9th Aug., at low water, the wind began to freshen from the south-west, and on the morning of the 10th Aug., the wind being south, and increasing in force, and the tide flowing, those on board the *Vivid* neglected to take due and proper precautions to keep that vessel in her proper berth, and about 3 a.m. the stern of the *Vivid* swung round to the westward, and she came into collision with the *Victor*, the port counter of the *Vivid* striking the starboard quarter of the *Victor*, carrying away the main rail, quarter piece, bulwark, stanchions, chain plates covering board, and inflicting other serious damage. The *Victor* filled with water and grounded, and as the tide ebbed, the *Vivid* set upon her and inflicted further damage.

8. At low water, holes had to be bored in the sides of the *Victor* for the purpose of letting the water out, and her cargo was discharged. She was temporarily repaired on Hythe beach, it being impossible properly to repair her there, she was then taken to Falmouth harbour, where some repairs were effected, and she was subsequently properly repaired at Whitchy. The *Victor* was detained for fifty-six days during the completion of the said repairs.

9. Those on board the *Vivid* neglected to take sufficient means properly to moor and secure the *Vivid*.

10. The aforesaid collision, and the damage thereby occasioned, was solely occasioned by the matters hereinbefore stated, or otherwise by the negligence and improper management of those on board the *Vivid*, and those on board the *Victor* in no way contributed to the same.

The defendant's answer admitted the truth of the allegations in article 3 of the petition, and the other facts, except as to the mooring of the *Vivid*, were substantially proved. The defendants' answer alleged that the *Vivid* was "duely and properly moored," and it was proved that she had a warp from her bows to a capstan in the sea wall, and her starboard anchor out with ninety fathoms of chain. The chain led aft, and her anchor lay off her starboard quarter, and she also had a spring from her starboard quarter to the chain. At the high tide, before the collision, the warp of the *Vivid* was removed to another capstan further away from the *Victor*, and her ropes were all hauled taut. The wind was proved to be about S. by E. The answer pleaded inevitable accident, and further alleged.

The *Victor* was not moored in a proper place, having regard to the *Vivid*, or at a proper distance from her.

The defendants, in their preliminary act, had omitted to answer paragraph 7, as to the course and speed of the other vessel when first seen; paragraph 8, as to the lights of the other vessel; and paragraph 9, as to the distance and bearing of the vessel when the other was first seen.

Witnesses were called for the plaintiffs to prove that if the *Vivid* had had a rope from her starboard quarter to the shore, it would have kept her from swinging round, and that an anchor and chain carried out in a line perpendicular to the *Vivid*'s starboard side, and leading from her starboard quarter, would have had the same effect. The witnesses for the plaintiffs also alleged that it was customary in bad weather to so moor a vessel discharging at Hythe. This, however, was denied by defendant's witnesses, who alleged that the *Vivid* was moored in the manner usual at that place. Evidence was also given by the plaintiffs to show that if the *Vivid* had hoisted her mainsail it would have had the effect of keeping her away to the eastward, and from the *Victor*.

The sea wall at Hythe runs nearly east and west. The collision occurred by the *Vivid* being driven round to the westward by the force of the wind.

R. E. Webster, for the plaintiffs.—I cannot contend that the *Victor* acquired any prior right to the berth by laying down a buoy, but I submit that the *Vivid* was not properly moored, in accordance with the usual custom of the place. She ought to have been better secured. When the weather became worse she was, even if sufficiently moored in the first instance, bound to have taken further precautions by hoisting her mainsail and letting out another anchor or a rope to the shore.

W. G. F. Phillimore, for the defendants.—The *Victor*, in the first instance, gave the *Vivid* a foul berth, and was, therefore, not entitled to call upon her to take more than the usual precautions. These were taken according to the evidence.

R. E. Webster, in reply.—The defence as of giving a foul berth is not sufficiently raised in the pleadings. The defendants did not answer the articles of the preliminary acts as to this point.

Sir R. PHILLIMORE.—The court has in this case good reason to regret the absence of nautical assessors; the more particularly as here the collision took place between two vessels moored or at anchor, and as there is all the greater difficulty arising from the contradictory evidence as to the local customs. It is unnecessary to reiterate the facts as they have been practically admitted. The action is brought by the owners of the schooner *Victor* against the *Vivid*, and is founded upon charges which may be classed under three heads; first, that the *Vivid* ought not to have been placed in the berth which had been preoccupied by the *Victor*'s buoy; secondly, that the *Vivid*'s mooring was insecure; thirdly, that a want of care was suggested, inasmuch as the *Vivid* ought to have taken further precautions when the state of the wind and weather materially altered. As to the first point, it was not insisted on, and was rightly abandoned by Mr. Webster in his argument. In fact, there was no evidence that a buoy was sufficient to retain possession of a berth by the local custom, and I know of no authority for such a proposition according to the general maritime law. Secondly, as to the insecurity of the mooring of the *Vivid*, it was very properly admitted by Mr. Webster, with his usual candour, which does not in any way detract from his merits as an advocate, that the *Vivid* was securely moored, so far as ordinary precautions were concerned. There was a rope from forward to a capstan on shore, and she had an anchor out with eighty fathoms of chain, and a spring from her starboard quarter to the chain, according to the usual custom. By the evidence of those who were in the habit of unloading ships in the port, and had experience of the general character of the place, and of the wind and weather there, such a precaution was ordinarily sufficient. Another anchor might have been useful, but the question remains whether it was necessary. It has been said that the change of wind to S.E. necessitated a second anchor, and it has been suggested that if another anchor had been used, the collision would not have occurred. That question I shall further have to consider under the third charge; but at present I must hold that a second anchor was not originally necessary. Thirdly, as to the charge of subsequent want of precaution, I will first dispose of the question of the mainsail. I have no warrant for concluding that the use of the mainsail would have been an efficient precaution, and indeed the evidence tends to show the contrary. There is little doubt, however, that the

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letting go of a second anchor would have been a useful, although not in the first instance a necessary precaution. Then comes the question, was the *Victor* in a condition to require from the *Vivid* the usual precaution? This is to be answered by the answer to this previous question, viz.: Did or did not the *Victor* give the *Vivid* a foul berth? On this point I have no hesitation, and I am of opinion, without doubt, that the *Victor* did give the *Vivid* a foul berth. The only other question with regard to this is, whether there is a sufficient statement of that fact in the pleadings? And, first, with regard to the defendants' preliminary act, there was perhaps no necessity to answer articles 7 and 8, but I am of opinion that article 9 ought to have been answered. If I could see that any injury had arisen to the plaintiff through this omission, I should have been inclined to have given him the full benefit of my decision, but it was fairly admitted that it made no difference to the plaintiffs. The answer filed on behalf of the defendants gives full notice to the plaintiffs that this important question will form part of their defence. The facts stated in the answer not only indicate the defence, but in article 9 of the answer it is distinctly stated that the *Victor* was not moored in a proper place, having regard to the *Vivid*. The plaintiffs therefore were well apprised of the nature of the defence, and must therefore be supposed to have made the best case in their power to meet the charge against them. I am of opinion that it is substantially proved by the evidence that the *Victor* gave the *Vivid* a foul berth. I cannot think that a vessel which has given another a foul berth can, if by being in the way of that vessel she receives damage by the swinging of that vessel, properly complain. Unless ordinary precautions have been neglected, I consider it to be a sound proposition of law that a man who has, by placing his vessel too near another, given the latter a foul berth, has no right to demand that extraordinary precautions should be taken. Taking this to be a sound proposition of law, I must hold that the *Vivid* having taken the ordinary precautions in the first instance, was not afterwards bound to take extraordinary precautions, and I must dismiss the *Vivid* from this suit with costs.

Solicitor for the plaintiffs, John Minter.

Solicitor for the defendants, Wollaston Knoch.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Reported by J. F. ASHALL, Esq., Barrister-at-Law.

Tuesday, Feb. 4, 1873.

(Present: The Right Hon. Lord Justice JAMES, Sir BARNES PRACOCK, Lord Justice MELLISH, and Sir MONTAGUE SMITH.)

THE SAN ROMAN.

Damage to cargo — War — Fear of capture — Reasonable delay.

An apprehension of capture by enemies' cruisers in time of war, founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, will justify him in delaying his ship in port during the continuance of the risk of capture, and the ship is not responsible in a suit in rem in the Admiralty Court for damage to the cargo caused by such reasonable delay, if the

voyage is ultimately completed and the cargo is delivered.

Semble, that if the voyage were abandoned, and the cargo not delivered according to the contract, the shipowners would be bound to show that they had been actually prevented from performing the voyage.

This was an appeal from a decree of the High Court of Admiralty in a cause of damage to cargo instituted in that court on behalf of Messrs. Anderson, Anderson, and Co., merchants of London, against the North German ship *San Roman* and her freight, and against her owners intervening. The *San Roman* was chartered to carry a cargo of timber from Vancouver's Island to a port in the United Kingdom, or on the Continent, and the cargo was consigned to the plaintiffs. On her voyage from Vancouver's Island, the vessel put into Valparaiso in distress, and her master there learned of the existence of war between France and North Germany, and, as there were French men-of-war frequently entering and leaving the port of Valparaiso, he remained in that port from 23rd Sept. 1870, till 23rd Dec. 1870. The question in the Admiralty Court was whether the master, by English or North German law, which was shown to be practically the same in such a case in both countries, was justified in his delay. The learned judge of the Admiralty Court (Sir R. Phillimore) held that the master, acting on a reasonable apprehension of capture, was justified in remaining in port. From this decree the plaintiffs appealed. (The facts and judgment of the learned judge of the Admiralty Court are reported 26 L. T. Rep. N. S. 948; ante p. 347.)

Butt, Q. C. (Johes with him) for the appellants. — The facts show no such risk of capture as justified this delay. There must be an actual operative restraint to justify a master remaining in port. If the state of things during a war is such that the probabilities are greatly in favour of capture if the ship puts to sea, no doubt the master is bound to stay in port; but if the probabilities are in favour of escape, the master ought to go to sea. It is a question of what a reasonable man would do under the circumstances. Even if the North German Government had made it illegal for North German ships to put to sea during the war, on the ground that so doing would give the enemy greater means of carrying on the war by capturing their property, this would be no justification in the case of a ship carrying English goods, and would not be recognised by English courts. There is no evidence that French men-of-war were cruising off Valparaiso. It is not shown that when they left that port, they did not go right away from it. Moreover, there is a peculiarity about the North German law as to delay in port, which should make the court cautious in allowing a master to justify his delay too easily. By the North German code (see report of case below) where a master remains in port through fear of capture, the owners of cargo are compelled to contribute towards the wages of the crew and expenses as for general average. If the master had gone on, he would have had no more employment during the war, whilst by delay in port he continued to receive wages, and expenses were incurred; and this does not fall exclusively on the shipowners. This he could claim by the law of his flag.

Lloyd v. Guibert, L. Rep. Q. B. 115; 13 L. T. Rep. N. S. 602 2 Mar. Law Cas. 26, 293.

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Milneard, Q. C. and Clarkson for the respondents, were not called upon.

The judgment of the Court was delivered by Lord Justice MILLER.—The only question which their Lordships have to determine in this case is whether a German vessel called the *San Roman* was justified in staying at Valparaiso from the 23rd Sept. 1870 up to the 23rd Dec. in the same year, on account of the alleged risk of capture in consequence of the war which then existed between France and Germany; this being a claim of the English charterers to recover compensation on account of what they allege to be an unreasonable delay. The learned judge in the court below has laid it down that "an apprehension of capture founded on circumstances calculated to effect the mind of a master of ordinary courage, judgment, and experience, would justify delay;" and their lordships are of opinion that that is a correct statement of the law of England. It has been admitted in the argument of the appellants that it is necessary to determine whether this case ought to be decided according to the law of England, or according to the law of Germany, because there is no practical distinction on the subject in the law of the two countries. Therefore, the question their lordships have to determine is entirely a question of fact, namely, whether the German master had during the time such an apprehension of capture founded on circumstances calculated to effect his mind, he being a man of ordinary courage, judgment, and experience, as would justify delay; and their lordships agree with the learned judge in the court below, that there was a sufficient risk of capture to justify this delay. This is not a case where the master has refused altogether to perform the contract. No doubt if the voyage had been abandoned, then it would have been necessary to show that he had been actually prevented from performing it; but this is merely a question whether there was a reasonable cause for delay. The evidence on the subject really is that it was reported at Valparaiso and generally known that French vessels of war were continually, during the months, at any rate, of September and October, and for a part of November, sailing in and out of the harbour of Valparaiso, Valparaiso being the great harbour on that coast, and if French vessels intended to capture German vessels, they were more likely to find prizes coming out of Valparaiso than from any other harbour on the coast. There is one particular ship that seems to have come in and gone out, and in ten days more to have come in again. It appears to their lordships that the German captain in Valparaiso could come to no other reasonable conclusion than that the principal object of these French war vessels, of which at one time there were as many as five, in Valparaiso, must have been to capture German vessels. Besides that, it appears that the newspapers at Valparaiso published reports, correct or incorrect, of captures that had actually taken place, and in addition to that it appears that the master went and consulted the consul of his own nation, and the consul advised him in the strongest language, in fact almost ordered him, not to go, and told him that if he would go, he must give him a certificate that he had received due warning not to leave Valparaiso. There were other German ships in that harbour, some loaded and some unloaded, and the captains of all of them came to the conclusion that it would be improper

and unsafe to leave Valparaiso at that time. It also appears that the master was far from being the last to leave when the French vessels had for a time departed, but that, on the contrary, he was among the first who went to the consul and required his papers for the purpose of leaving, and left accordingly. Therefore, there is nothing to show that he was at all neglecting or wishing to violate his duty towards the owners of the cargo. Their lordships agree with what was said before in the judgment in the case of the *Teutonia* (L. Rep. 4 P. C. 171; ante, p. 214), that the owner of an English cargo on board a foreign ship cannot expect that the foreign master of the foreign ship will take greater precautions with respect to his goods, or will run greater risk in their defence, than he would with respect to goods owned by one of his own nationality. If their lordships were to look upon this case as one in which the cargo was German as well as the ship, or a case in which both ship and cargo belonged to the same person, and then were to ask the question, Would a man of reasonable prudence, under such circumstances, have set sail or waited? it appears to their lordships most clearly that a man of reasonable prudence would have waited. Then again, when it is remembered that the owners of the cargo are Englishmen, it must be a matter of mere guesswork whether the cargo would have arrived in England sooner than it did if it had started before; because, in the first place, there would be a great risk of capture, and secondly, whether the vessel were captured or not, the captain of the German ship during the whole of that voyage from Valparaiso to Cork or Falmouth, and from Cork to Falmouth to its port of discharge, would have been justified in taking reasonable precautions to avoid French vessels. Again, if the ship were captured, nobody could tell how long it would have been kept before it was sent to France for the purpose of being condemned, or how long it would have taken before the cargo arrived. Therefore it is by no means certain that if the master had gone to sea before he did the cargo would have arrived any sooner. With regard to the last part of the delay, that after the 13th of Nov., nobody could tell for a time whether the last French vessel would come back or whether it was cruising about. The delay between the 11th and the 23rd Dec. is too short a delay to be a matter of any importance, yet that appears to be accounted for by his being engaged in procuring money to pay his expenses. On the whole, their lordships are of opinion that the judgment of the court below is perfectly right, and they will humbly advise Her Majesty that this appeal ought to be dismissed with costs. (a)

Appeal dismissed.

Solicitors: for the appellants, *Thomas and Holmes*; for the respondents, *Ingledew, Ince, and Greening*.

(a) The judgment in this case bears out an opinion expressed in a note to the report of the case in the court below (ante, p. 347), that the right of a master to stay in port for a reasonable time was not dependent upon the exceptions in the contract of affreightment. The excepted perils operate only as an excuse where the voyage is absolutely put an end to, and a master, whether he carries under a contract containing exceptions or not, is justified in delay where it is for the purpose of avoiding a peril, the effect of which would be to put a practical termination to the whole adventure.—Ed.

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COURT OF COMMON PLEAS.

Reported by H. F. POOLY and JOHN BOSE, Esqrs.,
Barristers-at-Law.

Saturday, Feb 8, 1873.

MORS-LE-BLANCH v. WILSON.

Refusal of consignee at foreign port to accept cargo—Demurrage—Power of master to land cargo and yet keep a lien upon it—Misdirection.

When the consignee of a cargo refuses to receive it, the master of the vessel may, at common law, land and yet preserve his lien upon it for the freight, provided that he retain dominion over the goods.

Semble, that if he deposit the cargo in the warehouse of an independent warehouseman, his lien for the freight is gone.

The plaintiffs had shipped for, and consigned to, the defendants at Buenos Ayres, a small quantity of coal. The bill of lading stated that the "coal was to be taken from the ship as soon as the master was able to deliver, or was to be landed at the expense and risk of the consignees." When the ship reached Buenos Ayres, the consignees refused to take the coal. The master kept the vessel waiting 28 days, and then discharged it to the order of the consignees of the ship, who afterwards sold it to pay freight.

The plaintiff having sued the defendants for demurrage and other expenses, caused by the detention of the ship, the jury were told by Brett, J., in answer to a question from their foreman, that the master "could not land the coal and keep his lien."

Held, that this direction was insufficient, as the cargo might under certain circumstances be landed without loss of the lien. (a)

(a) The question of a master's lien for freight and other expenses is one of extreme importance, and in this country, at least, is in a very extraordinary condition. Of the existence of such a lien there is no manner of doubt; but hitherto it has always depended upon the goods remaining in the master's possession or under his control. If he once parted with the goods, he lost all claim against them for his freight, although he, or his owner, still had their personal action against the shipper or consignee. The master's rights over the goods, however, went no further than this, according to the law of this country. He could not proceed in rem in the Admiralty Court against them for his freight, although that court, being the only court which has such a process, would seem the natural court to have jurisdiction to enforce a lien of this description. In the United States, on the other hand, the master's lien may be enforced in the Admiralty Court: (See *Parsons on Shipping*, vol. 1, p. 173, note, and the cases there cited.) At the same time it has been held in that country that if the master delivers up the goods to the consignee unconditionally, the master loses his lien, and cannot enforce it in the Admiralty Court: (*Sage of Linseed*, 1 Black's U. S. Sup. Ct. Rep. 108.) Recently, however, this power of enforcing a lien of freight, &c., by Admiralty process has been conferred upon shipowners to a limited extent in this country. By the County Courts Admiralty Jurisdiction Acts Amendment Act 1869 (32 & 33 Vict. c. 57), sect. 2, certain County Courts have jurisdiction over claims arising out of all agreements relating to the carriage of goods in any ship; and in *Cargo ex Ayres* (decided by the Privy Council on appeal, which will be reported in the next volume of these reports) a master's lien for freight, &c., was enforced in a County Court by a proceeding in rem against the goods carried. It is noticeable that in that case the master did not part with the control of the goods, having warehoused them in the port of London, until the suit had been instituted and bail given. If he had parted with them to the owner of the goods it is, to say the least, doubtful if he could have enforced his lien by the Admiralty pro-

! THIS was an action for not accepting a certain quantity of coal, bought by the plaintiffs for the defendants, and shipped for the defendants by the plaintiffs in two vessels which the plaintiffs had chartered. The plaintiffs were merchants carrying on business in Liverpool and London, the defendants were merchants carrying on business at Liverpool and Buenos Ayres.

The first count of the declaration stated that, in consideration that the plaintiffs, at the request of the defendants, would receive in the Thames, in a ship called the *Pitko*, a large quantity, to wit, 47½ tons of coal, and would carry the same from thence to Buenos Ayres, and there deliver the same to the defendants or their assigns, on certain terms, the defendants agreed with the plaintiffs, that the said coal should be taken by the defendants or their assigns as soon as the master of the ship was ready to deliver; and averred that the coal was received on board the ship in the Thames by the plaintiff, and was carried thence to the port of Buenos Ayres, and that the plaintiffs and the master were ready and willing to deliver the coal to the defendants upon the said terms, and that although all conditions (except such as the plaintiffs were prevented by the defendants from performing) were performed by the defendants, and all things happened, and all times elapsed necessary to entitle the plaintiffs to have the coal taken from the ship by the defendants or their assigns, yet the defendants did not, nor did their assigns, take the coal from the ship, whereby the ship was necessarily detained, and the plaintiffs, who had chartered the ship, incurred a liability to the ship-owners for and on account of the detention of the ship.

The second count stated that, in consideration that the plaintiffs, at the request of the defendants, would receive in the Thames in a certain ship called the *Pitko*, a large quantity of coal, to wit, 47½ tons, and would carry the same from thence to Buenos Ayres, and there deliver the same to the defendants or their assigns, on certain terms, the defendants promised that, in the event of the said coal not being taken by the defendants or their assigns from the ship when the master was ready to deliver the same according to the contract, the master might land the coal, and that the defendants would pay to the plaintiffs the expense incurred in and about such landing; and averred, that the said coal was received on board the said ship in the Thames by the plaintiffs and carried thence by them to Buenos Ayres, and that the plaintiffs and the master were ready and willing there to deliver the coal to the defendants or their assigns upon the said terms and according to the contract; but that the coal was not taken

away. This new power, however, goes only to a limited extent, as the Act only gives jurisdiction over claims not exceeding 300l. This creates a great anomaly, for above that sum there is no means of enforcing the lien except by warehousing the goods under the provisions of the Merchant Shipping Acts Amendment Act 1869, sect. 67, *et seq.*, or by retaining possession of the goods; there is no sufficient remedy against the goods themselves for the costs and charges to which the master is put by the delay of the consignee or his refusal to accept the goods. It is most extraordinary that the Legislature, in extending the remedy by giving jurisdiction to the County Courts, did not go further and give original powers, unlimited as to amount, to the Admiralty Court, which by the same Act acquires jurisdiction over these causes either by way of appeal or by transfer.—Ed.

from the ship by the defendants or their assigns, although a reasonable time on that behalf elapsed before the coal was landed as thereinafter mentioned, and that the coal was landed, and in and about the landing thereof the plaintiffs incurred great expense, and that, although all conditions were fulfilled, and all times elapsed, and all things happened necessary to entitle the plaintiffs to land the coal and to incur the said expenses, and to be paid the said expenses by the defendants, yet the defendants had not paid the same or any part thereof.

The third and fourth counts were similar to the first and second, save that they were in respect of 80 tons of coal shipped by the ship *Majestic* for Monte Video. The fifth count was a money count for freight.

The defendants pleaded five pleas to each of the special counts: first, that the defendants did not promise or agree, as alleged; secondly, that the plaintiffs did not receive or carry the coals, as alleged; thirdly, that the plaintiffs were not nor was the master, ready or willing to deliver the goods, as alleged; fourthly, that the said agreement in the count mentioned was made for certain coal called "smithy coal," and no other different coal, and not the coal so received or carried, as in the count mentioned; and that the plaintiffs put and received on board an entirely different coal from the said smithy coal, as the plaintiffs then well knew, and as the defendants did not know, until the time of the alleged breach, and carried the same to Buenos Ayres (Monte Video), and that the plaintiffs and the master were only ready and willing to deliver the said different coal as in the count mentioned, where the defendants or their assigns did not accept the said coal; and that the defendants did not promise otherwise than as in the plea above mentioned, and there was no receipt of coal otherwise than as above mentioned; fifthly, a similar plea alleging that the plaintiffs bought the coal for the defendants, but that the coal was not according to contract. To the money count there was a plea of never indebted. The plaintiffs joined issue thereon.

The action was tried before Brett, J., at the Liverpool Summer Assizes, 1872, when the following facts appeared in evidence:

The plaintiffs had chartered the ships *Majestic* and *Pitho* from London to Monte Video and Buenos Ayres respectively, and agreed to sell, and to ship for, the defendants, deliverable to them at each of those ports, a small quantity of coal along with their own cargo—namely 47½ tons by the *Pitho* and 80 tons by the *Majestic*. The bills of lading contained this clause: "The coal to be taken from the ship as soon as the master is able to deliver, or to be landed at the expense and risk of the consignees."

The *Pitho* reached Buenos Ayres on the 28th Nov. 1869, and was ready to discharge the coals on the 23rd Dec. The consignees of the coals did not appear. The captain advertised for them, and kept the vessel waiting till the 20th Jan., when he landed the coal to the order of the consignees of the ship, who sold it to pay the freight and expenses.

The *Majestic* reached Monte Video on the 8th Dec. 1869, and was ready to discharge the coal on the 24th Jan. 1870. The consignees not appearing, the captain advertised for them. One of the defendants

then came to the ship, and, having examined the coal, refused to take delivery on the ground that it was not of the quality agreed upon. The local commercial court was then consulted, and the coal was landed and sold under a decree of that court, on the 8th Feb., and the ship was detained by the proceedings till March 12. There was no evidence of the existence of a privileged warehouse either at Buenos Ayres or Monte Video. The owners of the *Majestic* afterwards sued the plaintiffs for demurrage, and recovered damages from the plaintiffs. There was no stipulation in the charter-party as to demurrage. The plaintiffs gave notice to the defendants of that action, but they declined to interfere, and the jury found a verdict against the now plaintiffs for fourteen days' detention, at 4*l.* per day, 56*l.*; and the verdict was upheld by the court. The costs and damages of that action, amounting to 208*l.*, were claimed as damages in the present action, and there was also claimed demurrage at 4*l.* a day in respect of the *Pitho*, the other particulars of damage being on account of freight, wages, and sustenance of crew, &c. The learned judge left it to the jury to say whether the defendants had caused the delay of the vessels at Monte Video and Buenos Ayres, and what they were entitled to for that delay; secondly, whether it was a reasonable thing for the plaintiffs to defend the action brought against them by the owners of the *Majestic*; thirdly, whether the action was defended in a reasonable manner.

After the learned judge had summed up the case, one of the jury asked whether the captain, "after he stored the coal at the port still retained his lien," to which the learned judge answered, "He cannot land the coal and keep his lien. He cannot take the cargo out of the ship and keep his lien." The jury then, without retiring, found for the plaintiff, damages 499*l.*, which amount they stated to be made up by the freight, the demurrage, and the costs of the action defended by the plaintiffs against the owners of the *Pitho*. They assessed the demurrage for each vessel at 56*l.*, being fourteen days at 4*l.* a day. Leave was reserved to move to reduce the damages by 208*l.*, the costs of the action, or such sum as the court should think fit.

A rule was afterwards applied for and refused as to the 208*l.*, on the ground that the question whether the plaintiffs had acted reasonably in defending the action was a question for the jury but granted generally to set aside the verdict and have a new trial on the ground that the judge misdirected the jury by telling them that if the masters of the vessels landed the coal the shipowners would lose their lien for the freight, and that they could not land the coal without losing the lien.

Feb. 10, 1873.—*Charles Russell*, Q.C., with him *Trevelyan*, for the plaintiffs, now showed cause.—There is no authority to show that the master had not a right to hold the goods in his own hands so long as there was any possibility of the consignee coming forward. The liability of the shipowner as carrier continues as long as the goods are on board (*Neille v. Whitworth*, 18 C. C., N. S., 435; 34 L. J. 155, C. P.), and the special clause in the bill of lading was introduced for the benefit of the shipowner. Even if the master was entitled to land the cargo he was not bound to do so. The effect of the clause is to preserve the lien in-

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dependently. The misdirection, therefore, was immaterial, the master being in no sense bound to land the cargo: See *Black v. Rose* (2 Moo. P. C. N. S., 277), where the court held that notwithstanding the practical power to keep alive the lien, the master was entitled to retain the goods, and to receive demurrage till the consignees came to fetch them. There is hardly any authority on the point whether a captain may land under an ordinary bill of lading and yet preserve his lien. In Smith's *Mercantile Law*, 7th edit. p. 584, it is said that "As a lien is a right to retain possession, it follows of course that where there is no possession there is no lien." There is, indeed, an *obiter dictum* of Willes, J. in *Meyerstein v. Barber* (L. Rep. 2 C. P. 54; 2 Mar. Law Cas., O. S., 420) to the effect that, had there been no Act of Parliament, according to our law he might have kept the goods a reasonable time on demurrage, or having landed and warehoused them. It is decided in *Somas v. British Empire Shipping Company* (30 L. J. 229, Q. B.) that no person possessing a lien can, in order to preserve it, create another; and if one man, who is entrusted with the goods of another, put them into the hands of a third person, contrary to orders, he is guilty of a conversion: *Seyds v. Hay*, 4 T. R. 260. [BRETT, J.—I can quite see that if a captain takes a warehouse of his own, or if he stores the goods in a privileged warehouse, he may keep his lien; but in every other case there would be two liens. KEATING, J.—The amount really in dispute is so small that it would be scandalous to send the case down for a new trial. I don't think Willes, J., in *Meyerstein v. Barber*, puts it that the lien could be preserved. What he says is rather an authority that the lien is lost.] They also cited

Abbott on Shipping, 5th edit. (1827), p. 243.

Abbott on Shipping, 1st edit. (1802).

and argued that in the first edition Lord Tenterden had been more cautious, and states what he states as a matter of practice, not as a matter of law.

Holker, Q.C. and Baylis for the defendants supported the rule.—The master must in these cases act in a reasonable manner. It is monstrous that a large vessel should be kept waiting on account of a few tons of coal. It is wrong to assume as a matter of law that the master may detain the goods as long as he pleases; and the question for the jury here was whether he had done what was reasonable or not. Before the Merchant Shipping Acts the shipowner might have landed at his own risk, as may be seen from the judgment of Willes, J., in *Meyerstein v. Barber* (L. Rep. 2 C. P. 54; 2 Mar. Law Cas. O. S. 420), where he says that the duty of the master, in case of no person being found to take delivery, or to pay freight, would have been to deal with the goods in a reasonable manner, regard being had to his lien for freight; and that according to our law he had the alternative given him of keeping the goods on board on demurrage, or of landing and warehousing the goods, having an action for the charges. [KEATING, J.—In your view, supposing that *Meyerstein's* case had been decided before the Merchant Shipping Acts, the decision would have been just the same. Logically, you must go that length. BRETT, J., referred to the judgment of Crompton, J. in *Erichsen v. Barksworth* (3 H. & N. 894.)] Only *Black v. Rose* is against me, and that

case does not bear the meaning put upon it by the other side. [BRETT, J.—To understand that case, you must go back to the judgment of Greasy, C.J., in the court below for the adoption of his reasons. (a) As for the clause in the bill of lading, I think that entitled the captain to land the coal at once, but you go further, and say that it obliged him to land at once.] They also cited

Certain Logs of Mahogany, 2 Sumner, 601;

The Santee, 3 Benedict, 519.

It was ultimately agreed, at the suggestion of the court, that the damages should be reduced by the 56l. recovered for the detention of the *Pitho*.

KEATING, J.—The circumstances of this case are peculiar. The case having been summed up quite rightly and correctly, one of the jury turns round and asks this question of the learned judge: "The jury want to know whether the captain, when he stored the coal at that port still retained his lien?" Now that must have meant did he, under the circumstances, retain his lien, and had the judge said "no" simply, there would have been no ground for setting aside this verdict on the ground of misdirection, because there was no evidence that there were any privileged warehouses at the port in question. But the judge said "He cannot land the coal and keep his lien; he cannot take the cargo out of the ship and keep his lien." We think that this was too wide a proposition, for our opinion is that a captain may land, and yet keep his lien by placing the goods in some warehouse over which either he or the consignee of the ship has exclusive control. Mr. Holker therefore has some right to complain. But what the real effect of the answer was upon the jury we are unable to say. If the damages were affected, it must have been to a very slight amount. The question between the parties being so small, they are quite right in coming to terms. The judgment of the court is that the rule be discharged, each party paying his own costs.

GROVE, J.—I am of the same opinion. It appeared to me when the rule was moved, and I still think, that it could not be law that under no circumstances could the master land the cargo without parting with his lien for freight. The authorities only show that, if the goods are landed, they must, in order to preserve the lien, be so landed as to retain the master's absolute and entire dominion over them—a thing which rarely can be done. The answer of my brother Brett to the question put to them was qualified only by the supposition that there were public bonded warehouses at the port of discharge. But the doubt I entertain is as to the sense in which we ought to understand the question, after the way in which the learned judge summed up the case. I am of opinion that all that was meant was, whether, if the master lands the goods at the ordinary landing place, and puts them into an ordinary warehouse, he thereby parts with his lien. Undoubtedly, if the question was put in that sense, the answer would have been correct; and because the answer goes in its terms somewhat further, we are called upon to say that the question was not put in that

(a) The question being as to the terms of a charter-party, it had been held in the court below that the charter-party intended that the master should deliver, and the merchant receive at the ship's side each day, and that on each delivery and receipt, the master ceased to be responsible for the goods, and also ceased to have any lien on the goods.

sense. There is this further question, namely, whether, within the rule laid down in *Orease v. Barrett* (1 O. M. & R. 919), and other cases, the court would grant a new trial where the misdirection has not conduced to a wrong verdict. In the present case I cannot possibly see that, if the alleged misdirection had not taken place, the jury could have reduced the damages by more than 56l. That I think is the largest amount that can be taken off.

BRETT, J.—I am of opinion that my answer to the jury was wrong, because it included the case where the master, after landing the goods, deposits them in a warehouse under his own control, and that it was incorrect to say that in such a case as that the master would lose his lien for freight. The point, as it seems to me, is by no means an easy one. This is a case in which the goods, when landed, would be landed in a port where the English statutes relating to public warehouses do not apply. There was no evidence as to what the foreign law was, and therefore the question is, What are the rights of a master at a port where there is no English warehousing statute in force, and no evidence of any law different from the law of England? I think the judgment of Crompton, J. in *Brichem v. Barkworth* (3 H. & N. 894; 29 L. J. 96, Ex.) shows that there may be a case where the master may land and yet keep his lien, because that learned judge says that, even where the consignee has neglected to accept the goods, and therefore where he must be assumed to be in fault, the master cannot keep the goods on board his ship for an unreasonable time. What must he do with them, then? It seems to me to follow that there must be some way of landing them by which his lien may be preserved; and I feel now clear that Crompton, J., had it in his mind that the master might land the goods and still preserve his lien for freight, if he kept them still entirely under his own exclusive control. The dictum of Willes, J., in *Meyerstein v. Barber* (L. Rep. 2 O. P. 38), seems to me to be to the same effect, and so also is the passage cited from Abbot on Shipping, because if by "practice" he means the universal practice of merchants, it becomes, as it seems to me, part of

the mercantile law. Whether the master can preserve his lien irrespectively of English statute law as to public warehouses, or of any foreign law equivalent thereto, by putting them into a warehouse belonging to a third person, is a question which is not necessary for us now to decide. The difficulty which presents itself against the master's retaining his lien in such a case seems to me to be this, that then another and an independent lien would exist; and I doubt very much whether, if the master were so to deposit the goods on shore as to give another person a lien upon them, he would not, as a matter of course, lose his own lien, even though such other person should undertake to the master not to deliver the goods to the consignee without being paid the master's claim for freight. But it is not necessary to decide that question now. I therefore think that the answer which I gave to the question put to me was wrong in its terms. I ought to have answered that under certain circumstances, a master might land and yet keep his lien, but there is no evidence that he could have done it in this case. If that had been the answer given, I should have been prepared to maintain it; but the answer I did give was wrong, and likely to lead the jury to a wrong conclusion. What I did say may have affected the verdict, but if it did it was to a very small amount. Whether it could have affected it to the extent of 56l., I doubt; because it does not by any means follow that, even if the master could have landed the goods so as to preserve his lien, he was bound to land them; and the jury would have had to consider whether, under the circumstances of the case, he had acted reasonably in keeping the goods on board as long as he did. In strictness the defendant is entitled to have the rule made absolute, but he has very rightly chosen to give way on being fairly met by the other side.

Rule discharged, parties agreeing to reduce verdict by 56l. on the terms that each party should pay his own costs of the rule.

Attorneys for plaintiffs, Forshaw and Hawkins. Attorneys for defendants, Gregory, Rowcliffe and Co. for Hull, Stone and Fletcher, Liverpool.

SUBJECTS OF CASES.

ABANDONMENT.

See *Collision*, Nos. 40, 44—*Marine Insurance*, No. 32—*Salvage*, No. 8.

ADMIRALTY COURT.

1. *Construction of statute*.—The High Court of Admiralty will not give a decision upon the construction of a statute which would be in direct conflict with the decision of a court of common law, although not agreeing with that decision. (Adm.) *Cargo ex Argos; The Hecaton* ... page 360
 2. *Prohibition—Power of Superior Courts*.—The High Court of Admiralty is not created by the statutes extending its jurisdiction a superior court so far as to take away from the superior courts at Westminster the power which they possessed before those statutes of issuing a prohibition to that court. *Smith v. Brown*, ante, p. 56, approved. (Exch. and Ex. Ch.) *James v. the South Western Railway Company* 428
 3. *Prohibition—Ship of foreign power—Exemption—International law—Jurisdiction*.—Where a cause of collision was instituted in the High Court of Admiralty against a ship, carrying cargo, but belonging to the Khedive of Egypt, who claimed exemption from all process of the English Courts on the ground that he was a Sovereign Prince, the Court of Queen's Bench refused to grant a prohibition restraining the High Court from proceeding on the ground that the question of jurisdiction, being a question of international law, was one which that court was peculiarly fitted to decide in the first instance. (Q.B.) *Re The Char- kieh* 533
- See *Collision*, Nos. 1, 2, 26, 27, 28, 29, 31, 32, 34, 35, 36, 37, 38, 39, 41, 42, 43—*Compulsory Pilotage*, No. 1—*Costs*, Nos. 1, 2, 3, 4, 5—*County Courts Admiralty Jurisdiction*, Nos. 1, 2, 5—*County Court Appeals*, Nos. 1, 2—*Damage*, Nos. 1, 2—*Foreign Enlistment Act 1870*, Nos. 4, 5—*Jurisdiction*, Nos. 1, 2, 3, 4—*Limitation of Liability*, No. 2—*Marine Insurance*—No. 1—*Mortgage*, No. 4—*Necessaries*, No. 1—*Practice*, Nos. 1, 3, 4, 5, 6, 7, 8, 9, 10, 11—*Salvage*, Nos. 1, 23, 24, 25, 26, 27, 28, 29, 30, 31—*Trinity Masters—Wages*, No. 1.

ADMIRALTY COURT ACT 1861.

See *County Courts Admiralty Jurisdiction*, No. 2—*Damage*, No. 1—*Damage to Cargo*, No. 2—*Limitation of Liability*, No. 2—*Practice*, No. 4—*Salvage*, No. 19.

ADVANCES.

See *Marine Insurance*, No. 35—*Mortgage*, No. 3—*Necessaries*, Nos. 2, 7, 8, 14.

AFFIDAVITS.

See *Practice*, Nos. 6, 7, 8.

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AGENTS.

See *Bottomry*, Nos. 10, 11, 12—*Necessaries*, Nos. 2, 3, 7, 8, 9—*Principal and Agent—Sale of Cargo by Master*, No. 1.

ALTERATION IN DECLARATION ON OPEN POLICY.

See *Marine Insurance*, No. 8.

APPEAL.

See *Costs*, No. 6—*County Court Appeals*, Nos. 1, 2—*Practice*, No. 11—*Salvage*, Nos. 30, 31, 32.

APPOINTMENT OF SALVAGE.

See *Salvage*, No. 22.

ARBITRATION.

See *Average Stater—Marine Insurance Association*, No. 1, 2.

ARREST OF SHIP.

See *Bottomry*, No. 13—*Limitation of Liability*, No. 2—*Piracy—Practice*, No. 4.

ASSESSMENT OF DAMAGES.

See *Collision*, Nos. 39, 40, 41.

ASSESSORS.

See *Trinity Masters*.

ASSIGNEES.

See *Damage to Cargo*, Nos. 1, 2—*Marine Insurance*, No. 34—*Marine Insurance Association*, No. 2.

ATTACHING OF POLICY.

See *Marine Insurance*, Nos. 10, 11, 12.

AVERAGE.

See *General Average—Marine Insurance*, No. 29.

AVERAGE STATEMENT.

See *Foreign Judgment*.

AVERAGE STATER.

Negligence—Good faith—Erroneous statement—Liability.—An average stater, employed by ship-owners and owners of cargo to investigate accounts and to adjust an average statement, is in the position of an arbitrator, and, so long as he acts in good faith, is not liable for negligence in making an erroneous statement. (C. P.) *Thorvis Sulphur Company v. Loftus* page 455

BAIL.

See *Bottomry*, No. 14—*Foreign Enlistment Act*, 1870, No. 4—*Limitation of Liability*, No. 2—*Necessaries*, No. 15.

BAILEE.

See *Wharfinger*.

BAERATRY.

See *Marine Insurance*, Nos. 13, 14, 36.

BILLS OF EXCHANGE.

See *Bottomry*, Nos. 1, 3, 4, 5—*Consignor and Consignee*, Nos. 1, 2.

BILLS OF LADING.

1. *Shipowner—Consignee—Contract*.—By the laws of England and of the North German Confederation a bill of lading is decisive as between shipowner and consignee, and the North German Code, although providing a form of bill of lading, does not prevent a special form of contract. (Adm.) *The Padra* page 71
 2. *Quantity shipped—Evidence—Onus of proof*.—Bills of lading signed by a master are *prima facie* evidence that the quantity named therein were received on board by him; the onus of rebutting this presumption, and of showing that a less quantity than that specified was received, lies upon the shipowner. (Ho. of L.) *McLean v. Fleming* 160
 3. *Rights and priority of holders—Acceptance of bills of exchange by consignee*.—Where it is the custom of trade to ship cargoes as against bills of exchange drawn in sets, and each annexed to a bill of lading, the consignee acquires no right to deal with the bills of lading until he has accepted the bills of exchange; and if one of the bills of lading comes by mistake into the hands of the consignee before acceptance of the bills of exchange, a third person, to whom such bill of lading is given as security by the consignee, and who has knowledge of the facts, acquires no rights of priority as against the holders of the other bills of lading. (L. C.) *Gilbert v. Guignon* 498
- See *Carriage of Goods*, Nos. 2, 3, 4, 13, 14, 15—*Consignor and consignee*, Nos. 2, 3—*Damage to Cargo*, Nos. 1, 2—*Guarantee—Marine Insurance*, Nos. 2, 13—*Salvage*, No. 7—*Wharfinger*.

BILLS OF LADING ACT.

Damages to Cargo, Nos. 1, 2.

BLOCKADE.

See *Carriage of Goods*, Nos. 21, 27.

BOARD OF TRADE.

See *Port—Ship*.

BOTTOMRY.

1. *Bond—What amounts to—Pledge of ship—Bill of exchange—No maritime interest—Maritime risk*.—An instrument drawn in the form of a bill of exchange for the payment of necessary disbursements, but which is payable after the arrival of the ship at her destination, and pledges the ship "except in case of total loss," is, although not stipulating for maritime interest, a bottomry bond. (Adm.) *The Elpis* 472
2. *What pledged—Maritime risk—Freight on subsequent voyage*.—A bottomry bond can only hypothecate something which is in danger of perishing by maritime risk during the time that the bond is running, and therefore cannot validly pledge freight to be earned on a voyage, after that maritime risk is ended and the bond is forfeited. (Priv. Co.) *Smith v. The Bank of New South Wales; The Staffordshire* 365
3. *Collateral security—Bills of exchange*.—Although a bottomry transaction cannot be based on personal security, bills of exchange may be given in addition to the bond. (Adm. Lr. and Priv. Co.) *Id.* 101, 365
4. *Bills of exchange—Collateral security—Presentation—What sufficient*.—Where a bottomry bond has been given, together with bills of exchange payable ten days after sight, to secure an advance, and it is agreed that if the bills on presentation are accepted the bond shall not be enforced, but the

drawee dies before the presentation can take place and, his executors refusing to act, probate or letters of administration have not been taken out, presentation to the managing clerk at the office of the deceased drawee on three several days is sufficient to satisfy the terms of the agreement so as to justify the bondholders, on the refusal of the clerk to accept, in enforcing the bond. The bondholders are not bound to accept an offer to pay after the bond has been despatched for enforcement, where they ask an indemnity for loss in case of seizure, and it is refused. (Priv. Co.) *Id.* page 365

5. *Bills of exchange—Collateral security—Acceptance by bondholders—Want of presentation and protest—Validity of bond*.—Where a bottomry bond on ship, freight, and cargo has been given by the master of a ship as collateral security for a bill of exchange drawn by him upon the bondholders, on the understanding that if the bill is properly met by funds being placed in the hands of the latter, the bottomry bond will not be enforced, but the master or shipowners, having placed no funds in the bondholders' hands, give notice that they do not intend to meet it, the bottomry bond is not bad as against the cargo, merely upon the ground that the bondholders have conditionally accepted the bill, and have neither presented it to the master for payment nor protested it. (Adm.) *The Onward* 540
6. *Necessity for communication with owners—Agency of master—Cargo—Repairs*.—The master of a ship, being only the agent of the cargo in special cases of necessity, is bound, when the circumstances permit, to communicate with the owner of the cargo before he does any act which seriously affects the value of the cargo. A master, therefore, putting into Port Louis, Martinique, for repairs to his ship, and intending to raise money for those repairs upon bottomry not only on ship and freight, but also upon cargo of an imperishable nature and belonging to one firm residing in Great Britain, is bound to communicate with them before having recourse to bottomry; otherwise the bond is invalid. (Adm.) *Id.* 540
7. *Communication with owners—What necessary*.—To justify a master in giving a bottomry bond on cargo where communication with the owners is necessary, a mere statement of injuries sustained by the ship and of the consequent necessity for repairs entailing considerable expense, unaccompanied by a statement that a bottomry bond is proposed, is not a sufficient communication; the law does not require the owners from such premises to draw the conclusion that the ship and cargo must be bottomried; although it may not be required that the words "bottomry of cargo" should be used in the communication, the fact itself should be stated, or at least the necessity for a bottomry bond should be an obvious and irresistible inference from the circumstances stated. (Adm.) *Id.* 540
8. *Communication with owners—Sufficiency of statement of injuries and repairs—Withholding information—Owners of cargo*.—A communication detailing the disasters to the ship, and the probable expense of repair, but not expressing the intention to bottomry the cargo, and requesting the owners of cargo to wait for further information, is not, where any communication is necessary, sufficient; more especially where the information as to the bottomry has been given to the shipowner, but withheld from the owners of cargo; and under such circumstances the owners of cargo are not bound to conclude that the master will resort to bottomry, or to

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- reply to the communication. *The Oriental* (3 Moore P. C. C. 398) followed; *The Bonaparte* (8 Moore P. C. C. 459) distinguished. (Adm.) *Id.* page 540
9. *Communication with owners—Delay—Loss of charter—Arrest of ship—Master also part-owner—Validity of bond.*—Where communication with owners would involve a delay of three months and loss of charter, a master, who is also part owner to the extent of one-third, and is compelled to raise money on bottomry to pay for repairs, and so prevent the arrest of his ship, need not communicate. (Adm. Ir. and Priv. Co.) *Smith v. The Bank of New South Wales; The Staffordshire* 101, 365
10. *Communication with owners—Mortgage—Ship's agent.*—A mortgagee is not for the purpose of previous communication, to be deemed an owner, though it may be different if he be ship's agent and agent for the owner. (Adm. Ir.) *The Staffordshire* 101
11. *Ship agents—Advances by—Personal credit of owners—Validity of bond.*—A bottomry bond is not invalid merely because the advance secured is made by the agents of the ship, provided that they could not be expected to advance on the personal credit of the owners, and gave the master an opportunity of obtaining an advance on the owners' personal credit elsewhere by refusing such an advance. (Priv. Co.) *Smith v. The Bank of New South Wales; The Staffordshire* 365
12. *Master—Duty of, in relation to cargo—Expense of repairs falling on cargo—Transshipment—Seamle.*—That a master being as agent for the cargo, as well as for the ship, bound to do his best for the whole adventure, and therefore not being entitled to bind the cargo for repairs of the ship at the sole expense of and without reasonable possibly of benefit to the cargo, cannot bottomry the cargo for repairs to the ship when the outlay for the repairs falling on the cargo would be so great that a reasonable and prudent owner, if present, would not have allowed his cargo to be bottomried, but would rather have paid the freight and transhipped the cargo. (Adm.) *The Onward* 540
13. *Non-delivery of cargo—Unliquidated damages—Arrest in foreign port—Validity of bond.*—A bottomry bond on a ship, given by the master to a creditor in satisfaction for, and as a compromise of, an unliquidated claim for breach of contract in respect of non-delivery of goods on a previous voyage, is bad, and will not be upheld by the High Court of Admiralty, even where the ship is arrested at the cost of the creditor in a foreign port, and the bond is necessary to obtain her release. (Adm.) *The Ida* 443
14. *Bail—Liability of—Value of ship at time of arrest.*—Where, in a bottomry suit bail has been given generally to cover ship and freight, but the ship only is held to be pledged by the bond, the bail is only liable to the extent of the value of the ship at the time of release from arrest, and an inquiry will be directed to ascertain that value. (Priv. Co.) *Smith v. The Bank of New South Wales; The Staffordshire* 365
- See Foreign Judgment.—*Maritime Liens*, Nos. 2, 3.—*Necessaries*, Nos. 10, 12.

BRITISH SHIP.

See *Necessaries*, No. 4.

BROKERS' COMMISSION.

See *County Courts Admiralty Jurisdiction Act*, No. 4.—*Necessaries*, No. 3.

CARGO.

See *Bottomry*, Nos. 6, 7, 8, 12, 13.—*Carriage of Goods*, Nos. 3, 5, 6, 7, 11, 12, 13, 14, 15, 16, 17, 18, 20, 22, 24, 26.—*Damage to Cargo*, Nos. 1, 2, 3, 4, 5.—*Marine Insurance*, Nos. 2, 4, 6, 7, 11, 12, 13, 15, 16.—*Sale of Cargo by Master*, Nos. 1, 2, 3, 4.—*Salvage*, Nos. 7, 23.

CARRIAGE OF GOODS.

1. *Common carrier—Barge owner—Goods carried for one person at a time—No special contract.*—A person who lets out barges for hire to any one of the public to convey goods from one place to another under his own care, but is in the habit of carrying for only one party at a time for the same voyage, and under no special contract, there being nothing to specify what vessel is to be employed, is a common carrier, and is liable for the loss of goods carried, although there be no negligence. (Ex.) *The Liver Alkali Company (Limited) v. Johnson* page 380
2. *Bill of lading—Steamship—Auxiliary screw.*—Where a vessel by which goods are carried is described as a "steamship," simpliciter, in the bill of lading forming the agreement between the freighter and the shipowner, the contract is that the goods shall be carried in a ship whereof the primary and principal propelling power is steam, and the terms of the contract will not be satisfied by forwarding the goods in an auxiliary screw steamship, making a sailing voyage with the occasional aid of the steam power. (Q. B.) *Fraser and others v. The Telegraph Construction and Maintenance Company* 421
3. *Bill of lading—Value, weight and contents unknown—Goods named not carried—Rate of freight—Estoppel.*—A bill of lading describing goods shipped as "thirteen packages, books, woodwork, whalebone, Dutch clocks, shoes, and linen goods," and stamped by the master with the words "value, weight, and contents unknown," is, on the ground that the shipowner declines by affixing the latter words to assent to the shipper's representation, as to the contents of the packages, a contract to carry whatever goods are contained in the packages; the shipowners are therefore bound to carry and deliver silk stuffs contained in one of the packages, there being no wilful or fraudulent representation on the part of the shippers. Although the freight charged for the other goods may be lower than for silk stuffs, the shippers are not estopped from proving the delivery of silk stuffs to the shipowners. (C.P.) *Leban and another v. The General Steam Navigation Company* 435
4. *Bill of lading—Damage to cargo—Excepted perils—Dangers of the seas—Risk of capture—Refusal to deliver.*—Where by a bill of lading, given by the master of a North German ship, goods are to be delivered at a North German port to English consignees, "the dangers of the seas only excepted," a refusal on the part of the master to deliver at the port named, on the ground of the existence of a war exposing his ship to risk of capture, is a breach of contract entitling the consignees to recover for damage to cargo, as by the terms of the contract the master was exempt from delivery in one event only. (Adm.) *The Patria* 71
5. *Shipowner and charterer—Respective duties of.*—The respective duties of charterer and shipowner are that the charterer must offer a reasonable cargo of the kind specified in the charter, and the shipowner must provide a ship that is reasonably fit to carry such a reasonable cargo. (C.P.) *Stanton v. Richardson* 44

6. *Charter-party—Breach of—Frustration—Voyage—Dissolution of contract.*—If the shipowner commits a breach of charter such as to justify the charterer in not putting the cargo stipulated for on board at the moment of the breach, and it cannot be remedied within such a time as not to frustrate the object of the voyage, the charterer is altogether absolved from performance of the charter. (C.P.) *Id.* page 449
7. *Charter-party—Reasonable cargo—Unseaworthy ship—Unreasonable delay—Dissolution of contract.*—Where a shipowner agrees to carry a cargo specified in the charter-party and the charterer provides a reasonable cargo of that description, but owing to the unfitness and unseaworthiness of the ship the cargo is damaged and is necessarily unloaded, the charterer is, if the ship cannot be made seaworthy within a reasonable time, absolved altogether from the performance of his contract to load a cargo, and may recover damages for the injury to his cargo. (C.P.) *Id.* 449
8. *Charter-party—Demurrage—Dock regulations—Selection of agent—Commencement of lay-days.*—Where by a charter-party a vessel is to proceed to a dock and there load in the usual and customary manner a full and complete cargo of coals to be supplied by an agent selected by the charterers, and, owing to the agent having other vessels to load a delay takes place, not by the charterer's fault but in consequence of the dock regulations, before the vessel goes into dock to be loaded by that agent, and a further delay in dock before getting to the place of loading, the lay days commence, in the absence of any express stipulation to the contrary, from the time of the ship's arrival in dock, provided that there is nothing unreasonable in the selection of the particular agent. *Tupacoll and others v. Balfour and others* 501
9. *English charter-party—Foreign ship—Governing law—Reasonable delay.*—A charter-party in the English language between English merchants and foreign ship-owners, by which the foreign ship is to carry a cargo to a British port for orders for any port in the United Kingdom or on the Continent between Bordeaux and the Baltic, is governed upon a question of reasonableness of delay in a suit for damage to cargo by the law of the ultimate place of performance, that place being fixed by the orders received at the port of call. (Adm.) *The San Roman* 347
10. *Contract of affreightment—Governing law—Transshipment.*—A contract of affreightment in the English language, entered into at Constantinople, between the master of a North German vessel and North German merchants there resident, by which it was agreed that the vessel should load and proceed to a British port for orders for a safe port in the United Kingdom, or on the continent between Havre and Hamburg, is governed as to the duty of transshipment in an intermediate port by North German law, although the cargo may be consigned to consignees resident in England. (Adm.) *The Express* 355
11. *Transshipment—North German law—Breach of contract.*—By North German law, where the master of a vessel is required to transship his cargo in an intermediate port where he is detained by fear of capture by enemies' cruisers, he is not bound to do so otherwise than at the expense of the owner of cargo, nor to part with the cargo, unless distance freight for the part of the voyage performed and other expenses have been paid or secured. Where consignees require a North German master to transship at his own expense, he is not bound to do so, and his refusal under those circumstances is not a breach of contract. (Adm.) *The Express* 355
12. *Freight paid in advance—Right to recover—Loss of cargo—Chartered rates.*—Freight paid in advance is not recoverable on the loss of cargo before delivery. When by a charter-party it was stipulated that the charterers shall make advances on freight to the master, who shall sign bills of lading at the current rate of freight as required, but not under chartered rates unless paid the difference in cash, and the master is prevailed upon by the charterers to sign bills of lading under the chartered rates without being paid the difference, and the cargo is lost before delivery, the shipowners may recover the difference in an action against the charterers, as the difference if paid, would have been, not an indemnity *pro tanto* for the loss of lien, but a payment in advance of freight. (Ex. Ch. from Ex.) *Byrne v. Schiller and others* page 111
13. *Demurrage—Dead freight—Short shipment—Lien—Charter-party—Right of shipowner—Holders of bills of lading.*—A charter-party by which the ship is to proceed to a port and load a full cargo, which the charterer binds himself to ship, ten days to be allowed for demurrage, the master to have a lien for dead freight and demurrage, gives, as against the holders of a bill of lading (stipulating that the cargo is to be delivered as per charter-party, the consignees "paying freight and all other conditions or demurrage," as per charter-party), a lien for demurrage, and such lien is preserved by the bill of lading; but it does not give a lien upon the cargo for unliquidated damages in respect of cargo short shipped, that not being dead freight; nor has the shipowner a lien for damages in respect of the detention of the ship beyond the demurrage days, such detention not being demurrage. (Exch. Ch. from Q. B.) *Gray v. Carr and another* 115
14. *Dead freight—Lien for—Charter-party—Holders of bills of lading.*—"Dead freight" means compensation, liquidated or unliquidated, for the loss suffered by the shipowner by the failure on the part of the charterer to supply a full cargo, and the amount payable in respect thereof, where it is unliquidated, is such reasonable amount as the shipowner would have earned, after deducting such expenses as he would have incurred, if a full cargo had been supplied. A lien on the cargo, actually shipped, for dead freight may be created by express stipulation in the charter-party. *Quære*, whether this would affect holders of a bill of lading? (H. of L.) *McLean v. Fleming*. 160
15. *Shipowner's lien—Holders of bills of lading—Notice of charter-party—General ship.*—A charter-party entered into by charterers and the master of a ship, by which a lien is given to the master on goods shipped, does not bind shippers who ship their goods without notice of the charter-party, and upon the faith of an advertisement holding the ship out as a general ship, and they may claim the return of the goods, free of all claim by the master, on his refusal to sign bills of lading except in the terms of the charter-party. When a ship is so advertised shippers are not bound to inquire whether a charter-party exists. (Rolls.) *Peck v. Lorrain*... 163
16. *Shipowner's lien on cargo—Landing—Dominion over goods—Lien.*—When the consignee of a cargo refuses to receive it the master of the vessel may, at common law, land and yet preserve his lien upon it for the freight, provided that he retain dominion over the goods. *Seemable*, that if he deposit the goods in the warehouse of an independent warehouseman, his lien for the freight is gone. (C.P.) *More-le-Blanch v. Wilson* 605

17. *Shipowner's lien upon cargo when landed—Right to demurrage.*—*Semble*, a master of a ship, if he can retain his lien upon goods which consignees refuse to accept when landed and warehoused, cannot claim demurrage after the goods should have been so landed. (C.P.) *Id.* page 605
18. *Delay—Deviation—Danger to ship—Cargo—Common peril.*—A master, on the receipt of credible information that his vessel will be exposed to imminent peril by continuing her voyage, is justified in deviating or passing for a reasonable time to avoid that peril, or to make inquiries. To justify a master in so passing or deviating it is not necessary that the ship and cargo should run a common risk. (Adm. & Priv. Co.) *The Teutonia*; *Duncan and others (apps.) v. Küster (resp.)*.....32, 214
19. *Delay—Deviation—Risk of capture—Negotiation for discharge—Waiver of orders.*—A delay of twenty-one days in an intermediate port during a war, in consequence of which there is immediate risk of capture if the ship put to sea, light and variable winds prevailing during the whole time, is a reasonable delay. Negotiation for discharge at such intermediate port may waive positive orders to proceed. (Adm.) *The Heinrich* 79
20. *Delay—Deviation—War—Risk of capture.*—A delay in an intermediate port of two months during a war, in consequence of which there is immediate risk of capture if the ship put to sea, the vessel waiting for a steam tug, which was considered necessary by the charterer's agents to avoid capture, but the master being willing to sail and take the risk of capture, is a justifiable delay, and the shipowners are not liable for the damage to the cargo or loss of profit caused by the delay. (Adm.) *The Wilhelm Schmidt* 82
21. *Delay—Deviation—War—Risk of capture—Extent of risk.*—By both English and North German law, risk of capture, such as to justify a master, whose vessel is carrying a cargo under a charter-party and bills of lading containing the exceptions, "Queen's enemies, &c." in putting into and remaining in an intermediate port during the continuance of the risk, need not amount to an actual operative restraint (almost a blockade), but must be that risk which would induce a reasonably prudent man, exercising due discretion and fortitude, not to expose the vessel to capture. Where such a risk exists, a delay even of nine months is not unreasonable, nor a breach of contract: *Semble*, that where the chances of escape and capture are equal, the master would be justified in remaining in port. (Adm.) *The Express* 355
22. *Delay—Deviation—War—Fear of capture—Damage to cargo.*—An apprehension of capture by enemies' cruisers in time of war, founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, will justify him in delaying his ship in port during the continuance of the risk of capture, even when carrying a neutral cargo, and the ship is not responsible in a suit in rem in the Admiralty Court for damage to the cargo caused by such reasonable delay, if the voyage is ultimately completed and the cargo is delivered. *Semble*, that if the voyage were abandoned, and the cargo not delivered according to the contract, the shipowners would be bound to show that they had been actually prevented from performing the voyage. (Adm. & P.C.) *The San Roman*..... 347, 603
23. *Contract—Illegal performance of—Intention to break law.*—A contract to do a thing, which cannot be performed without a violation of the law, is void, whether the parties know the law or not; but in order to avoid a contract which can be legally performed, on the ground that there was an intention to enforce it in an illegal manner, it is necessary to show the existence of a wicked intention to break the law. (Q.B.) *Waugh v. Morris* page 573
24. *Charter-party—Illegality—Carriage of hay—Contagious Diseases (Animals) Act—Intention of parties—Transshipment—Performance—Detention.*—A charter-party, by which it is agreed that certain hay shall be carried to London, and there delivered, all cargo to be taken from the ship alongside, is not invalid because an order in Council, under the Contagious Diseases (Animals) Act, prohibits the landing of hay in the port of London, if there was no original intention on the part of either party to break the law, and the contract was capable of legal performance by the transshipment of the goods in the port, and by their export by the owner. There is no such illegality in the contract as will enable the owner of the goods to resist an action for damages in respect of the detention of the ship. (Q.B.) *Id.* 573
25. *Charter-party—War—Illegality—Delivery at one of several ports—Order to illegal port—Right to new order—Payment of freight.*—Where a charter-party stipulates that a cargo is to be delivered at one of several ports, as ordered by the consignee, and it becomes illegal by the law of the country of the ship through the outbreak of war, after the order is given, to deliver at the port named, and the master without committing a breach of contract puts into another of the ports named in the charter-party, he is entitled to a new order from the consignee, and is not bound to deliver at that port without payment of full freight. (Adm. & Priv. Co.) *The Teutonia*; *Duncan and others (apps.) v. Küster (resp.)*..... 214
26. *Abandonment of voyage—Staying in port—Risk of capture—Refusal to deliver.—Offer of freight.*—Where a master has improperly refused to complete his voyage and remains in an intermediate port on the ground of risk of capture, he is bound, on the offer of consignees to pay full freight, to deliver the goods at that intermediate port even though they be part of a general cargo and at the bottom of the hold. *Semble*, he would be bound by English law to deliver without payment of freight. (Adm.) *The Patria* 71
27. *Dissolution of contract of affreightment—Blockade—Executory contract—Right of shipowner to refuse performance.*—A blockade of the port of destination of which there is no chance of termination within a reasonable time, operates as a dissolution of an executory contract of affreightment containing an exception against restraints of princes; and where the shipowner obtains intelligence of the blockade after the contract is made, but whilst it is still executory, and before he has laden his cargo, he is justified in treating the contract as an entire contract to load and carry to the port of destination, and, as such, impossible of performance, and is, therefore, not bound to perform part of the contract by proceeding to load his cargo. (Q.B.) *Geipel and others v. Smith and another*..... 268
- See *Charter-party—County Courts—Admiralty Jurisdiction*, Nos. 2, 3.—*Damages to cargo*, Nos. 4, 5.—*Jurisdiction*, Nos. 1, 2, 3, 4.—*Limitation of Liability*, No. 1.

CARRIAGE OF PASSENGERS.

Special contract—Loss of baggage—Wilful default.—A special contract, entered into between a shipowner and a passenger by sea, containing a provision that the shipowner would not be answerable for loss of baggage "under any cir-

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ommetaneous whatsoever;" covers the case of wilful default and misfeasance by the shipowner's servants. (Ex.) *Taubman v. The Pacific Steam Navigation Company* page 337

See *Inspection of Documents*.

CARRIER.

See *Carriage of Goods*, No. 1.—*Limitation of Liability*, No. 1.

CESSER OF LIABILITY.

See *Charter-party*, No. 1.

CHANGE OF SOLICITORS.

Solicitor's Lien, No. 3.

CHARTERER.

See *Carriage of Goods*, Nos. 5, 6, 7, 8, 12, 13, 14, 15.—*Charter-party*, Nos. 1, 2, 6.—*Salvage*, No. 6.

CHARTER-PARTY.

1. *Charterer—Cesser of liability—Liabilities before and after shipment*.—A clause in a charter-party by which it is agreed that "this charter-party being concluded by the charterer on behalf of another person resident abroad, all liability of the charterer shall cease as soon as he has shipped the cargo," exempts the charterer only from liabilities incurred after shipment, but not from liabilities incurred previous to shipment. (Q.B.) *Christoffersen v. Hansen* 305

2. *Construction—Continuous employment—Breach—Dissolution of contract—Plea—Damages*.—A charter-party, by which a ship is to proceed to a loading berth at B., and there load a cargo and carry the same, "the vessel to load with G. or C. till the end of September at master's option, after September with C., the vessel to continue at this rate and term till the end of March, 1872," is a contract for the continuous employment of the vessel, and the charterers, by refusing to load the vessel with G. in September, the master having exercised his option by electing to load with G., break the continuity of the employment and justify the master in refusing any longer to perform the contract. A plea to an action for breach of charter in not loading, that the master exercised his option, and the charterers refused to load with G., is a good plea. The breach of the charterers is not a partial breach for which damages on which an action for breach would have been compensation to the shipowner, but goes to the root and whole consideration of the contract. (Ex.) *Bradford and another v. Williams* 313

3. *Excepted Perils—Bill of lading differing from charter-party—Contract—Knowledge of consignees*.—Where a charter-party contains the exceptions "Queen's enemies, restraints of princes," &c., and a stipulation that the master is to sign bills of lading in pursuance thereof "without prejudice to this charter-party," and the bills of lading are signed containing no exception but "dangers of the sea only excepted," the cargo being thereby consigned to consignees named therein, who had notice of the terms of the charter-party at the time it was entered into, the contract is contained in both instruments, and the stipulation in the bills of lading does not supersede the stipulations in the charter-party. (Adm.) *The San Roman* 347

4. *Excepted perils—Outward and homeward voyage—Pleading*.—The exceptions in a charter-party, which stipulates that a vessel shall proceed to a foreign port, and there load a cargo and carry the same to a home port, apply to the outward voyage as well as to the homeward voyage, and if the ship is lost by reason of excepted perils on the outward voyage, her owners are not

liable for breach of charter. A plea setting up this defence to an action for breach of charter in not proceeding to the port of loading is a good plea. (Q.B.) *Harrison v. Garthorne* page 303

5. *Demurrage—Working days—Statement of, to be furnished—Expiry of charter—Reasonable time—Pleading*.—Where a time charter provides for a certain number of working days for loading and discharging in each voyage and that, of the number exceeded, "a statement shall be furnished to the said merchants on the expiration of this charter," and that the merchant shall pay for the excess, the above clause is complied with by furnishing a statement within a reasonable time after the expiration of the charter-party, and a replication that such statement was furnished within a reasonable time, is a good answer to a plea (to a declaration for money due for demurrage) alleged that the statement was not furnished at the expiration of the charter-party. (Ex.) *Board and another v. Rhodes* 557

6. *Construction—Metage dues—Liability for—Charterer's expense—Metage, where performed*.—Under a charter-party, providing that a ship would load a cargo of oats and proceed to a safe port and there "deliver the same always afloat on being paid freight" at certain rates per quarter of oats discharged; "the cargo to be brought and taken from alongside at charterer's expense and risk," the shipowners are liable to pay a due for metage performed by the owners of the port of discharge by virtue of an ancient right, if such due in its origin was for metage performed on board, but if the metage was to be done ashore the charge falls on the consignee and they must repay the shipowners the amount disbursed for the same. (Q.B.) *Feedham and another (appas.) v. Peterson (resp.)* 93

See *Carriage of Goods*, Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 24, 25, 27; *County Courts Admiralty Jurisdiction*, Nos. 1, 2, 3.

CINQUE PORTS COMMISSIONERS.

See *Salvage*, Nos. 30, 31.

COLLISION.

1. *Pilot—Suit against—Admiralty Court—County Court—Jurisdiction*.—The High Court of Admiralty, the County Courts and the Court of Passage (Admiralty Jurisdiction) have no jurisdiction to entertain a suit in personam against a pilot for damage by collision occasioned to a ship by his negligence whilst in charge of another ship. (Adm.) *The Alexandria; The Oceanic Steam Navigation Company (Limited) v. Jones* 464

2. *Rules of Navigations and Lights—Application to British and United States ships—Foundation of decisions*.—The law administered by the Admiralty Courts of Great Britain and the United States, relating to all rules of navigation, and rules concerning lights in cases of collision on the high seas, is the same. In British Admiralty Courts, decisions in cases of collision between British and American ships rest directly upon the rules, as accepted expressions of law made applicable by the Merchant Shipping Amendment Act 1862 (25 & 26 Vict. c. 63), ss. 58, 61, to the ships of both countries. In the United States Admiralty Courts, the decisions are founded upon the general law and usage of the sea, as evidenced by written rules or statutes identical in the two countries, there being no such provision in the Act of Congress applying the rules in the United States as sect. 61 of the Merchant Shipping Amendment Act 1862. The steamer *Scotia* (20 L. T. Rep. N. S. 375; 3 Mar. Law Cas. O. S. 323), followed. (Vice-Adm. N. S. W.). *The Narada* 477

3. *Lights and signals—Steamship—Getting under way—Going astern—Duty to show a light astern.*—A steamship, which, in getting under way in the Thames to go up the river between sunset and sunrise, is compelled to go astern and partly athwart the river in order to get clear-ahead, and whose regulation lights are not visible to vessels coming up the river, is bound to take every possible precaution to warn approaching vessels of her position, and to use the best light she has on board for that purpose. Placing a service lantern, ordinarily used to give light in discharging cargo, over the stern, is not a sufficient precaution. A vessel neglecting such a precaution commits a breach of Art. 20 of the regulations for preventing collisions at sea. (Adm.) *The John Fenwick* page 349
4. *Lights and signals—Overtaking ships—Duty of leading ship—Sailing rules, No. 17.*—Where one ship during the night time is overtaking another within the meaning of Article 17 of the Regulations, although the leading ship may be in such a position that the following ship cannot see the regulation lights of the leading ship, the latter is not bound, under ordinary circumstances, to give a signal or show a light to the following ship. (Adm.) *The Chanowry* 569
5. *Fog—Rate of Speed—Sounding fog-horn—Sailing rules, Nos. 10 and 16.*—A steamer in a dense fog is bound to go as slow as it is possible for her to go and maintain steering way. Eight or nine knots an hour is too high a rate of speed in a fog in the British Channel. A steamer should continually sound her fog horn in such circumstances. (U.S. Dist. Ct., East. Dist. of N. Y.) *The Steamship Westphalia* 12
6. *Fog—Speed.*—Four to five knots an hour is not a moderate speed for a steamer in a thick fog in the Baltic, twenty-five miles east of Gotland. (Priv. Co.) *The Mogra Charis* 153
7. *Fog—Duty of Steamship—Speed—Engine-power Sailing Rule, No. 16.*—The meaning of Art. 16 of the regulations for preventing collisions at sea, when applied to a steamer in a fog, is that it is her duty to avail herself of her hoiler power to be ready to stop and reverse with power and efficiency in a fog, while at the same time she moderates her speed so as to enable such power to be exercised with greater efficiency. A speed of nine and a half knots an hour is too high a rate of speed for a steamer in the Atlantic on a voyage from Bremen to New York in a fog. (U.S. Dist. Ct., S. Dist. of N. Y.) *Jeffery v. The Steamer House* 240
8. *Fog—Steamship—Steam whistle—Duty to stop and reverse—Sailing rule, No. 16.*—A steamship going at a moderate speed in a fog, on hearing a steam whistle sounded many times, indicating that another steamer is approaching and has come so near that if the vessels then stopped they would be within hailing distance, is bound under the terms of Art. 16 of the Regulations for Preventing Collisions at Sea, not only to stop, but to reverse her engines, and ought not to wait until the vessels eight each other, when such reversing would be too late. (P. C.) *The Frankland; The Kestrel* 489
9. *Steamship—Tug drifting—Lights—Sailing rules, No. 15—Sailing ship—Duty of.*—A tug, lying in wait and drifting with her coloured lights burning, is a steam vessel in motion, and is bound to keep out of the way of a sailing vessel, but the latter, having seen the lights of the tug in time to avoid her, is bound to use the necessary precautions to do so, and should she neglect this and a collision ensue, both vessels are to blame. (U.S. Dist. Ct., East. Dist. of Mich.) *The Sunnyside* 91
10. *Steamship—Tug towing ship—Sailing vessel—Duty of tug—Special circumstances—Sailing rules, Nos. 15 and 19.*—The fact that a steam tug is towing a vessel against the wind involves no such danger of navigation, and no such special circumstances within the meaning of Art. 19 of the Regulations for Preventing Collisions at sea as will justify a departure from the rule (art. 15) that a steamship shall keep out of the way of a sailing vessel. (Adm.) *The Warrior* page 400
11. *Crossing ships—Picking up pilot—Pilot station—Special circumstances—Sailing rules, Nos. 14 and 19.*—The fact that two steamers, upon crossing courses, are bearing down at the same time upon a well-known pilot station to take pilots on board, is not such a special circumstance within the meaning of art. 19 of the Regulations for Preventing Collisions at Sea, as will justify a departure from Art. 14, requiring the steamer which has the other on her own starboard hand to keep out of the way of the other. (Adm.) *The Ada; The Snappo* 475
12. *Close hauled ship—Luffing—Deviation from course.*—A close hauled vessel is justified in luffing so as to bring her, after she has sighted another vessel, as close to the wind as she can get so as to remain under command, and such luffing is not a deviation from her course that will relieve the other vessel, having the wind free, from the duty of getting out of her way. (Priv. Co.) *The Marmion* 412
13. *Risk of collision—Vessels meeting end on—Sailing rules, Nos. 13 and 16.*—When two steamships are meeting end on, within the meaning of Art. 13 of the regulations for preventing collisions at sea, and one of them, at a proper distance, ports her helm sufficiently to put her on a course which will carry her clear of the other, she thereby determines the risk, and is not "approaching another ship so as to involve risk of collision," within the meaning of Art. 16, and is not bound to slacken speed or stop. (Priv. Co.) *The Earl of Elgin; The Jeannet* 150
14. *Risk of collision—Sailing rule, No. 18.*—Art. 16 of the regulations only applies when there is a continuous approaching of two ships. (Priv. Co.) *Id.* 150
15. *Overtaking ships—Same general course—Crossing ships—Sailing rules, Nos. 14 and 17.*—Where two steamships, bound in the same general direction, but on courses differing by one point, are steaming one behind the other, and one is overtaking the other, they are not crossing vessels within the meaning of Article 14 of the Regulations for Preventing Collisions at Sea, but the vessel which is behind the other is a vessel overtaking another within the meaning of Article 17 of the Regulations, and is bound to keep out of the way of the leading vessel. (Adm.) *The Chanowry* 569
16. *Going about—Following ship—Necessity for signal.*—A vessel beating against the wind is entitled to go about in such a place as is usual and ordinary, without warning vessels following her of her intention, and vessels so following must be prepared for the vessel ahead going about. (Adm. and P.C.) *The Palatine; The Priacilla* 468
17. *Foul berth—Ordinary precautions—Duty of first vessel.*—Where a vessel taking up a berth to discharge, gives another a foul berth, the former vessel has no right to require that the latter shall take more than the ordinary and usual precautions against weather, and the latter having taken such precautions, will not be responsible for the damage to the former resulting from a collision which might have been prevented by further, but unusual, precautions. (Adm.) *The Virid* 601

18. *River navigation—Crossing river—Sailing Rules—Violation of.*—Vessels navigating the river Thames are at liberty to go on which side they please of mid-channel, but if on crossing from one side to the other they violate the regulations for preventing collisions at sea, they will be held liable if they come into collision with another vessel. *The Velocity*, 21 L. T. Rep. N. S. 686, explained. (Priv. Co.) *The Owners of the Steamship Niord*, resp.; *The Esk*; *The Niord* page 1
19. *River navigation—Side of river—Custom—Sailing rules, No. 14.*—Crossing vessels—Course down river.—There is a practice for steam vessels, going down Greenwich Reach in the river Thames on a flood tide, to keep the north side of the river in rounding the point. Where a steamer is going up Greenwich Reach, and sights, two points on her starboard bow, the red lights of another steamer coming down the reach along the north shore, the vessel going up being further to the southward of the channel than the vessel coming down, the two vessels are not to be considered as crossing vessels, within the meaning of Art. 14 of the Regulations for Preventing Collisions at Sea. The vessel going up the river has no right to suppose that the vessel coming down is crossing from one side of the river to the other, but is bound to suppose that the vessel coming down the river will, in accordance with the practice of the river and her consequent right, keep along the north shore. (P.C.) *The Banger*; *The Cologne* 484
20. *River navigation—Going about—Sailing vessel—Necessity for signal—Duty of other vessels.*—Where a sailing vessel is beaking up the river Thames on a flood tide against the wind, and has gone towards the south shore to the edge of the tide, and as near to that shore as she can safely go, so as to avoid collision with vessels at anchor on the south side of the river, she is entitled to go about without warning vessels of her intention, and a steamer coming up astern of her ought to know from her position and the state of her sails that she is going about, and is bound to take measures by stopping or otherwise to avoid a collision. (Adm.) *The Palatine* 468
21. *Loss of life consequent upon collision—Contributory negligence—Duty of crew of damaged ship.*—Two vessels came into collision, and one of them, being rendered helpless, was driven ashore by a gale of wind, and three of her crew killed and others injured. The other vessel, being to blame, was liable in loss of life and injuries, as they were the natural consequences of the collision. The crew of the wrecked vessel were not guilty of contributory negligence in not going on board other vessels when doing so would have been attended by great risk. (Adm.) *The George and Richard* 50
22. *Rendering assistance after collision—Duty of wrong-doing ship—Risk of capture.*—Although it is the duty of every vessel, whether British or foreign, to render assistance to another which she has injured in collision, that duty will not compel a ship to remain alongside another so injured, so as to run risk of capture by an enemy's fleet. (Adm.) *The Thuringia* 283
23. *Rendering assistance—Merchant Shipping Act—United States ships.*—The rule contained in the Merchant Shipping Amendment Act 1862, sect. 33, that the omission by any ship, after a collision, to render all practicable assistance to another, shall be presumptive evidence against the former that she is in fault, does not apply to United States ships, because that rule has not been adopted by the United States. (Vice-Adm. N. S. W.) *The Nevada* 477
24. *Inevitable accident defined.*—Inevitable accident in point of law is that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. *The Virgil* (3 W. Rob. 201), followed and approved. (Priv. Co.) *The Marperia* page 261
25. *Inevitable accident—Onus on defendant—Ordinary and usual precaution.*—Inevitable accident is where the collision could not have been prevented by proper care and seamanship in the particular circumstances of the case. A defendant, in order to support a defence of inevitable accident, is bound to show that everything ordinary and usual was done which could and ought to have been done to avoid a collision. (Adm. Ir.) *The Secret* 318
26. *Pleading—Practice—Admiralty Court.*—If a party to a cause of collision in the High Court of Admiralty intends to rely upon a particular act of negligence, he is bound to set out that act in his pleadings, and it is not sufficient that the act may be included in an allegation in the pleadings which do not clearly express the intention, as the not having stated it is likely to mislead the other party and to prevent him from being prepared to meet that case. (Priv. Co.) *The Marperia* 261
27. *Pleading—Admiralty Court—Allegation of negligence—Damaged ship stationary.*—In a cause of collision instituted by the owners of a vessel moored in a harbour, *Semble*, that the established rule, which requires a plaintiff in a cause of damage to state with reasonable certainty the instances of neglect on which he intends to rely, and if he relies on a breach of a statutory rule of navigation, that he should specifically plead that the act done or not done was in violation of that particular rule, does not apply to a case where one vessel is under way and the other incapable of moving. Where the petition states such facts on the part of the plaintiff, as if proved or admitted, would lead to the conclusion that the vessel charged with the collision was to blame, it is then rather for the defendant to show what has been done than for the plaintiff to show what might have been avoided. (Adm. Ir.) *The Secret* 318
28. *Pleading—Admiralty Court—Allegation—Sufficiency of proof.*—An allegation in a petition that the vessel proceeded against in a collision case was "considerably further out to the south side of the river than" the other vessel, and improperly ported, and so brought about a collision, is sufficiently proved to entitle the owners of the vessel making the allegation to recover, by showing that the vessel proceeded against was further over to the south side of the river than the other, and improperly ported. The word "considerably" need not be proved to the full extent. (P.C.) *The Ranger*; *The Cologne* 484
29. *Onus of proof—Lights—Fishing vessel—Sea Fisheries Act 1868.*—In a cause of damage in the High Court of Admiralty on behalf of a fishing smack, injured by collision whilst attached to her nets, an allegation in the defendants' answer that the plaintiffs neglected to comply with the provisions of the Sea Fisheries Act 1868, as to lights, throws upon the plaintiff the onus of proof and the obligation to begin, contrary to the usual rule that a fishing vessel attached to her nets, being in the same position as a vessel at anchor, has the right to require a vessel coming into collision with her to begin and show excuse for the collision. (Adm.) *The Bottle Imp* 571
30. *Onus of proof—Overtaking ships.*—In a collision case, where the plaintiffs established a prima

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- facie* case that the defendants' vessel was overtaking their vessel within the meaning of Art. 17 of the Regulations for Preventing Collisions at Sea, the onus of showing excuse for the collision is thrown upon the defendants. (Adm.) *The Chanorry* page 569
31. *Onus of proof—Inevitable accident.*—Where in a case of collision in the High Court of Admiralty, the defence of inevitable accident is raised, the onus of proof lies in the first instance on the plaintiffs, who must establish that blame does attach to the vessel proceeded against. The onus attaches to the defendants only after a *prima facie* case of negligence and want of seamanship has been shown against them. *The Bolivia* (3 Notes of Cases, 210) followed and approved. (Priv. Co.) *The Marpesia* 261
32. *Onus of proof—Total loss by negligence of ship's own crew.*—In the High Court of Admiralty, the burden of proving that the total loss of a vessel injured by collision resulted, not from the collision but from want of ordinary nautical skill and courage on the part of the crew of that vessel, lies upon the original wrong-doers. (Adm.) *The Thuringia* 283
33. *Onus of proof—Compulsory pilotage—Charge of defective steering.*—In a case of collision, where the defence is compulsory pilotage only, and the defendants prove orders given by the pilot and obeyed by the crew for the purpose of avoiding the collision, and where the plaintiffs seek to show that the collision was due to the defective steering power of the defendants' vessel, it lies upon the plaintiffs to establish the fact by substantive evidence. (Adm.) *The Livra* 204
34. *Practice—Admiralty Court—Preliminary act.*—The High Court of Admiralty will not, at the hearing, allow the amendment of the preliminary act in a case of damage by collision. (Adm.) *The Frankland* 207
35. *Practice—Admiralty Court—Cross cause—Evidence.*—Where a cause of damage arising out of a collision between two ships has been heard and decided, and both ships have been found to blame, and the owners of cargo on board the ship proceeded against subsequently institute a cause against the former plaintiffs in respect of the same collision, the Court of Admiralty has no power to make an order allowing the plaintiffs (the owners of cargo) to use the evidence given in the former cause in the hearing of the latter, if the defendants refuse to consent to such an order. (Adm.) *The Demeltris* 230
36. *Practice—Admiralty Court—Notice of action—Proceeding in rem.*—Under a statute which provides that no action shall be brought against the City of Dublin Steam Packet Company in respect of injury done to any vessel on the high seas, unless a month's notice of action shall be given to the company, it is not necessary to give such notice before instituting proceedings in rem in the Admiralty Court, as that Court deals with the res only, and the res, and not the owner personally, is liable in the suit, and the statute relates only to personal actions. (Adm. Ir.) *The Mullingar* ... 232
37. *Practice—Interrogatories—Admiralty Court—Jurisdiction.*—The Court of Admiralty has power to order interrogatories to be administered to a defendant before the plaintiff has filed his petition. (Adm.) *The Murillo* 579
38. *Practice—Interrogatories—Admiralty Court—Appearance—Jurisdiction.*—When a cause of collision was instituted in personam against a defendant as owner of a ship, and the defendant entered an appearance, alleging himself to be "improperly sued as one of the owners" of the ship, the Court of Admiralty allowed interroga-
- tories to be administered by the plaintiff to the defendant for the purpose of ascertaining the ownership before the plaintiff's petition was filed. (Adm.) *The Murillo* page 579
39. *Assessment of damages—Demurrage—Time—Delay for repairs—Business connected with collision—Rate allowed.*—Demurrage is allowed by the High Court of Admiralty to the owners of a ship damaged by collision during the time that she has been necessarily delayed for the purpose of effecting the repairs rendered requisite by the collision, and of transacting business unquestionably connected with the collision. Making a protest and the obtaining the necessary official documents by the master relating to the damage done to both ship and cargo is business unquestionably connected with the collision. Delay in their preparation, caused by the dilatoriness of foreign authorities, and not by the default of the master, is chargeable to the collision. *Quere*, whether transshipment and forwarding of cargo can be said to be business connected with the collision. The usual rate of demurrage allowed to steam vessels of the ordinary class, carrying cargo, is 6d. per ton on the gross tonnage, or 9d. per ton on the net tonnage, per day. (Adm.) *The City of Buenos Ayres* 169
40. *Assessment of damages—Unjustifiable abandonment—Want of ordinary courage and nautical skill—Liability of wrongdoers.*—The master and crew of a vessel injured by collision are bound to show ordinary courage and nautical skill in endeavouring to save their vessel from total loss, and defendants will not be held liable for any loss that might have been avoided by the exercise of such ordinary courage and skill, and if her master and crew unjustifiably abandon her, and she is consequently totally lost, the defendants will not be liable for such total loss of the plaintiff's ship, but only for the expense which would have been incurred in making good the actual damage sustained by the collision, and for loss of earnings during the probable time required to effect the repairs. (Adm.) *The Thuringia* 283
41. *Assessment of damages—Reference to registrar and merchants—Revision of report.*—Where a reference has been made to the registrar and merchants in a case of collision in the High Court of Admiralty to assess the damages as to the time and rate at which demurrage is to be allowed, the court will review the registrar's report and correct any portion of it founded upon what the court deems to be an erroneous review of the evidence. (Adm.) *The City of Buenos Ayres* 169
42. *Costs—Defence of compulsory pilotage.*—Defendants in a cause of damage, who rely at the hearing upon the defence of compulsory pilotage only, but whose pleadings raise other issues, which are not proved, are not entitled to their costs. (Adm.) *The Livra* 204
43. *Costs—Inevitable accident.*—The rule of the Admiralty Court, in cases where a collision is found to be the result of inevitable accident, is to make no order as to costs unless it can be shown that the suit was brought unreasonably, and without sufficient *prima facie* grounds, and this rule is followed by the Court of Appeal. (Priv. Co.) *The Marpesia* 261
44. *Costs—Exorbitant claim—Reference.*—Where an exorbitant claim is made before the registrar and merchants for the value of a vessel injured in a collision, abandoned and totally lost, and the abandonment is held unjustifiable, the plaintiff will be condemned in the costs of the reference. (Adm.) *The Thuringia* 283

See *Compulsory Pilotage*, Nos. 1, 2, 3, 4—*Damage*
No. 2—*Damage to Cargo*, No. 5—*Jurisdiction*,
No. 4—*Limitation of Liability*, Nos. 1, 2, 3—*Sal-*
vage, Nos. 15, 16, 17.

COLONIAL STATUTES.

See *Compulsory Pilotage*, No. 1, 2, 3, 4.

COMMON CARRIER.

See *Carriage of Goods*, No. 1—*Marine Insurance*,
No. 33.

COMMUNICATION WITH OWNERS.

See *Bottomry*, Nos. 6, 7, 8, 9, 10—*Sale of Cargo*
by master, Nos. 1, 2, 3, 4.

COMPULSORY PILOTAGE.

1. Colonial statutes—*Binding in Admiralty Courts*
—*Waters of colony*.—Colonial statutes, imposing
compulsory pilotage upon vessels navigating in
the waters of the colony and relieving owners
from liability for the negligence of pilots taken
under such compulsion, are binding equally upon
the High Court of Admiralty and the Vice-Admir-
alty Courts. (P.C.) *The Hibernian*, ... page 491
2. *Compulsion—What amounts to—Penalty—Desti-*
nation of.—A statute enacting that certain vessels
"shall take on board" a pilot to conduct such
vessels in certain waters "under a penalty equal
in amount to the pilotage of the vessel," which
penalty goes to a fund for the relief of decayed
pilots, renders the taking of a pilot compulsory
upon such vessels, on the ground that when a
statute inflicts a penalty for not doing an act, the
penalty implies that there is legal compulsion to
do the act, whatever may be the destination of
the penalty. (P.C.) *Id.*, ... 491
3. *Canadian statutes—River St. Lawrence—Com-*
pulsion—Penalty.—The two Canadian statutes
enacting that (27 & 28 Vict. c. 58, sect. 10) masters
of certain vessels leaving Montreal for a port out
of the province "shall take on board a branch
pilot for and above the harbour of Quebec, to
conduct such vessel, under a penalty equal in
amount to the pilotage of the vessel, which
penalty shall go to the Decayed Pilots' Fund,"
and that (27 & 28 Vict. c. 13, sect. 14) "no owner,
&c., shall be answerable to any person whatever
for any loss or damage occasioned by the fault or
incompetency of any qualified pilot acting in charge
of such ship within any place where the employ-
ment of such pilot is compulsory by law," are to
be read and construed as *in pari materia*, and the
owner of a ship navigating the River St. Lawrence
(Canadian waters), under the direction of a pilot
taken on board under the provisions of those sta-
tutes, employs the pilot so taken on board by
compulsion of law, and is, therefore, exonerated,
according to the law of Canada, from all liability
for damage inflicted upon another vessel by the
pilot's negligence. (P.C.) *Id.*, ... 491
4. *Selection of pilot—Licensed pilots—Master and*
servant.—A power of selection given to ship-
masters, &c., by a statute (27 & 28 Vict. cap. 58,
s. 2, Canadian), by which they may choose such
"pilot or pilots," as they may think fit from
among certain licensed pilots, "there called
"branch pilots," gives only a restricted power of
selection out of a particular class, and therefore
does not create the relation of master and servant
between the shipowner and pilot. (P.C.) *Id.*, ... 491

CONCEALMENT OF MATERIAL FACT.

See *Marine Insurance*, Nos. 17, 18, 19, 20, 21,
22, 23.

CONSEQUENTIAL DAMAGE.

See *Collision*, No. 21.

CONSIGNOR AND CONSIGNEE.

1. *Appropriation of cargo—Lien—Bills of exchange*
—*Endorsement to third parties—Priority*.—Where
a consignor draws bills of exchange on the con-
signee against a cargo consigned to the latter,
at the joint risk and profit of himself and them,
and, forwarding to them the bill of lading, re-
quests the consignee to honour the bills, to
which they consent, but afterwards endorses
the bills to third persons, there is no approp-
riation of the proceeds of the cargo to meet
the bills, and the third parties have no lien on
the cargo in priority to the claim of the con-
signee in respect of their general lien. (L.J.J.)
Roby and Company's Perseverance Ironworks
(Limited) v. Otter, ... page 413
 2. *Vesting of property—Acceptance of bill of exchange*
—*Intention of consignor*.—Where a bill of
exchange and a bill of lading are sent together,
with the intention that the bill of exchange shall
be accepted or the bill of lading returned, the
property in the goods to which the bill of lading
relates, does not pass to the person to whom the
bill of lading is sent, on his refusal to accept the
bill of exchange. (H. of L.) *Shepherd v. Harri-*
son, ... 66
 3. *Passing of property—Loss before arrival—Pur-*
chaser taking risk—Liability—Bills of lading.—
An agreement between vendors and purchasers
that the vendor shall ship on board a vessel a
cargo of fresh water ice, "to be despatched with
all speed to any ordered port, the vendors for-
warding bills of lading to the purchaser, and
upon receipt thereof the purchaser takes upon
himself all risks and dangers of the sea, and the
purchaser agrees to buy and receive the said ice
on its arrival at the ordered port, and pay cash
on delivery, at the rate of twenty shillings per ton
weight on board during delivery," passes the prop-
erty to the purchaser on receipt of the bills of
lading, and renders him liable to pay on arrival
according to the value of the cargo; and if the
cargo be lost by the perils of the sea before
arrival, transfers the risk to the purchaser, so
as to render him liable to pay the vendor the
value of the cargo at the time of the loss. (Exch.
Ch. from Ex.) *Castle and others v. Playford*, ... 255
- See *Bills of Lading*—No. 1—*Damage to Cargo*,
Nos. 1, 2—*Vendor and Purchaser—Wharfinger*.

CONSOLIDATION OF CAUSES.

See *Salvage*, Nos. 25, 26, 27.

CONTRABAND OF WAR.

See *Marine Insurance*, No. 16.

CONTRACT.

- See *Bills of Lading*, No. 1—*Carriage of Goods*, Nos.
1, 2, 3, 4, 5, 6, 7, 10, 21, 22, 23, 24, 27—*Carriage*
of Passengers—Charter-party, Nos. 1, 2, 3, 4, 5, 6
—*Consignor and Consignee*, Nos. 1, 2, 3—*Prin-*
cipal and Agent—Salvage, Nos. 8, 9, 10, 12, 13,
14—*Vendor and Purchaser*.

CONTRIBUTORY NEGLIGENCE.

See *Collision*, No. 21.

CO-OWNER.

See *Necessaries*, Nos. 7, 9.

COSTS.

1. *Certifying for costs—County Court—Admiralty*
Jurisdiction Acts—Admiralty Court—Expense of
trial.—The High Court of Admiralty will certify
for costs, under 32 & 33 Vict., c. 71, s. 9, where
it is less expensive to try in London than in a
County Court. (Adm.) *The Beaumaris Castle*, ... 19

SUBJECTS OF CASES.

2. *Sale of vessel—Admiralty Court—Costs of sale—Priority.*—Where there are several claimants against the proceeds of a vessel in the registry of the High Court of Admiralty, the vessel having been sold in the cause of one claimant, the costs of sale will be paid before all other claims, as the sale is for the benefit of all. (Adm.) *The Panthea*..... page 133
3. *Consent to motion—Admiralty Court—Practice.*—The High Court of Admiralty will not give the costs of appearing to consent to a motion where the party so appearing is not in any way prejudiced by the motion. (Adm.) *The Achilles*..... 163
4. *Admiralty Court—Practice—Decree—Necessaries—Meritages.*—Where the plaintiff in a cause of necessities obtains a decree against a ship, and the mortgagees neglect to enter a caveat until after an order for payment out of court in the cause of necessities has been made, the court will give to the plaintiffs in the cause of necessities the costs caused by the delay of the mortgagees. (Adm.) *The Merland* 44
5. *Pleading—General traverse—Special defence—Defendants' rights to costs.*—Defendants in a cause in the Admiralty Court may prove a special defence under a general traverse, if such defence is no surprise to the plaintiffs, and on such defence being established the defendants are entitled to costs. Where a special defence is raised on the pleadings, if such defence is established, and even though the case is concluded under the general traverse, the defendants are entitled to judgment and costs on the second defence. (Priv. Co.) *The Orient* 108
6. *Mistake in law affecting costs—Right to appeal.*—Where there has been a mistake on a matter of law in the court of first instance which affects or governs costs, the party prejudiced is entitled to have the benefit of correction by appeal. (Priv. Co.) *Id.* 108
- See *Collision*, Nos. 42, 43, 44—*Foreign Enlistment Act 1870*, No. 4—*Practice*, No. 4—*Salvage*, Nos. 29, 31—*Solicitors' Lien*, Nos. 1, 2, 3.

COUNTY COURTS ADMIRALTY JURISDICTION.

1. *Extent of jurisdiction—Admiralty Court—Charter-party—Short delivery.*—County Courts Admiralty Jurisdiction Acts (31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51), although they invest certain County Courts with a jurisdiction to entertain and determine a limited portion of the cases which were formally entertained and determined only in the High Court of Admiralty, do not by inference and indirect enactment enlarge the jurisdiction of the High Court of Admiralty, or give to County Courts a jurisdiction which the High Court of Admiralty never possessed. A County Court having admiralty jurisdiction has no jurisdiction to entertain a suit for damages for short delivery of cargo arising out of a charter-party, the High Court of Admiralty having no jurisdiction to entertain such claim. (C. P.) *Simpson and another v. Blues and another* 326
2. *Extent of jurisdiction—Claim in relation to the hire of ship, or to the carriage of goods—Admiralty Court.*—The County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), sect. 2, conferring upon certain County Courts, having Admiralty Jurisdiction under the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), power to try "any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship," confers upon those County Courts a more extensive jurisdiction

- in relation to such agreements than that possessed by the High Court of Admiralty, under the Admiralty Court Act 1861, sect. 6 (P. C., reversing Adm.) *Gaudet (app.) v. Brown (resp.)*; *Cargo ex Argos—Geipel and others (apps.) v. Cornforth (resp.)*; *The Heusens* page 360, 519
3. *Jurisdiction—Proceedings against goods—Freight demurrage and expenses—Proceedings against ships—Breach of charter irrespective of damage to goods—Domicile of owners.*—County Courts having Admiralty Jurisdiction have, under the County Courts Admiralty Jurisdiction Amendment Act 1869, sect. 2, jurisdiction to try causes instituted in rem by ship-owners against goods laden, or lately laden, on board their ships to recover freight, demurrage, and expenses, and also causes instituted in rem by charterers against ships, which they have chartered for breach of charter-party, irrespective of any damage to, or breach of contract or duty in respect of goods carried on board such ships, even though the owners of the goods or ships may be domiciled in England or Wales. (P. C. reversing Adm.) *Id.* 360, 519
4. *Broker's commission—Charter-party—Right of broker to sue.*—A charter-party made between captain and charterers contained a clause providing for payment of commission to a broker for negotiating the charter-party. Held, that the broker could not sue in the County Court in rem, under 32 & 33 Vict. c. 51, s. 2, sub-sect. 1, as for a claim arising out of an agreement made in relation to the use or hire of a ship, he not being a party to the charter. (Adm.) *The Norea Rafuelina*; *John Japp and Joseph Kirby (apps.) v. Francisco Durante (resp.)*..... 16
5. *Leave to proceed—Jurisdiction—Practice—Admiralty Court.*—The Court of Admiralty has no power to grant leave to proceed in that court, under the County Courts Admiralty Jurisdiction Act 1868, s. 9, when proceedings have already been instituted. (Adm.) *The Loreta* 19
- See *Collision*, No. 1—*Costs*, No. 1—*Necessaries*, Nos. 11, 12—*Practice*, No. 11—*Salvage*, No. 1.

COUNTY COURT APPEALS.

1. *Fresh evidence on appeal—Admiralty Court—Jurisdiction—Practice—Reporter.*—The High Court of Admiralty is extremely reluctant to admit evidence at the hearing of an appeal from a County Court, but will do so under special circumstances. The insufficiency of notes of evidence in the court below is some ground for the admission of evidence at the hearing of the appeal, but the fact that a reporter has not been employed to take down the evidence below must always be a circumstance to be inquired into when an appellant applies for leave to produce evidence on appeal. (Adm.) *The Busy Bee*..... 293
2. *Fresh evidence on appeal—Grounds for admission of—Practice—Admiralty Court—Surprise.*—The Court of Admiralty is very cautious as to admitting fresh evidence at the hearing of an appeal from a County Court, and will not do so unless justice will not be satisfied without it. *Seem*, surprise is a ground for the admission of fresh evidence. (Adm.) *The Moorley*..... 471

See *Practice*, No. 11.

CROSS CAUSES.

See *Collision*, No. 35.

CROSSING SHIPS.

See *Collision*, Nos. 11, 15, 18, 19.

CUSTOM.

See *General Average*, No. 2—*Marine Insurance*, No. 8, 37.

SUBJECTS OF CASES.

DAMAGE.

1. *Jurisdiction—Admiralty Court*—"Damage done by any ship"—*Loss of life and personal injury—Lord Campbell's Act—Prohibition*—"Damage done by any ship," in the Admiralty Court Act, 1861, s. 7, does not include loss of life and personal injury, and therefore the Admiralty Court has no jurisdiction to entertain a suit under Lord Campbell's Act for damages resulting from negligence in the management of a vessel which has caused personal injury and death. And the Court of Queen's Bench will prohibit such a suit. (Q.B.) *Smith v. Brown* page 56
2. *Jurisdiction—Admiralty Court—Ship avoiding collision run ashore—Lights—Ship aground—Fairness*—"Where a vessel, in order to avoid a collision with another, is compelled to run ashore, the Admiralty Court has jurisdiction to entertain an action against the other vessel as a claim for damage received by a ship under 3 & 4 Vict. c. 65, s. 8. By general maritime law those in charge of a ship aground at night in the fair way of a navigable channel are bound to take proper means to apprise other vessels of her position. *The Industrie* 17
3. *Injury to tow—Supply of tug—Duty of tug and tow*—"The doctrine that a tug is liable for an injury to the tow, unless the tug can show that she was not in fault, applies exclusively to cases of injury resulting from the violation or neglect of some duty coming within the scope of the duties devolving upon that class of employment. Whilst being towed by a tug a schooner sheered out of the course and struck upon a sunken rock: Held, that it was the duty of the tow to follow directly in the course of the tug, and that the tug, therefore, was not liable for damages resulting from the accident. It is no part of the duty of the tug to take precautions against the sheering of the tow; but if the tow sheers in consequence of a manœuvre of the tug, and thereby sustains damage, the tug is liable. *Quare*, whether it is the duty of a tug to inform tow of danger in the passage. (U. S. Dist. Ct.: East. Dist. of Mich.) *The Tag Stranger* 19

DAMAGES.

See *Collision*, Nos. 39, 40, 41.

DAMAGE TO CARGO.

1. *Consignee—Assignee of bill of lading—Right to sue under Bills of Lading Act*—"Consignee who are also assignees of bills of lading, have the right to sue under 18 & 19 Vict. c. 111 in a suit for damage to cargo. It was intended by this statute that the right of suing upon the contract under a bill of lading should follow the property in the goods therein specified—that is to say, the legal title to the goods as against the indorser. (Adm.) *The Freedom* 28
2. *Assignee of bills of lading—No loss suffered—Right to sue—Consignee*—"Assignees of bills of lading acquire a right to sue under the Bills of Lading Act and the Admiralty Court Act for damage to cargo caused by delay, even though they have suffered no loss, owing to their being compensated for the deterioration of the cargo named therein under the terms of the contract of sale, and *semble*, they may sue as trustees for the consignees. (Adm.) *The Wilhelm Schmidt*, ... 82
3. *Putrefaction—Sea damage—Want of circulation—Close packing of cargo—Exempted perils—Evidence—Onus—Performance of contract—Reasonable care*—"Damage to cargo proximately caused by the putrefaction of other portions of the cargo injured by sea damage and by close packing and want of ventilation, is not within the exception

- "dangers of the seas" in the bill of lading. The consignees have a right to recover for such damage on showing that the shipowners have failed to perform their contract to deliver in like good order and condition as shipped, unless the shipowners (on whom the onus lies) can show that the cargo was properly ventilated during the voyage, and so throw upon the plaintiffs the burden of proving that the damage might have been avoided by reasonable care on the part of the shipowners. (P.C.) *The Freedom* page 28
4. *Duty of master—Preservation of cargo*—"There is a duty imposed upon a master, as representing the shipowner, to take reasonable care of the goods entrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction, or deterioration by reason of accidents, for the necessary effects of which there is, by reason of the exceptions of the bill of lading, no original liability. (Ex. Ch. from Q.B.) *Notara v. Henderson* 278
 5. *Injury by collision and water—Perishable cargo—Duty of master*—"Where a vessel is damaged by collision, and her cargo, being injured by water, is of a nature to deteriorate if steps are not taken to dry it or otherwise restore it to its usual condition, it is the duty of the master, if he have opportunity without unreasonable delay or deviation, to unship his cargo, or take other steps for that purpose. If he has such opportunity and neglects it, and the cargo is damaged in consequence, the shipowners will be liable for the damage occasioned by such neglect. (Ex. Ch. from Q.B.) *Id.* 278
- See *Carriage of Goods*, Nos. 4, 9, 20, 22—*County Courts Admiralty Jurisdiction*, No. 3—*General Average*, No. 2.

DEAD FREIGHT.

See *Carriage of Goods*, Nos. 13, 14.

DECLARATION.

See *Marine Insurance*, Nos. 4, 8.

DECK CARGO.

See *Marine Insurance*, Nos. 2, 13.

DELAY.

See *Carriage of Goods*, Nos. 9, 19, 20, 21, 22—*Marine Insurance*, No. 3.

DELIVERY OF CARGO.

See *Carriage of Goods*, Nos. 4, 10, 19, 22, 24, 25, 26, 27.

DEMURRAGE.

See *Carriage of Goods*, Nos. 8, 13, 17—*Charter-party*, No. 5—*County Courts Admiralty Jurisdiction*, No. 3.

DETENTION.

See *Carriage of Goods*, Nos. 13, 24—*Foreign Enlistment Act*, 1870, No. 3.

DEVIATION.

See *Carriage of Goods*, Nos. 18, 19, 20, 21, 22, 26—*Marine Insurance*, No. 3.

DISBURSEMENTS.

1. *Master—Proceeding in rem—Admiralty Court*—"A master may proceed in rem in the High Court of Admiralty against his ship, even when in the hands of mortgagees, for disbursements for necessities properly made on his ship's account, as long as he has made himself personally liable for such disbursements. (Adm.) *The Marco Polo*... 54
2. *Master—Right to proceed against ship*—"A master of a ship can only claim against his ship for dis-

SUBJECTS OF CASES.

burements from the date on which he is placed on the ship's register as master. (Vice-Adm. Viet.) *The Albion*.....page 481
 See *Maritime Liens*, Nos. 2, 4—*Necessaries*, 2, 3, 8, 14—*Wages*, No. 2.

DISSOLUTION OF CONTRACT OF AFFREIGHTMENT.

See *Carriage of Goods*, Nos. 6, 7, 23, 24, 27.

DOCK AND LIGHT DUES.

See *Necessaries*, No. 2—*Tonnage Rates*.

DOMICILE.

See *County Courts' Admiralty Jurisdiction*, No. 3—*Necessaries*, No. 11.

ESTOPPEL.

See *Carriage of Goods*, No. 3—*Salvage*, No. 13.

EVIDENCE.

See *Collision*, Nos. 35, 41—*County Court Appeals*, Nos. 1, 3—*Damage to Cargo*, No. 3—*Marine Insurance*, Nos. 37, 38—*Practice*, Nos. 5, 6—*Salvage*, Nos. 28, 31.

EXCEPTED PERILS.

Carriage of Goods, Nos. 4, 21—*Charter-party*, No. 3, 4—*Damage to Cargo*, No. 3—*Salvage*, No. 7.

FIRE.

See *General Average*, No. 2.

FISHING VESSEL.

See *Collision*, No. 29.

FLOATING PIER.

License to use—*Jurisdiction of court of equity*.—The Board of Works have no power to convert a revocable licence to use a floating pier on the river Thames into an irrevocable licence, as against the Conservators of the Thames, and an Act of Parliament confirming such conversion does not affect the rights of the latter. A court of equity has jurisdiction to enforce the rights of the Conservators of the Thames in such a case. (Rols.) *Conservators of the Thames v. The South-Eastern Railway Company*..... 3

FOG.

See *Collision*, Nos. 5, 6, 7, 8.

FOREIGN ADJUSTMENT.

See *Marine Insurance*, No. 29.

FOREIGN ATTACHMENT.

See *Lord Mayor's Court*.

FOREIGN CONTRACT.

See *Sale of Ship*.

FOREIGN ENLISTMENT ACT 1870.

1. *Prize crew*—*Taking charge of prize*—*Warlike operation*.—The detaching a prize crew after capture to take charge of and to carry a prize, and its native crew as prisoners of war, safely to a port of the captors, is essentially a warlike naval operation. (Priv. Co. reversing Adm.) *The Gannet*; *H. M.'s Procurator-General (app.) v. Elliot and others (resps.)*.....86, 211
2. *Prize*—*Merchantman*—*Possession of captors*—*Naval operation of captors*.—A merchantman, on lawful capture by a belligerent vessel, and whilst held by a naval prize crew detached from that vessel, is in the actual possession of the government of her captors, her prize crew are still part of the crew of the belligerent vessel, share in captures made by that vessel, and may make lawful captures whilst on board the prize. The prize, therefore, ceases to be a merchantman and becomes a vessel engaged in the naval operations of her captors. (Priv. Co. reversing Adm.) *Id.*..... 86 211

3. *Towing prize of war*—*Naval operation*—*Service of belligerent*.—A British steam tug sent by her owners to tow a prize in charge of a prize crew from British waters to the waters of her captors, the tug owners knowing she was a prize, is assisting in a naval warlike operation, and the sending the tug for that purpose is, Her Majesty being neutral, a dispatching for the purpose of taking part in the naval service of a belligerent within the meaning of the Foreign Enlistment Act 1870 (33 & 34 Vict. c. 90), sect. 8, sub-sect. 4, and the tug is therefore forfeited to the Crown. (Priv. Co. reversing Adm.) *Id.*.....page 86, 211
4. *Practice*—*Admiralty Court*—*Bail*—*Amount of*—*Consent of Crown*.—Where a vessel is arrested under the provisions of the Foreign Enlistment Act 1870, the Court of Admiralty will admit her to bail with the consent of the Crown. *Sensible*, the consent of the Crown is not necessary. The court will only require bail to be given to the extent of the value of the ship and her equipment, and not any further sum for costs. (Adm.) *The Gannet*..... 45
5. *Practice*—*Vessels detained*—*Application for indemnity*.—In an application to the Court of Admiralty for an indemnity by the Crown in respect of the detention of vessels under the Foreign Enlistment Act 1870, sect. 24, where the Secretary of State has released the vessels without issuing his warrant stating reasonable and probable cause for the detention, the proper form of procedure is by motion upon affidavits, but the Crown is entitled to time to answer the applicant's affidavits so as to raise any questions of law and fact. (Adm.) *The Great Northern and The Midland*..... 246

FOREIGN JUDGMENT.

Review of—*Fraud*—*Manifest error*—*Average statement*—*Bottomry*.—The decision of a competent foreign court under the direction of which an average statement is made, and a bottomry bond given to defray expenses declared to have been incurred under the statement, will not be reviewed in an English court unless there is manifest error on the face of the proceedings, or is shown to have been obtained by fraud, or to be wanting in the conditions of natural justice. (Priv. Co.) *Messina v. Petrocchino*..... 298

FOREIGN SHIP.

See *Carriage of Goods*, Nos. 9, 10—*Salvage*, No. 19—*Wages*, No. 1.

FOREIGN SOVEREIGN.

See *Admiralty Court*, No. 3—*Jurisdiction*, Nos. 1, 2, 3, 4.

FORFEITURE.

See *Foreign Enlistment Act 1870*, No. 3—*Piracy*.

FOUL BERTH.

See *Collision*, No. 17.

FRAUD.

See *Marine Insurance*, Nos. 8, 9, 19.

FREIGHT.

See *Bottomry*, Nos. 2, 6, 12.—*Carriage of Goods*, Nos. 3, 12, 13, 14, 16, 26.—*County Court Admiralty Jurisdiction*, No. 3.—*Lord Mayor's Court*—*Marine Insurance*, Nos. 6, 7, 10.—*Mortgage*, Nos. 1, 2, 3.—*Wharfinger*.

GENERAL AVERAGE.

1. *Leak*—*Pumping with engine*—*Spare spars as fuel*—*Coals purchased*.—Where a sailing vessel, having on board a donkey engine ordinarily used

for the purpose of working the ship and pumping so as to save a number of hands, is compelled after encountering a severe gale, in which she has sprung a leak, to burn the spare spars and coal, in order to keep the engine at work to pump the water out of her, and so keep herself afloat; such consumption of spars and stores (per Kelly, C.B., and Bramwell, B.) entitles her owners to general average contribution from the owners of cargo, but *contra* (per Martin and Cleasby, B.B.) Coals afterwards purchased for that purpose by the master, are not general average expenses. (Ex.) *Harrison v. Bank of Australasia* ... page 198

2. *Damage by water—Fire—British custom—Law.*—Loss by injury to cargo through water being let into a ship's hold to extinguish a fire, being a voluntary and intentional sacrifice of the cargo made under the pressure of imminent danger, and for the benefit and with a view to secure the safety, of the whole adventure then at risk, is a general average loss by English law; but it having hitherto been the practice of British average staters to treat a loss so occasioned as not a general average loss, a shipper, whose goods are shipped under a bill of lading providing for "average, if any, to be adjusted according to British custom," and are so injured, is precluded by that stipulation from recovering as for a general average loss under the existing custom. The custom should in future be in accordance with the law. (Q.B.) *Stewart v. West India Pacific Steamship Company* 528
See *Marine Insurance*, No. 29.

GUARANTEE.

Bills of lading—Genuineness of—Forgery.—A statement endorsed on the back of certain bills of exchange to the effect that "A. holds bills of lading and policies for 251 hales of cotton per ship C." on the faith of which B. accepted the bills of exchange, does not amount to a guarantee that the bills of lading are genuine, and if B. has met the bills of exchange he cannot recover the money if it turns out that the bills of lading are forged, there being no fraud on the part of A. (V.C.M.) *Leather v. Simpson* 5

ILLEGALITY.

See *Carriage of Goods*, Nos. 23, 24, 25.

INCEPTION OF RISK.

See *Marine Insurance*, Nos. 10, 11, 12.

INEVITABLE ACCIDENT.

See *Collision*, Nos. 24, 25, 31, 43.

INJUNCTION.

See *Limitation of Liability*, No. 1.—*Sale of Ship*.

INSPECTION OF DOCUMENTS.

Passenger—Action against ship's agents—Fraudulent representations.—In an action for making false and fraudulent representations with respect to a ship, whereby the plaintiff was induced to take a passage in her, and was afterwards obliged to leave on discovering the falsity of the defendant's representations, inspection was refused to the plaintiff of letters of other passengers, also compelled to leave, to the defendants, of letters of the master to the defendants relative to the plaintiff, and of letters to the defendants from the owner of the ship written after the plaintiff had left it. (C.P.) *Richards v. Gellatley* 277

INSURABLE INTEREST.

See *Marine Insurance*, Nos. 2, 33.

INTERROGATORIES.

See *Collision* Nos. 37, 38.

JETTISON.

See *Marine Insurance*, Nos. 2, 13.

JURISDICTION.

1. *Khedive of Egypt—Sovereign Prince—Claim of exemption from process.*—The Khedive of Egypt is not a sovereign prince, and is, therefore, not entitled to claim the exemption for himself and his property from the ordinary process of the courts of this country, which is by international law founded upon the comity of nations, accorded to foreign sovereigns. (Adm.) *The Charkeih* page 581
2. *Sovereign prince—Exemption from jurisdiction—Person and property—Proceeding in rem—Jus coronae.*—A sovereign prince is exempted from the jurisdiction of the tribunals of a state in which he happens to be, absolutely so far as his person is concerned, and, with respect to his property, at least so far as that is connected with the dignity of his position, and the exercise of his public functions: no proceeding in rem can be instituted against the property of a sovereign prince if the res can in any fair sense be said to be connected with the *jus coronae* of the sovereign, but other property of a sovereign may be proceeded against in rem. (Adm.) *The Charkeih* 581
3. *Sovereign prince—Trading—Waiver of exemption.*—A sovereign prince, by engaging in trade, may waive the privilege which he otherwise possesses of being exempt from the jurisdiction of the tribunals of a state in respect of the property so engaged. (Adm.) *The Charkeih* 581
4. *Foreign sovereign—Trading—Merchant ship—Collision—Admiralty Court—Jurisdiction.*—A ship belonging to a foreign sovereign, but used by him as a merchant vessel for trading purposes, is liable to be proceeded against in rem in the Admiralty Court for damage done to another ship by collision. (Adm.) *The Charkeih* 581
5. *Mail packets—Exemption from process—Treaty.*—Sembles, that mail packets, although the property of a government, are not exempt from the ordinary process of the tribunals of a foreign state, unless expressly exempted by treaty. (Adm.) *The Charkeih* 581
- See *Admiralty Court*, Nos. 2, 3—*Collision*, Nos. 1, 2, 37, 38—*County Courts Admiralty Jurisdiction*, Nos. 1, 2, 3, 4, 5—*County Court Appeals*, No. 1—*Damage*, Nos. 1, 2—*Floating pier—Limitation of Liability*, No. 2—*Lord Mayor's Court—Marine Insurance Association*, No. 1—*Mortgage*, No. 4—*Necessaries*, Nos. 11, 12, 13—*Salvage*, No. 1—*Ship—Wages*, No. 1.

JUSTICES.

See *Ship*.

LAY DAYS.

See *Carriage of Goods*, Nos. 8, 13.—*Charter-party*, No. 5.

LAW GOVERNING A CONTRACT.

Intention of parties—Construction of contract.—The rights and obligations of parties to a contract are to be determined by the law which they have declared themselves to intend, and where there is no express declaration of intention the presumption as to the law contemplated by the parties must be gathered from the circumstances of each case. Where a contract is plain in its terms, those terms must receive the ordinary and natural construction, and do not admit of the introduction of a law dehors the contract. (Adm.) *The Patria; The Wilhelm Schmidt* 71, 82
See *Carriage of Goods*, Nos. 9, 10—*Foreign Judgment—Marine Insurance*, No. 29.

SUBJECTS OF CASES.

LIENS.

See *Carriage of Goods*, Nos. 13, 14, 15, 16, 17—*Consignor and Consignee*, No. 1—*Maritime Lien*, Nos. 1, 2, 3, 4—*Mortgage*, No. 1—*Necessaries*, Nos. 4, 5, 9—*Salvage*, No. 18—*Solicitor's Lien*, No. 1, 2, 3—*Wages*, No. 2—*Wharfinger*.

LIFE SALVAGE.

See *Salvage*, Nos. 19, 27.

LIGHTS.

See *Collision*, Nos. 2, 3, 4, 19, 29—*Damage*, No. 2.

LIMITATION OF LIABILITY.

1. *Carriers by land and sea—Loss at sea—Right to Limitation—Injunction.*—A railway company, who are both carriers by land and carriers in their own ships by sea, are entitled, under the Merchant Shipping Acts Amendment Act 1862 (25 & 26 Vict. c. 63), sect. 54, to limitation of liability in respect of the loss occasioned by their negligence at sea of luggage belonging to a passenger, whose contract with the company was for carriage partly by land and partly by sea on a through ticket; and the Court of Chancery will grant an injunction restraining an action brought to recover that loss. (*L.C. and L.J.J.*) *The London and South-Western Railway Company v. James* page 526
2. *Admiralty Court—Jurisdiction—Vessel totally lost—Sum paid into court in lieu of bail—Ship or proceeds not under arrest.*—The payment into the Admiralty Court of a sum of money in lieu of bail in a collision case, the vessel being totally lost, is not sufficient to give that court jurisdiction in a suit for limitation of liability at the instance of the owners of the vessel, because neither the ship nor the proceeds thereof are under arrest within the terms of the Admiralty Court Act 1861 (24 Vict. c. 10) sect. 13. (*Ex. and Ex. Ch.*) *James v. The South-Western Railway Company* 226, 428
3. *Two collisions at same time—Right of shipowner to limitation.*—A shipowner, whose vessel injures two other vessels in a collision on one occasion, and by one act of improper navigation, does not incur in respect of each vessel a separate liability beyond the limitation of liability provided for by the Merchant Shipping Amendment Act 1862, sect. 54, and is entitled to have his liability limited as for one collision. (*Adm.*) *The Rajah* 403

LLOYD'S LIST.

See *Marine Insurance*, Nos. 22, 23.

LORD CAMPBELL'S ACT.

See *Damage*, No. 1—*Loss of Life*.

LORD MAYOR'S COURT.

Jurisdiction—Foreign attachment—Whole cause of action within—Freight payable—Goods deliverable—Prohibition.—To give the Lord Mayor's Court jurisdiction, the whole cause of action must have arisen within the City of London. The fact that freight under a charter-party is payable, or, *semble*, even that goods are to be delivered within the City, will not give that court power to issue a foreign attachment against the freight, and a prohibition will issue to restrain the Lord Mayor's Court from so doing. (*C.P.*) *Byrne v. The Guano Consignment Company (Weguelin and others, garnishees)* 196

LOSS.

See *Carriage of goods*, No. 12—*Carriage of Passengers—Consignor and Consignee*, No. 3—*Limitation of Liability*, Nos. 1, 2—*Marine Insurance*, Nos. 5, 6, 7, 8, 11, 30, 31, 32, 33—*Marine Insurance Association*, Nos. 2, 3.

LOSS OF LIFE.

Unborn child—Negligence—Right to recover.—A child *en ventre sa mere* is entitled to recover under Lord Campbell's Act on the death of its father by negligence. (*Adm.*) *The George and Richard* page 59

See *Collision*, No. 21—*Damage*, No. 1—*Limitation of liability—Nos. 1, 2.*

MAIL PACKETS.

See *Jurisdiction*, No. 5.

MARINE INSURANCE.

1. *Maritime contract—Admiralty Jurisdiction—Claim in personam—American rule.*—The contract of marine insurance is a maritime contract, and a claim in personam arising out of it is cognisable in admiralty, under the constitution of the United States, declaring that the judicial power should extend to "all cases of admiralty and maritime jurisdiction." The opinion of Story, J., in *De Lovio v. Boit* (3 Gallison, 398), approved and adopted. *Semble*, that having regard to the maritime codes of all European countries, admiralty jurisdiction ought to embrace all maritime contracts, and that contracts the subject matter of which is maritime, are not the less maritime contracts because they are made and are to be performed elsewhere than on the high seas. The English rule to the contrary criticised and disapproved. (*U.S. Sup. Ct.*) *New England Mutual Marine Insurance Company v. Dunham* 21
2. *Insurable interest—Deck cargo—Clear bill of lading—Mistake of shipper's agent—Jettison.*—Shipowners are so far bound by the signature of their agent in a foreign port that, when the agent gives by mistake a clear bill of lading for goods shipped on deck, the goods having been directed to be received, and having been received to be shipped on deck at shipper's risk, instead of a bill of lading stating that fact, the shipowners are liable for a loss by jettison, and have therefore an insurable interest in the goods. (*C.P.*) *Stephens v. The Australasian Insurance Company* 458
3. *Risk covered—African trade—Deviation—Delay—Salvage owner's property.*—An insurance on a ship "at and from L. to the coast of Africa, and during her stay and trade there," means that she is to go to the coast of Africa, and stay there for any purpose which properly falls within the description of African trade, and the shipowner cannot substitute any other risk, nor may the ship be employed, under the terms of the insurance, for other than trading purposes. Delaying the ship in an African port whilst the master and crew are engaged in salvaging a vessel, which the owner has purchased after loss, is substitution of another risk and employment for other purposes, and vitiates the policy. (*Ex. Ch. from Ex.*) *The Company of African Merchants (Limited) v. The British and Foreign Marine Insurance Co. (Limited)* 558
4. *Policy on goods by ship or ships to be declared—Contract—Declaration.*—The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared is that he will insure any goods of the description specified which may be shipped on any ship answering the description, if any, in the policy, or on the voyages specified in the policy, to which the assured elects to apply the policy; the object of the declaration is to identify (and it need do no more) the particular adventure. (*Q.B.*) *Ionides v. The Pacific Fire and Marine Insurance Company* 141

5. Policy on goods carried by lightermen—Proportion of underwriters' liability—Loss actually sustained—Amount at risk.—A policy on an ordinary form of Lloyd's policies effected by lightermen on the river Thames upon craft of every description, on "all goods and produce as interest may appear," which contains at the foot a special clause, stipulating that the policy is "to cover all losses, damages, and accidents, amounting to 200, or upwards, in such craft, to goods carried by Messrs. G. as lightermen, and delivered to them to be waterborne either in their own or other craft, and for which losses, damages, and accidents Messrs. G. may be liable or responsible to the owners thereof, or others interested," renders underwriters liable for the proportion that their subscription bears to the loss actually sustained and not merely to the amount of the value actually at risk at the time of loss. (Q.B.) *Joyce v. Kennard* page 194
6. Policy on chartered freight—Passage money—Total loss of cargo—Valued policy.—In a policy of insurance in the ordinary form upon "chartered freight," the term "freight" does not include passage money paid for coolies, and where there has been a total loss of cargo on board the vessel, an underwriter of a valued policy on freight is not entitled to take into account that passage money in estimating his liability for the loss. (C.P.) *Denoon v. The Home and Colonial Assurance Company (Limited)* 309
7. Valued policy on freight—Partial cargo—Loss—Liability of underwriters.—A valuation of the freight *prima facie* refers to the freight due for a full cargo, and therefore, unless underwriters are otherwise informed, a policy on freight, valued at a fixed sum, and underwritten for one-half that sum, is, as applicable to a partial cargo, an open policy for one-half the loss of freight not exceeding in any case half the valued amount, and where a loss of freight less than that amount takes place in respect of a partial cargo, the underwriters are liable only in respect of half that loss. *Id.* 309
8. Open policy—Ship or ships to be declared—Declaration—Mistake—Alteration after loss—Usage.—By the usage prevailing among underwriters, a declaration on an open policy "on goods by ship or ships to be thereafter declared" may be altered, even after the loss of the goods is known, if it be altered at a time when it can be, and is, altered innocently and without fraud. Where shipowners alter declarations so as to make the policy "on goods by ship or ships to be thereafter declared" cover goods which ought to have been shipped at shippers' risk, but were actually, through a mistake of their agents abroad, shipped at their own risk, and make these alterations after the loss becomes known, under the *bona fide* belief that their agent has neglected to inform them of the terms of shipment, and with a *bona fide* intention of rectifying the mistake in accordance with the usage, the alterations are binding on the underwriters. (C.P.) *Stephens v. The Australian Insurance Company* 458
9. Insurance on profits—Reasonable profits—Excessive valuation—Evidence of fraud—Notice to underwriters.—An insurance, if on profits, must be taken to be an insurance on such profits as may be reasonably expected, or possible profits. Excessive valuation of profits is almost conclusive evidence of fraud, and, even if not fraudulent, would seem to be a material fact that should be communicated to the underwriters; the mere mention in a slip that profits were to be insured "however high they might be" would seem to be an insufficient communication to the underwriters. (Per Hannen, J. at N.P.) *Ionides v. Pender* page 432
10. Inception of risk—Chartered freight—Attaching of policy—"At and from"—A policy on chartered freight "at and from" a port, which stipulates that the insurance "shall commence upon freight and goods or merchandise aforesaid from the loading of the said goods on board the said ship or vessel at as above," does not attach till the cargo is actually laden on board. (Q.B.) *Berkett v. West of England Marine Insurance Company (Limited)* 185
11. Inception of risk—Attaching of policy on goods—"From the loading"—Part only loaded.—A policy on chartered freight on a cargo of guano "lost or not lost in the sum of 8000, upon the freight payable to them (the insurers) in respect of the present voyage to be performed as below by the vessel *Napier*, &c., from Baker's Island to port of discharge in the United Kingdom, the insurance on the same beginning from the loading of the said vessel," does not attach if the vessel, after arrival at Baker's Island, but before taking in the whole of her cargo, is driven on a reef and becomes a total wreck. (Q.B.) *Jones and another v. The Neptune Marine Insurance Company* 416
12. Inception of risk—"From the loading"—Prior loading—Construction of policy—Outward cargo—Homeward interest.—The usual clause that the assurance is to commence "from the loading" of the goods at as above in a policy, being a re-insurance subject to all the clauses and conditions of the original policy, is not to be construed strictly, where a clause in the original policy indicates that the policy is intended to cover a prior loading. Where, therefore, a re-insurance was declared to be upon cargo in the ship *D.* at and from any port or ports on the West Coast of Africa, to the vessel's port or ports of call and discharge in the United Kingdom, the insurance to commence "from the loading" of the goods at as above; and by the original policy it was agreed that the insurance should be upon cargo of the vessel *D.*, at and from Liverpool to any ports in any order backward and forward on the coast of Africa, and thence back to a port of discharge in the United Kingdom, "outward cargo to be considered homeward interest twenty-four hours after arrival at the first port of discharge," the policy of re-insurance was held to cover the goods loaded at Liverpool after they had been twenty-four hours in the first port of discharge, the outward cargo being thus in the same position as if it had been shipped in Africa for the homeward voyage. (Q.B.) *Joyce v. The Royal Marine Insurance Company* 396
13. Barratry—Carrying deck cargo—Jettison—Clear bill of lading.—The act of a master in stowing goods (afterwards jettisoned in a storm) on deck, after he has been warned by the ship's agent of the responsibility he was assuming, and that as he had signed clear bills of lading he was bound either to carry the goods under deck or to provide for it on deck by extra insurance, does not amount to an act of barratry. All the authorities on the law relating to barratry reviewed. (New York Court of Common Pleas.) *Atkinson and Hewitt v. The Great Western Insurance Company* 382
14. Barratry—Scuttling ship—Knowledge of shipowner.—The scuttling of a ship by the master with the knowledge of the shipowner, but without the knowledge of the freighter, is an act of barratry in respect of which the freighter may recover against the underwriters on cargo. (Per Hannen, J. at N.P.) *Ionides v. Pender* 432

15. *Stranding—Beaching—Previous injury by perils insured against—Ordinary and usual place.*—Where a ship has been so injured by perils insured against that it becomes necessary to beach her in an ordinary and usual place for vessels to take the ground, but in consequence of her previous loss and injuries she sustains injury by straining, such beaching cannot be considered as in the usual course, but is a "stranding" within the meaning of that word as used in policies of insurance. (C.P.) *De Mattos v. Sanders*... 377
16. *Contraband of war—Carried to neutral port—Ultimate destination.*—A cargo, which if it were shipped direct to a belligerent port would be contraband of war, does not cease to be contraband by reason of its being first sent to a neutral port, if the original intention of the shippers is that it shall ultimately reach a belligerent port. Such a cargo is within the warranty "no contraband of war" in a policy of insurance, and shippers cannot recover against the underwriters for it if seized on the voyage to the neutral port. (C.P.) *Seymour v. The London and Provincial Marine Insurance Company* 423
17. *Concealment of material facts—Slip contract—Knowledge after initialling.*—A slip being in practice the complete and final contract between the parties to a contract of marine insurance, although not enforceable at law or in equity, there is no obligation on the assured to communicate a material fact that comes to his knowledge after the initialling of the slip and before the issuing of the policy. (Q.B.) *Cory v. Patton; Lishman and others v. The Northern Maritime Insurance Company (Limited)* 225, 554
18. *Concealment of material fact—Pleading—Knowledge after initialling.*—In an action on a policy of Marine Insurance a replication by the plaintiffs to a plea of the concealment of a material fact that before they had knowledge of the fact their agent had entered into an agreement with the defendant to effect the assurance, and that if they had communicated the fact to the defendant when they first knew it, he would still in honour, conscience, and good faith have been bound to subscribe his name to the policy sued upon, is good replication. (Q.B.) *Cory v. Patton* 225
19. *Concealment of material fact—Initialling of ship—Issuing of policy—Knowledge of underwriters.*—The issuing of a policy of insurance without protest by underwriters, after they have become aware that the assured has (innocently and without fraud) concealed from them a material fact known to him, but unknown to them, before the initialling of the slip, is conduct which, if it leads the assured to suppose that the underwriters treat the contract as still subsisting, and deliver it to him as a binding contract, shows that the underwriters have made an election not to avoid the contract, but to treat it as still binding and subsisting, and throws upon them the burden of showing that the circumstances attending the issuing of the policy were such that the assured was not justified in supposing them to have made such an election. (Ex. Per Martin and Bramwell, BB, Cleasby, B, dissentiente.) *Morrison v. The Universal Marine Insurance Company (Limited)* 503
20. *Policy—Warranty—Benefit of underwriters—Slip—New risk—Communication.*—The introduction into a policy on freight of a warranty (not in the slip) for the benefit of underwriters, to the effect that the hull of the ship is not insured beyond a certain amount, does not create a new contract or new risk different from the slip, and therefore does not affect the duty of communication of material facts. (C.P.) *Lishman and others v. The Northern Maritime Insurance Company (Limited)* page 554
21. *Concealment of material fact—Open policy—Ship or ships to be declared—Name of ship.*—Where a policy on ship or ships to be declared is subscribed by an underwriter after a material fact relating to a particular ship, which the assured afterwards intends, if necessary, to declare under that policy, has been posted at Lloyd's, and so become known to the assured and may or may not have so become known to the underwriter, without the name of the ship and the material fact having been communicated by the assured to the underwriter so that he may know the risk proposed, the policy is vitiated. (Q.B.) *Leigh v. Adams* 147
22. *Material fact—Lloyd's list—Class of ship—Half time survey.*—The refusal of a shipowner proposing an insurance to submit his ship, classed A 1, to the half time survey required by Lloyd's rules is not, as a matter of law, a material fact which need be communicated by him to an underwriter, a subscriber of Lloyd's. The materiality of the fact is a question for a jury. (Q.B.) *Gandy v. Adelaide Marine Insurance Company* ... 189
23. *Underwriter's knowledge—Lloyd's list—Material fact—Necessity for communication.*—There is no rule of law, either in principle or upon authority, which affects the underwriter with notice of whatever may be in Lloyd's lists beyond those things which are matters of general knowledge, and not applicable to a particular ship. A shipowner proposing insurance is, therefore, bound to communicate to the underwriters every material fact relating to his ship, unless such material fact is already within the knowledge of the underwriter, such knowledge being a question of fact in each particular case. (Ex.) *Morrison v. The Universal Marine Insurance Company (Limited)* 503
24. *Misrepresentation—Safety of port.*—Where a shipowner proposes a policy of insurance on his ship whilst at a port of which he has no knowledge beyond the opinion of the master and of a local pilot, *bona fide* expressed in a letter from the master stating that the port is a safe port, which opinion the owner communicates to the insurer by showing him the letter, this is not such a misrepresentation by the assured as will vitiate the policy if the port afterwards turns out to be unsafe. (C.P.) *Anderson and others v. The Pacific Fire and Marine Insurance Company* 220
25. *Misrepresentation—Metalling of ship—Repairs to metal.*—A statement in a proposal for insurance that a ship was last metalled in a named year, whereas in fact she was metalled two years previously, but in the year named in the proposal the metal sheathing was overhauled, thoroughly repaired, and replaced with new where necessary, is not such a misrepresentation as will vitiate the policy. (V.C.B. and L.J.J.) *Alexander v. Campbell* 373, 447
26. *Misrepresentation—Age of ship.*—A misrepresentation, however innocent, that a ship is new when she is in fact old, will vitiate a policy. (Q.B.) *Ionides and Another v. The Pacific Fire and Marine Insurance Company* 141
27. *Mistake in ship's name—Subject sufficiently described.*—If the description in a policy of marine insurance designate the subject of insurance with sufficient certainty, or suggests the means of doing it, a mistake in the name of the ship, or of other particulars, will not defeat the contract. *Id* 141
28. *Mistake in ship's name—Open policy on goods—Substitution of policy on particular ship.*—Where a slip is signed for an open policy on goods on

- ship or ships to be declared, but afterwards and before the policy is issued it is arranged between the underwriters and the assured that a policy on a particular ship shall be substituted for convenience, the parties intending that the goods shall be insured on whatever ship they may be loaded, a mistake in the name of the ship is immaterial, and will not vitiate the policy. (Ex. Ch. from Q.B.) *Ionides v. The Pacific Fire and Marine Insurance Company*..... page 141, 330
29. *General average—Foreign adjustment—Liability of underwriters.*—Under a policy in the ordinary form, but containing in the margin the condition "to pay general average as per foreign statement if so made up," underwriters are bound by a statement at a foreign port, both as to the facts and the law of general average at the foreign port, and must pay any sum awarded by the foreign average adjuster. This applies in a case where the statement includes charges on ship and cargo for a bottomry bond given by the master. (C.P.) *Harris v. Scaramanga*..... 339
30. *Partial loss—Total loss—Seizure by salvors.*—Where a partial loss has occurred, such partial loss is not converted into a total loss by seizure of the property by salvors, and proceedings thereon in the Admiralty Court, which absorb the whole of the property. (C.P.) *De Mattos v. Sanders*..... 377
31. *Partial loss—Repairs—Total loss succeeding—Valued policy—Liability of underwriters—Two policies.*—Where a ship is insured from L. to C., and thirty days after arrival at C., and before arrival suffers a particular loss, and the assured, not knowing this, insures her again with the same underwriters while at C. and home to L., under a valued policy fairly representing her value in an uninjured state, and the ship, whilst under repair and after the expiration of the first policy and the attaching of the second, is totally destroyed by fire, the underwriters are liable under the first policy for the amount the repairs would have cost if completed, and under the second for the sum at which the ship was valued, without deduction of any part of the sum payable under the first policy. (C.P.) *Lidgett v. Seaton and another*..... 95
32. *Partial or total loss—Abandonment—When justifiable—Experts—Ship, stranded—Acceptance of abandonment.*—When it appears that by proper exertions a stranded vessel might have been got off and been fully repaired at a moderate cost, the abandonment is void and a partial loss only can be recovered, and to warrant the recovery of a total loss it must be proved that the delivery of the vessel from the peril was, upon reasonable grounds, judged to be impracticable. The right to abandon must be determined by the judgment of experts, applied to the condition of the vessel at the time of abandonment. The owners of a vessel are not bound to receive her from the underwriters if there is any material deficiency in the repairs. She must be as good as she was before, and be returned within a reasonable time. If the underwriter takes possession of the ship, although under protest, and gets her off and repairs her, it is an acceptance of the abandonment if he does not return her in a reasonable time. (Sup. Ct. of Missouri.) *The Phoenix Insurance Company v. Copelin & The Benton*..... 14
33. *Common carrier—Loss—Subrogation to rights of assured as against underwriters—Right of insurer to sue carrier.*—Where goods upon which an insurance has been effected are delivered to a common carrier, he is primarily liable for any loss which may occur, but is entitled to be subrogated to the rights of the insured as against the insurer. The principle of subrogation applies equally in the case of fire and marine insurance. Where a loss arises by the fault of the carrier, the insurer who pays the amount of it to the assured is entitled to use his name in a suit to recover damages against the carrier. (U.S. Sup. Ct.) *Hall v. The Nashville and Chattanooga Railroad Company*..... page 406
34. *Assignee of policy—Interest—Right to sue.*—The assignee of a policy of marine insurance assigned under the policies of Marine Insurance Act 1868 (31 & 32 Vict. c. 86, sect. 1), may maintain an action in his own name, even though he is not beneficially interested in the subject matter of the insurance. By the assignment the assignee obtains an interest in the thing lost, and is therefore "entitled to the property" within the meaning of the Act. (Q.B.) *Lloyd v. Fleming; Lloyd v. Spence*..... 192
35. *Set-off—Suing in right of third person—Advances—Premium—Bankruptcy Act 1861.*—Where a plaintiff, suing on a policy in the right of a third person who has made advances on the security of the bill of lading and the policy of insurance on the goods, has become bankrupt, the defendant is not entitled under the Bankruptcy Act 1861 (24 & 25 Vict. c. 184, sect. 197) to set-off sums due to him for premiums by way of mutual credit. (C.P.) *De Mattos v. Sanders*..... 377
36. *Practice—Plea of unseaworthiness—Particulars—Intention to scuttle ship.*—In an action brought on a marine policy the defendant obtained a Master's order granting leave to plead several matters, *inter alia*, "that the vessel, when she set sail on the said voyage, was not seaworthy for the same," upon condition that particulars of the plea should be delivered. The defendant gave as particulars "that the master when she set sail intended to scuttle the ship on her said voyage." The Master discharged the order allowing the plea, on the ground that the particulars were insufficient, but the court allowed the plea, as the evidence offered in support of the plea would be limited by the particulars, *sed quare*, whether the fact stated in the particulars would be admissible as proof of unseaworthiness. (Q.B. Bail Court.) *Ionides v. Pender*..... 381
37. *Slip—Evidence—Issuing of policy—Custom of underwriters.*—A slip signed by underwriters is not admissible as evidence of a contract of insurance unless stamped, and a custom whereby underwriters are bound to issue a policy, in accordance with the terms of the slip, notwithstanding that it was discovered, after signing the slip, that the subject matter of the insurance was lost, is bad. (Per Kelly, C.B. at Nisi Prius.) *Morrison v. The Universal Marine Insurance Company*..... 100
38. *Slip—Evidence—Stamp Act.*—An underwriter's slip, although not in any way a binding contract, is not a policy within the meaning of the 30 Vict. c. 23, sect. 9, and is admissible in evidence to show the intention of the parties to a policy of insurance at the time of entering into the contract. (Q.B. and Ex. Ch.) *Ionides v. The Pacific Fire and Marine Insurance Company*..... 141, 330
- See *Marine Insurance Association*, Nos. 1, 2, 3, 4—*Necessaries*, No. 2—*Salvage*, No. 6.
- MARINE INSURANCE ASSOCIATION.
1. *Arbitration clause—Jurisdiction of court of equity.*—A rule of mutual insurance association by which all matters in dispute relative to any claim in respect of an insurance are to be referred to arbitration as a condition precedent to any action at law or suit in equity, does not apply to questions of law, and the jurisdiction of

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- an equity court on a question of law is not thereby excluded. (V.C.B.) *Alexander v. Campbell* page 373, 447
2. *Rules—Loss—Right of action—Prior assessment by committee.*—A member of a mutual shipping insurance association, whose ship is insured by the association and is lost, has no right of action against another member for his contribution to the loss, when, by the rules of the association, signed by the plaintiff, the amount to be borne by each member is to be assessed and apportioned by the committee of the association, and this is not done. (Ex.) *Wright v. Ward* 25
3. *Rules of—Assignee of policy—Payment of sums due—Undertaking to pay.*—A rule of a mutual insurance association which provides that "no member, mortgagee, or assignee, the whole or any part of whose share in a ship insured in the association shall, at the time of entering or afterwards, be mortgaged or assigned to any person or persons, shall have any claim by virtue of this policy, nor shall any assignee of such policy have a claim for any loss or damage which may be sustained by such ship, unless previous to the occurrence of such loss or damage such member, mortgagee, or assignee, shall have delivered to the manager an undertaking approved of by the mortgagee or assignee, whereby he shall covenant with the manager to pay and discharge all sums of money which are or may become due from such member in respect of such ship and her insurance, and in respect of the insurances underwritten on his behalf in this association," is not fulfilled by a deposit of a policy for a valuable consideration (who is to be considered as an assignee within the meaning of the rule) paying all sums payable in respect of the ship and her insurances without giving the undertaking; and such a deposit does not recover on the policy. (L. J. reversing V.C.B.) *Alexander v. Campbell* 373, 447
4. *Admission of liability—Policy not stamped—Winding-up.*—An entry in the minute book of a marine insurance association admitting the liability of the association upon a certain policy, the association being ordered to be wound-up before the money is paid, entitles the insured to prove for the amount so admitted to be due, although the policy is not stamped. (V.C.B.) *Re The Teignmouth and General Mutual Shipping Insurance Association (Martin's Claims)* ... 325

MARITIME LIENS.

1. *Order of payment—Priority.*—Maritime liens, being in the nature of rewards for services rendered, rank against the fund out of which they are to be paid in the inverse order of their attachment on the res, and the last in time should be the earliest in payment. (Adm.) *The Hope* 563
2. *Master's wages and disbursements—Bottomry bondholder—Priority.*—The claim of a master for his wages earned and disbursements made subsequently to a voyage, during which a bottomry bond has been given on his ship, takes priority over the claim of the bondholder. (Adm.) *Id.* 563
3. *Bottomry bondholder—Master's wages—Priority.*—A bottomry bondholder is entitled to priority over the claim of a master for wages earned on voyages previous to that during which the bond is given. (Adm.) *Id.* 563
4. *Master's wages and disbursements—Mortgages—Priority.*—A master's claims for wages and disbursements, whenever earned or made, take priority over the claims of mortgagees, who have no maritime lien in respect of their mortgage. (Adm.) *Id.* 563
- See *Necessaries*, Nos. 4, 5, 9—*Salvage*, No. 18—*Wages*, No. 2.

MASTER.

See *Disbursements*, Nos. 1, 2—*Maritime Liens*, Nos. 2, 3, 4—*Necessaries*, No. 9—*Solicitor's Lien*, No. 2—*Wages*, No. 2.

MASTER, DUTY AND POWERS OF.

See *Bottomry*, Nos. 6, 7, 9, 12, 13—*Collision*, Nos. 22, 23—*Damage to Cargo*, Nos. 4, 5—*Sale of Cargo by Master*, Nos. 1, 2, 3, 4.

MASTER'S WAGES.

See *Necessaries*, No. 9—*Maritime Liens*, Nos. 2, 3, 4—*Solicitor's Lien*, No. 2—*Wages*, No. 2.

MATERIAL MEN.

See *Necessaries*, Nos. 4, 5, 8, 9.

MEASURE OF DAMAGES.

See *Collision*, Nos. 39, 40, 41.

MEASUREMENT OF REGISTERED TONNAGE.

See *Tonnage Rates*.

MEETING SHIPS.

See *Collision*, Nos. 12, 13.

MERCHANT SHIPPING ACTS.

See *Collision*, Nos. 2, 23—*Limitation of Liability*, Nos. 1, 2, 3—*Salvage*, No. 1—*Ship*.

MEEGEE.

See *Necessaries*, No. 10.

METAGE DUES.

See *Charter-party*, No. 6.

MISREPRESENTATION.

See *Inspection of Documents—Marine Insurance*, Nos. 24, 25, 26, 27, 28.

MISTAKE.

See *Costs*, No. 6—*Marine Insurance*, Nos. 2, 8—*Mortgage*, No. 4—*Tonnage Rates*.

MISTAKE IN SHIP'S NAME.

See *Marine Insurance*, Nos. 27, 28.

MORTGAGE.

1. *Freight—Right to—Possession—Second mortgage—Lien—Priority.*—A first registered mortgagee of a ship, on taking possession, is legally entitled to any freight then due, and a second mortgagee cannot claim to have the value of ship and freight applied as one fund in discharge of the first mortgage, and after that is discharged, the balance in discharge of the second mortgage. The first mortgagee has the paramount legal title, and he takes the ship and freight by the same title. A second mortgagee having an express lien on the freight does not acquire any right as against the first mortgagee, nor does a further advance by the first mortgagee, after the date of the second mortgage, alter the right of the first mortgagee to the freight under the first mortgage. (L.J.) *The Liverpool Marine Credit Company (Limited) v. Wilson* page 323
2. *Freight—Possession—Mortgage of freight.*—A mortgagee of a ship is entitled to accruing freight on taking possession, and this right is not taken away by the fact that the freight is mortgaged to a third party without notice to the mortgagee of the ship. (V.C.M.) *Wilson v. Wilson* 265
3. *Charterers—Mortgages—Possession—Deduction of advances by charterers.*—Where a ship is mortgaged previously to a charter-party entered into between the shipowner and the charterers, and the ship is subsequently seized by the mortgagees, the charterers are not entitled to deduct from the amount due for freight advances made by them

- for ships' disbursements in excess of the sum stipulated for by the charter-party, even if they have no notice of the mortgage. (V.C.B.) *Tanner v. Phillips* page 448
4. *Mortgages in possession*—Sale of ship by—Discharge—Mistake—Registration—Admiralty Court—Jurisdiction.—Where mortgages in possession sell a ship to a purchaser, and at his request endorse on the back of the mortgage deed a discharge, which is by mistake registered at the Custom House, in consequence whereof the Custom House authorities refuse to register the ship in the name of the purchaser, the High Court of Admiralty has jurisdiction to, and will, declare in a suit of mortgage and possession brought by vendor and purchaser the property to be in the purchaser, no reason to the contrary being shown. (Adm.) *The Rose* 567
- See *Maritime Liens*, No. 4.
- MORTGAGEES.
- See *Bottomry*, No. 10.—*Costs*, No. 4.—*Disbursements*, No. 1.—*Maritime Liens*, No. 4.—*Mortgage*, Nos. 1, 2, 3, 4.—*Necessaries*, Nos. 4, 6.
- MOTION.
- See *Costs*, No. 3.—*Practice*, Nos. 3, 8.
- MUTINY.
- See *Salvage*, No. 5.
- NAVAL OPERATION.
- See *Foreign Enlistment Act 1870*, Nos. 1, 2, 3.
- NAVAL SERVICE.
- See *Foreign Enlistment Act 1870*, Nos. 1, 2, 3.
- NECESSARIES.
1. *Meaning of—Admiralty Court—Statutes*.—The term "necessaries," where used in the statutes giving the Admiralty Court jurisdiction over such claims, has the same meaning as is given to it by the common law courts, and signifies, whatever the owner of a vessel as a prudent man would, if present under circumstances in which his agent, in his absence, is called upon to act, have ordered for the service of his vessel. *Webster v. Seekamp* (4 B. & Ald. 353) followed. (Adm.) *The Riga* 246
2. *Insurance premiums—Charges paid for entering, dues, pilotage, and protest—Advances*.—Premiums paid by a ship broker, at the owners' request, to procure insurance on freight; charges paid by a ship broker for entering, reporting, and piloting a ship, for tonnage and light dues, and for noting protest; advances made by a shipbroker for pilotage, travelling expenses of the master, and goods supplied for the ship's use, are necessities. (Adm.) *Id.* 246
3. *Brokerage charges*.—Brokerage charges, made by a ship's broker for acting as ship's agent, and for negotiating a charter-party, may be necessities, but must be shown to come within the definition. (Adm.) *Id.* 246
4. *Maritime lien—British vessel—Mortgage—Priority*.—Material men have not a maritime lien upon a British or British colonial ship for necessities supplied in England. All valid charges upon the ship, to which persons other than the owner are liable for the necessities supplied, take precedence of such a claim for necessities. A mortgage, therefore, has priority over a material man. *Semble*, that when a British ship has been transferred by sale to an owner, other than the owner liable for the necessities, no claim can be made against the ship for those necessities. (Adm. and Priv. Co.) *The Two Ellens* 40, 208
5. *Maritime lien—Foreign ship—Sembles*.—Material men have a maritime lien for necessities supplied to a foreign ship. (Priv. Co.) *Id.* 208
6. *Mortgage—Transferor—Right to appear in cause of necessities*.—The transferor of a mortgage, although the transfer be not registered, has a *locus standi* in a cause of necessities instituted against the ship. (Adm.) *The Two Ellens* page 40
7. *Ship's agents—Advances—Ship's account—Co-owner—Right to sue*.—The agents of a foreign ship in a British port, who have paid for necessities supplied to her, or who have rendered themselves liable to pay for such necessities, may proceed against the ship for such advances as were made on the ship's account, but not for the balance of a general account against her owners. A co-owner of a ship may proceed against the ship for advances made by him, but *semble*, not if he is interested in the particular voyage for which the ship is supplied. (Adm.) *The Underwriter* 127
8. *Ship's agent—Shipwright—Advances—Repairs—Priority of payment*.—A ship's agent appointed by a master on his arrival in port, having no previous knowledge of either master or owner, making no inquiries as to how he is to be paid for advances for necessities, and allowing the ship to be placed in the hands of a shipwright for repairs, cannot, when her value is increased by the repairs, claim to be paid, in a suit in which he arrests the ship, in priority to the shipwright. (Adm.) *The Panthea* 133
9. *Master—Partner—Agency—Wages—Priority*.—A master of a foreign ship, who is also part owner, and upon whose orders necessities have been supplied, is not entitled to claim priority for his wages over the material men, as he himself is personally liable to them for the necessities supplied. *Semble*, that a master who is not part owner would not in such case be entitled to priority over a material man, as he also would be liable for the necessities supplied by his orders as agent for his owners. In a suit for master's wages, a plea by material men that the necessities were supplied by the master's orders, is a good plea. (Adm.) *The Jenny Lind* 294
10. *Bottomry Bond—Merger*.—A claim for necessities supplied to a ship, to secure the payment of which the master has given a bottomry bond on his ship, is merged in the bond, and cannot be enforced by the material men on the single contract. (Adm.) *The Elpis* 472
11. *Domicil—Objection to jurisdiction—When to be taken—County Court—Prohibition*.—Where a suit is instituted in a County Court (Admiralty Jurisdiction) under 31 & 32 Vict. c. 71, s. 3, for necessities supplied to a ship, the objection that the owner or part owner of the ship is domiciled in England or Wales (24 Vict. c. 10, s. 5) must be taken before judgment is pronounced. Where the objection is taken for the first time after judgment has been pronounced, a prohibition will not be granted. (Q.B.) *Ex parte Michael* 337
12. *Bottomry—Cause of necessities—Transfer of cause—County Court—Petition—Practice—Jurisdiction*.—Where a cause of necessities is instituted in a County Court under the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) and is transferred under sect. 8 of that Act to the High Court of Admiralty, and the petition of the plaintiff shows the claim to be based on a bottomry bond (the County Court having no jurisdiction over bottomry bonds), the High Court will reject the petition. *Semble*, that where a suit is instituted in a County Court over which that court has no jurisdiction, the High Court of Admiralty cannot acquire jurisdiction by transfer, even if it has original jurisdiction in such a suit. (Adm.) *The Elpis* 472

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13. *Vice-Admiralty Court—Jurisdiction—British possession.*—A Vice-Admiralty Court has no jurisdiction under 24 Vict. c. 24, s. 10, to entertain a suit for necessities supplied at a port out of the possession, that is the British possession, in which the court is established. (*Vice-Adm. Vict.*) *The Albion*.....page 481

14. *Pleading—Practice.*—Where a petition in a cause of necessities alleges that money was advanced for necessary expenses at the owner's request, without stating what those necessary expenses were, such a claim will be struck out on motion to reject or alter the petition. (*Adm.*) *The Riga*..... 246

15. *Bail—Payment into court—Order of Court of Chancery.*—Where official liquidators of a company paid into court a sum of money in lieu of bail in a suit of necessities, and then obtained an order from the Court of Chancery (England), restraining the plaintiff from proceeding in the suit "until further order" only, the Court of Admiralty of Ireland refused to make an order directing the payment out of court of the money to the defendants. (*Adm. Ir.*) *The Lion*..... 321

See *Bottomry*, No. 1—*Costs*, No. 4—*Disbursements*, No. 1—*Solicitor's Lien*, No. 1. $\times$

NEGLIGENCE.

See *Average Stater—Limitation of Liability*, No. 1.—*Loss of Life—Salvage*, Nos. 15, 16, 17, 21.

NEUTRAL CARGO.

See *Carriage of Goods*, Nos. 18, 22, 25.

NON-DELIVERY OF CARGO.

See *Bottomry*, No. 13—*Carriage of Goods*, Nos. 4, 25, 26, 27—*County Courts' Admiralty Jurisdiction*, Nos. 1, 8.

NOTICE OF ACTION.

See *Collision*, No. 36.

ONUS OF PROOF.

See *Bills of Lading*, No. 2—*Collision*, Nos. 25, 29, 30, 31, 32, 33—*Damage to Cargo*, No. 3—*Marine Insurance*, No. 19—*Practice*, No. 2.

OPEN POLICY.

See *Marine Insurance*, Nos. 8, 21, 28.

OVERTAKING SHIPS.

See *Collision*, Nos. 15, 16, 30.

PARTIAL LOSS.

See *Marine Insurance*, Nos. 30, 31, 32.

PARTICULARS.

See *Marine Insurance*, No. 36.

PASSAGE MONEY.

See *Marine Insurance*, No. 6.

PASSENGER.

See *Carriage of Passengers—Inspection of Documents*.

PASSENGERS' LUGGAGE.

See *Carriage of Passengers—Limitation of Liability*, No. 1—*Salvage*, No. 18.

PAYMENT IN MISTAKE.

See *Tonnage Rates*.

PERILS.

See *Carriage of Goods*, Nos. 4, 18, 19, 20, 21, 22, 25, 26—*Charter-party*, Nos. 3, 4—*Consignor and Consignee*, No. 3—*Damage to Cargo*, No. 3—*Marine Insurance*, Nos. 13, 14, 15—*Salvage*, No. 7.

PERSONAL INJURY.

See *Damage*, No. 1.

PILOTAGE.

See *Compulsory Pilotage*, Nos. 1, 2, 3, 4—*Necessaries*, No. 2.

PILOTS.

See *Collision*, Nos. 1, 11, 33—*Compulsory Pilotage*, Nos. 1, 2, 3, 4—*Salvage*, Nos. 10, 11.

PIRACY.

Arrest—Condemnation—Prior sale—Innocent purchaser.—A ship duly sold before proceedings taken against her by the Crown, by public auction to a bona fide and innocent purchaser, cannot be afterwards arrested and condemned on account of former piratical acts, at the suit of the Crown. (*Priv. Co.*) *Reg. v. McCleverty; The Telegrafo or Restauracion*.....page 63

PLEADING.

See *Charter-party*, Nos. 2, 4, 5—*Collision*, Nos. 26, 27, 28—*Costs*, No. 5—*Marine Insurance*, Nos. 18, 36—*Necessaries*, Nos. 12, 14—*Salvage*, Nos. 23, 24, 30, 31.

POLICY.

See *Marine Insurance*, Nos. 4, 5, 6, 7, 8, 10, 11, 12, 19, 20, 21, 24, 28, 31—*Marine Insurance Association*, No. 4.

PORT.

Extent of—Powers of Board of Trade—Taking ballast.—The powers of the Board of Trade, under the Customs Consolidation Act 1853, and the Harbour Transfer Act, 1852, to appoint ports and to declare the limits thereof, are not limited to revenue purposes only, nor are such powers confined to "ports" in their merely geographical sense, and therefore a person taking ballast or shingle from parts of the shore of a port, the limits of which had been extended by the Board of Trade, such taking having been prohibited by them, is guilty of an offence under 54 Geo. 3, c. 159, s. 14. (*Q. B.*) *Nicholson (app.) v. Williams (resp.)*..... 67

See *Carriage of Goods*, Nos. 21, 22, 24, 25, 27—*Charter-party*, Nos. 4, 6—*Marine Insurance*, No. 24.

POSSESSION.

See *Mortgage*, No. 1, 2, 3, 4.

PRACTICE.

1. *Admiralty Court—Vice-Admiralty Courts—Proxies—Production of.*—The usual practice in the High Court of Admiralty as to the production of proxies is for proctors to proceed without the exhibition of any proxy until called upon to produce it, and when called upon they satisfy the law by stating the names of the parties for whom they appear. In the Vice-Admiralty Courts proctors are not bound to do more than this, under rule 40 of the Vice-Admiralty Rules and Regulations, unless upon a strict order of the court. (*Priv. Co.*) *The Ezine*..... 155

2. *Proxies—Proof of—Production.*—The production of a proxy, purporting to be duly signed and sealed, but without proof of the handwriting of those who appear to have subscribed the instrument, is a prima facie compliance with an order to produce a proxy, and throws the onus of disproving its authenticity on the opponents. (*Priv. Co.*) *Id.*..... 155

3. *Want of proxy—Objection to suit—Motion—Protest.*—An objection to a suit on the ground of the non-production of a proxy is a preliminary objection to be raised on motion, and not on protest, and the utmost a court of admiralty can do when a proxy, purporting to be duly signed, is produced is to stay proceedings until further information can be obtained. (*Priv. Co.*) *Id.*..... 155

4. *Admiralty Court—Re-arrest of ship—Costs—Admiralty Court Act 1861, ss. 15 & 22.*—The High Court of Admiralty will issue a writ under

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- the Admiralty Court Act 1861, ss. 15 & 22, directed to the marshal, for the re-arrest of a ship, to cover costs taxed in a suit against her, where the damages and costs together exceed the amount of bail. (Adm.) *The Freedom* page 136
5. *Admiralty Court—Reference to registrar and merchant—Objection to report—Further evidence.*—The Court of Admiralty will not, in a case of collision, hear further evidence on objection to the registrar's report as to damages, unless the party making the application can satisfy the court that the further evidence could not, by proper diligence, have been produced before the registrar and merchants, or that the party asked at the reference for an adjournment to produce it, and was refused. (Adm.) *The Thuringia* 166
6. *Admiralty Court—Reference to registrar and merchants—Objection to report—Further evidence—Affidavit.*—The affidavit in support of a motion for leave to produce further evidence (on objection to the registrar's report), where the object is to vary the evidence already given, should be clear and concise as to the witnesses it is proposed to call, and the nature of their testimony. (Adm.) *Id.* 166
7. *Admiralty Court—Reference to registrar and merchants—Affidavit—Time of filing affidavit.*—The affidavit of a witness who is not tendered for cross-examination, and who deposes to a fact material to an inquiry before the registrar and merchants, should be filed before the hearing of the reference. (Adm.) *Id.* 166
8. *Admiralty Court—Motion—Adjournment—Filing of affidavit.*—The adjournment of the hearing of a motion in the Admiralty Court for the convenience of counsel does not preclude the parties making the motion from filing and using a further affidavit. (Adm.) *Id.* 166
9. *Admiralty Court—Priority—Decree—Suits in pari conditions.*—The rule that a suitor in the High Court of Admiralty who first obtains a decree shall have priority in order of payment only applies where suitors are in *pari conditions*. (Adm.) *The Markland* 44
10. *Admiralty Court—Suit in rem—Decree made in mistake—Power to rescind.*—When the High Court of Admiralty in a suit *in rem* has made, *per incuriam*, an order directing payment out of court to satisfy the claim of a suitor, the court has power before payment to vary or rescind the order. (Adm.) *Id.* 44
11. *County Courts—Admiralty jurisdiction—Short-hand-writers—Reporter—Rules—Appoint.*—By rule 32 of the General Orders for the County Courts Admiralty Jurisdiction, it was intended that a shorthand-writer, or at least a reporter, should be employed in all admiralty causes in the County Courts, where there is a probability of appeal, to take down the evidence, so that the appellant might be in a position to bring up at the hearing of the appeal a transcript of the notes of evidence. (Adm.) *The Busy Bee* 293
- See *Bottomry*, No. 14—*Collision*, Nos. 26, 27, 28, 34, 35, 36, 37, 38, 41—*Costs*, Nos. 3, 4—*County Court Admiralty Jurisdiction*, No. 5—*County Court appeals*, Nos. 1, 2—*Foreign Enlistment Act*, 1870, Nos. 4, 5—*Inspection of documents—Necessaries*, Nos. 12, 14, 15—*Salvage*, Nos. 23, 24, 25, 26, 27, 28, 29, 30, 31—*Solicitor's lien*, No. 3.

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See *Collision*, No. 34.

PREMIUMS.

See *Marine Insurance*, No. 35—*Necessaries*, No. 2.

PREPAYMENT OF FREIGHT.

See *Carriage of Goods*, No. 12.

PRESENTATION.

See *Bottomry*, Nos. 4, 5.

PRINCIPAL AND AGENT.

Order to purchase goods—Construction of by agent—Principal's power to repudiate.—Where a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bona fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the order to be read in the other sense of which it was easily capable. An order to agents to purchase 500 tons of sugar at a certain limit to cover costs, freight, and insurance, "50 tons more or less on moment if it enables you to get a suitable vessel," is substantially complied with by the shipment by the agents of 400 tons, the agents *bona fide* adopting this construction of the order, of which it was fairly capable. (*H. of L.*) *Ireland and others v. Livingston* page 389

PRIORITY.

See *Consignor and Consignee*, Nos. 1, 2—*Costs*, No. 2—*Maritime Liens*, Nos. 1, 2, 3, 4—*Mortgage*, Nos. 1, 2, 3—*Necessaries*—Nos. 4, 8, 9—*Practice*, No. 9—*Solicitor's Lien*, Nos. 1, 2—*Wages*, No. 2.

PRIZE OF WAR.

See *Foreign Enlistment Act*, 1879, Nos. 1, 2, 3.

PROCTOR.

See *Practice*, Nos. 1, 2, 3.

PROFITS.

See *Marine Insurance*, No. 9.

PROHIBITION.

See *Admiralty Court*, Nos. 2, 3—*Damage*, No. 1—*Lord Mayor's Court—Necessaries*, No. 11.

PROTEST.

See *Bottomry*, No. 5—*Necessaries*, No. 2—*Practice*, No. 3.

PROTEST OF CONSUL.

See *Wages*, No. 1.

PROXY.

See *Practice*, Nos. 1, 2, 3.

RE-ARREST OF SHIP.

See *Practice*, No. 4.

REFERENCE TO REGISTRAR AND MERCHANTS.

See *Collision*, Nos. 41, 44—*Practice*, Nos. 5, 6, 7.

REGISTRAR'S REPORT.

See *Collision*, No. 41—*Practice*, Nos. 5, 6.

REGISTRATION OF SALE.

See *Mortgage*, No. 4.

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See *Collision*, Nos. 2, 4, 5, 7, 8, 9, 10, 11, 13, 14, 15, 18, 19, 30.

REPAIRS OF SHIP.

See *Bottomry*, Nos. 6, 7, 8, 12—*Marine Insurance*, Nos. 25, 31—*Necessaries*, No. 8.

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See *County Court Appeals*, No. 1—*Practice*, No. 11.

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See *Carriage of Goods*, Nos. 31, 27.

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See *Practice*, No. 10.

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RISKS.

See *Bottomry*, Nos. 1, 2—*Carrriage of goods*, Nos. 4, 19, 20, 21, 22, 26—*Collision*, Nos. 13, 14, 22—*Marine Insurance*, Nos. 3, 5, 8, 10, 11, 12, 13, 14, 15.

RIVAL SALVORS.

See *Salvage*, Nos. 26, 27.

RIVER NAVIGATION.

See *Collision*, Nos. 18, 19, 20.

SAILING SHIP.

See *Collision*, Nos. 9, 10, 12, 16, 20—*Salvage*, No. 22.

SALE OF CARGO BY MASTER.

1. *Authority of master—Necessity for sale—Inability to communicate with owners—Agency—Duty to sell.*—The authority of a master of a ship to sell the goods of the absent owner is derived from the necessity of the situation in which he is placed; and, consequently, to justify his thus dealing with the goods he must establish (1) a necessity for the sale; and (2) inability to communicate with the owner and obtain his directions. Under these conditions, and by force of them, the master becomes the agent of the owner, not only with the power but under the obligation (within certain limits) of acting for him; but he is not entitled to substitute his own judgment for the will of the owner in selling the goods if it is possible to communicate with the owner and ascertain his will. (*Priv. Co.*) *The Australasian Steam Navigation Company v. Morse* page 407
2. *Necessity for sale—Interest of owner.*—There is a necessity for the sale of cargo by a master if, under the circumstances of the case, a sale is the best and most prudent thing to be done for the interest of the owner. (*Priv. Co.*) *Id.* 407
3. *Communication with owners—Urgency for sale—Distance—Means of communication—Duty of master—Telegraph.*—The possibility of communicating with the owner of a cargo depends upon the circumstances of each case, involving a consideration of the facts which create the urgency for an early sale, the distance of the port from the owners, the means of communication which exists, and the general position of the master in the particular emergency. Such communication only need be made when an answer can be obtained, or there is a reasonable expectation that it can be obtained, before sale; the master is bound to employ the telegraph as a means of communication, where it can be usefully done; but the state of the particular telegraph, the way in which it is managed, and the possibility of transmitting explanatory messages, are proper subjects to be considered in determining the question of the practicability of communication. (*Priv. Co.*) *Id.* 407
4. *Communication with owner—General cargo.*—The fact that a master cannot communicate with all the owners of a general cargo does not of itself justify him in selling without communicating with any of the owners; but this fact, increasing the embarrassment of the master, is to be considered when an estimate of his conduct has to be formed. (*Priv. Co.*) *Id.* 407

SALE OF GOODS.

See *Consignor and Consignee*, No. 3—*Principal and agent—Vendor and Purchaser*.

SALE OF SHIP.

Foreign contract—Specific performance—Power of Court of Chancery.—The Court of Chancery has power to grant specific performance of a contract to purchase a ship. A., an Englishman, entered into a contract at Hamburg to purchase from B., a foreigner, a foreign ship, then on her home-

ward voyage to Cork, possession to be given on discharge of the cargo at any port whither she may be ordered. The vessel was ordered to Sunderland and discharged her cargo. The Court granted to A. specific performance against B., who was out of the jurisdiction, and restrained the removal of the vessel from Sunderland. (*V.C.M.*) *Hart v. Herwig* page 572
See *Costs*, No. 2—*Mortgage*, No. 4—*Piracy*.

SALVAGE.

1. *Admiralty Court—Value of rated property under £1000—Jurisdiction—Merchant Shipping Act—County Court Admiralty Jurisdiction Act 1868.*—The jurisdiction in salvage cases, when the value of the property is under £1000, taken away by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) sect. 460, and the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63) sect. 49, is restored to that court by the County Courts' Admiralty Jurisdiction Act 1868 (31 & 32 Vic. c. 71) sect. 9. (*Adm.*) *The Empress* 183
2. *Short-handed ship—Putting hands on board—Owners, master and crew—Right to salvage reward.*—Putting additional hands on board a vessel in distress, which has been driven out to sea by stress of weather short-handed, to assist in bringing her into port, is a salvage service. The men so placed on board the distressed vessel are the principal salvors, but the owners, master, and crew of the salving vessel are entitled to share in the reward; the owners, however, are entitled only to a small proportion as their vessel itself does not under such circumstances render assistance, and the only risk they run is, that she may be short-handed in bad weather. (*Adm.*) *The Charles* 296
3. *Stranded ship—Shifting cargo—Labourers—Right to reward.*—Work done by labourers in shifting the cargo of a vessel that has been damaged by collision and so forced to run ashore, for the purpose of lightening her and of enabling her to be sufficiently repaired to get to the nearest port, is in the nature of salvage service, and entitles the labourers to salvage reward. (*Adm.*) *The Antelope* 513
4. *Shipping cable—Taking out anchor and chain—Salvage service.*—Taking out during bad weather an anchor and chain to a vessel, which is compelled to slip her cable to get away from a dangerous position and run for a place of safety, is, although the anchor and chain in the result are not needed, a salvage service. (*Adm.*) *The Aeolus* 516
5. *Mutiny—Officers incapacitated—Supplying officer—Master, owners, and crew—Right to reward.*—Where the officers of a vessel are rendered incapable of navigating her by reason of a mutiny on board, and another vessel sends her mate on board, and the disabled vessel is taken by him into place of safety, the other vessel is a salvor, and her owners, master, and crew are entitled to salvage reward. (*U.S. Dist. Ct.; S. Dist. of N.Y.*) *The Brig, J. L. Bowen and her cargo* 106
6. *Charterer—Demise of ship—Right to salvage.*—A charter-party, by which it is stipulated that the charterer shall bear all expenses, pay the wages of the crew, and all charges incidental to the running of the steamer, except marine insurance, and that the steamer shall be delivered up at the termination of the engagement, in the same and as good condition as she was at the time of the hiring, so passes the ship to the charterer, that he is entitled as *pro hac vice* owner to reward for salvage service which may be rendered by the vessel. (*Adm.*) *The Scout*... 258

7. *Salvage of ship and cargo*.—*Salvage*, and *salvaged ship owned by same persons*.—*Bills of lading*.—*Excepted perils*.—*Right of owners, master, and crew to salvage reward*.—Where a crew steamship carrying cargo under bills of lading, containing the exception "accidents from machinery," becomes disabled through her machinery breaking down, and another vessel belonging to the same owners renders salvage service, and brings the disabled ship into safety, those services being over and above the contract to carry safely and deliver in the like good order and condition as shipped, entitle the shipowners to salvage reward, as against the cargo of the salvaged vessel. The master and crew of the salvaging vessel are entitled to reward as against ship, cargo, and freight. (Adm.) *The Miranda*. 440
8. *Crew of ship as salvors*.—*Abandonment by master and crew*.—*Dissolution of contract*.—The abandonment of a vessel in distress by her master (accompanied by the majority of the crew) operates as a dissolution of the contract between the owners and seamen, and if one of the crew voluntarily remains on board, and renders salvage services, he is entitled to salvage reward. (Adm.) *The Lejonet*. 438
9. *Ships belonging to same owners*.—*Right of crew to reward*.—*Contract*.—Where salvage services are performed by one ship to another, and both vessels belong to the same owner, the crew of the ship which has performed the salvage service is entitled to salvage reward, if the services rendered are not such as the crew are bound to perform under their contract. (Priv. Co.) *The Sappho*. 65
10. *Pilot*.—*Contract of*.—*Right to salvage reward*.—A pilot entering into an engagement to pilot a vessel undertakes to supply local knowledge and the peculiar skill of his class, and will not be allowed, even though he contribute to the safety of the vessel, to change the character of his service from pilotage to salvage, except where the vessel was in distress before he went on board to render the service, or where such circumstances of extreme danger and personal exertion supervene, which exalt his service into a salvage service. (Adm.) *The Solus*. 516
11. *Waterman*.—*Acting pilot*.—*Right to salvage reward*.—A waterman acting as a pilot is subject to the same disabilities as a licensed pilot in respect of claiming salvage reward against a ship which he has been engaged to pilot. (Adm.) *Id.* 516
12. *Contract with salvors*.—*Employment by salvors of third persons*.—*Knowledge of contract*.—*Right to reward*.—A contract between salvors and owners for an agreed amount to be paid in any event, creates only a personal obligation on the part of the owners, and as a salvor by contract has no claim against the property salvaged beyond the contract price, such a claim cannot create against the owners of the property any obligation beyond that price in favour of a third party, who, with a knowledge of the contract, is employed by the salvors to assist in recovering the property. (U. S. Dist. Ct. of Mich.) *The Schooner Marquette*. 404
13. *Contract for salvage services*.—*Effect of competent parties*.—*Increased difficulty of service*.—*Payment into court*.—*Estoppel*.—A contract to perform salvage services when entered into by competent parties is binding, even if the services increase in difficulty. Even if one of the parties, being at the mercy of the other, consents to abandon the contract, the Admiralty Court will uphold the agreement. The owners of the salvaged vessel will not be stopped from setting up the agreement by tender or payment into court of money by way of compensation for damages and extra expense incurred by the salvors. (Adm.) *The Waverley*. 47
14. *Contract for expenses*.—*Right to reward*.—*Ousting of right*.—An agreement entered into between the master of the salvaging ship and the officer commanding the distressed vessel, by which the latter acknowledges the receipt of the men, and undertakes "to pay all expenses attached thereby, as my vessel is in distress for want of men, and I cannot bring her in without help," is not such an agreement as will oust the right of the salvors to reward, but is an agreement to pay expenses in all events. *Semble*, even if the agreement did oust the right of the others, it would not effect the right of the men placed on board the distressed vessel. (Adm.) *The Charles*. 296
15. *Collision*.—*Default of salvor*.—*Right to salvage reward*.—A vessel rendering assistance to another which she has injured in collision cannot claim salvage reward if the collision takes place by her default. (Adm.) *The Glenaber*. 401
16. *Collision*.—*Salvage vessel owned by owners of vessel doing damage*.—*Right to salvage reward*.—The owners, master, and crew of a vessel which renders assistance to a vessel injured by collision are not deprived of their right to salvage reward by the fact that some of the owners are also owners of another vessel by whose misconduct the collision takes place. (Adm.) *Id.* 401
17. *Collision*.—*Salvor employed by wrong-doing vessel*.—*Right to salvage reward*.—A vessel rendering salvage assistance is not deprived of her right to reward by the fact that she is employed by a vessel whose misconduct renders her employment necessary. (Adm.) *Id.* 401
18. *Passengers' baggage*.—*Lien*.—Salvors have no lien upon personal baggage and effects belonging to passengers on board a salvaged vessel. (Adm.) *The Willem III.* 129
19. *Life salvage*.—*Foreign ship*.—*Service of British waters*.—Salvors of life cannot recover salvage reward under the Admiralty Court Act 1861, sect. 9, for services rendered outside British waters to a foreign ship, even though such services are by another vessel to which the salvaged persons have been transferred by the original salvors completed within British waters. (Adm.) *The Willem III.* 129
20. *Value of salvaged property*.—*Assessment of reward*.—*Deduction of expenses paid by salvors*.—Expenses incurred in salvaging a vessel, such as pumping, watching, &c., which strictly ought to be paid by the marshal of the High Court of Admiralty, will if paid by salvors, be deducted from the value of the salvaged vessel in assessing the salvage reward. (Adm.) *The Lejonet*. 438
21. *Extent of liability*.—*Negligence of salvaged ship*.—*Injury to salvor*.—The V. having got aground, the M. came to her assistance. They were lashed together, the V. being the more powerful vessel. The V. got off, but the M. ran upon a snag and made a hole in her bottom, and was lost. The V. had been aground more than a day, and had had ample opportunity of knowing the locality. Held: That in having failed to make the necessary investigations as to the dangers of the place, and being the chief and controlling motive power, the V. was liable for the services and the loss of the M. (U. S. Circ. Ct. : S. Dist. of Ill.) *The Missionary v. The Virginia*. 107
22. *Appointment*.—*Owners, master, and crew*.—*Sailing vessel*.—*Steam power*.—In apportioning salvage reward among the owners, master, and crew of a sailing vessel which has rendered salvage service by towing a vessel in distress, and remaining by her in bad weather, the High Court of Admiralty will not allot to the owner the same

- proportion as that allotted to the owners of a steamship (usually one-half) unless it appears that the sailing vessel itself was, as in the case of services rendered by means of steam power, the chief agent in effecting the salvage. (Adm.) *The Palmyra* 182
23. *Admiralty Court—Pleading—Proceedings against ship and cargo—Settlement of claim against ship—Plea of.*—In a case of salvage originally instituted against ship and cargo, where the owners of the ship have settled the claim against the ship, the plaintiffs, in proceeding against the cargo, may plead the fact that they have so settled with the shipowner, but are not entitled to plead the amount paid in settlement. (Adm.) *The Due Chechi* 204
24. *Admiralty Court—Pleading—Suits in different courts—Plea of amount recovered.*—Where two suits of salvage were instituted by different sets of salvors in respect of salvage services rendered to the same property on the same occasion, the one suit in the Admiralty Court of the Cinque Ports, the other in the High Court of Admiralty, and the salvors in the former suit recovered salvage reward, the High Court allowed the amount of such reward recovered to be pleaded by the defendants in their answer in that court for the purpose of informing the court of the value of the property against which it would have to make its award, that value being the net value, less all proper deductions, and an award previously made by a competent court in respect of the same service being a proper deduction. (Adm.) *The Antelope* 513
25. *Admiralty Court—Practice—Consolidation of causes.*—The Court of Admiralty will consolidate causes of salvage instituted on behalf of several sets of salvors on the application of the plaintiffs. (Adm.) *The Melpomen* 515
26. *Admiralty Court—Consolidated causes—Practice—Conflicting interest.*—Where salvage causes have been consolidated by order of the Court of Admiralty, but it appears that the interest of one of the plaintiffs conflicts with those of the others, the court will give leave for that plaintiff to appear separately by counsel at the hearing. (Adm.) *The Scout* 258
27. *Admiralty Court—Practice—Rival salvors—Right to begin—Cross-examination—Consolidation—Life salvor.*—In a salvage suit in the Court of Admiralty where there are rival salvors, the right to begin depends upon the circumstances of each case, but the salvor who first enters his suit has originally the right to begin, unless special circumstances be shown. Rival salvors have a right to cross-examine each other's witnesses, but only on a point at which they are at issue. A salvor who saves life in addition to the services rendered by him in connection with the other salvors, is not bound to consolidate, where the salvors cannot agree as to the conduct of the cause. (Adm.) *The Morocco*; *The Willem III* 46, 429
28. *Admiralty Court—Practice—Evidence—Amount of claim.*—In a salvage suit evidence of the amount on which another suit has been instituted in another court for services rendered at the same time is not admissible. (Adm.) *The Antelope* 477
29. *Tender—Costs—Practice—Admiralty Court.*—A tender in a cause of salvage in the High Court of admiralty must be made with costs, or the ground for refusing costs must appear upon the face of the tender. (Adm.) *The Thracian* 207
30. *Tender—Appeal from Cinque Ports—Practice—Admiralty Court.*—On appeal by the owners of a salvaged ship from a salvage award made by the Cinque Ports Commissioners, the appellants may, without filing pleadings, place upon the file of the court a tender, although no tender was made before the Commissioners, and the respondents are bound to accept or reject a tender so made. (Adm.) *The Annette* page 577
31. *Evidence—Appeal from Cinque Ports—Practice—Value of salvaged property—Admiralty Court.*—An appeal from an award of Cinque Ports Commissioners being in the nature of a rehearing, pleadings may be filed and new evidence given by the appellants, although at the imminent risk of costs; and, consequently, the question of the value of the salvaged property, although agreed before the commissioners, may be reopened on appeal. (Adm.) *Id.* 577
32. *Appeal—Increasing reward—Grounds for.*—The Privy Council will increase the amount awarded by the Admiralty Court for salvage services where such amount would not be fair compensation, considering the risk and amount of property and number of lives saved. But the difference must be very considerable before they will interfere. Where the same salvage services are rendered at first with great risk, but afterwards with ease, the court will only treat it as one transaction. (P.C.) *The Glenduror* 31
- SALVOR'S LIEN.
See *Salvage*, No. 18.
- SEA FISHERIES ACT 1868:
See *Collision*, No. 29.
- SEAWORTHINESS.
See *Carriage of Goods*, No. 7—*Marine Insurance*, No. 36.
- SET OFF.
See *Marine Insurance*, No. 35.
- SHIP.
Fishing cable—Seagoing vessel—Merchant Shipping Acts Amendment Act 1862, s. 3—Board of Trade—Justices—Jurisdiction.—A fishing cable of ten tons burthen, 24ft. in length, and decked forward, with two movable masts and fng-masts, accustomed to go twenty miles out to sea, and to remain out twelve hours at a time, usually sailing, but sometimes propelled by oars, is a "ship" within the meaning of the Merchant Shipping Amendment Act 1862, s. 3. Where such a vessel was run down by a steamer, and her crew drowned, the Board of Trade sent down a clerk to the coroner's inquest held thereon, and he took notes of the evidence and forwarded them to the Board of Trade, and they directed the justices to hold an inquiry, it was held that such justices had jurisdiction to hold such inquiry under the Merchant Shipping Acts. (Q.B.) *Ex parte Ferguson and Hutchinson* 8
- See *Bottomry*, Nos. 5, 6, 7, 8, 9, 12, 13, 14—*Carriage of Goods*, Nos. 2, 5, 7, 18—*Marine Insurance*, Nos. 25, 26, 27, 28, 36—*Salvage*, Nos. 2, 3, 4, 5, 6, 7, 8, 9, 14, 15, 16, 17, 19, 21, 23.
- SHIP-AGENT.
See *Bottomry*, Nos. 10, 11—*Necessaries*, Nos. 2, 3, 7, 8.
- SHIP BROKER.
See *County Courts Admiralty Jurisdiction*, No. 4—*Necessaries* Nos. 2, 3, 7, 8.
- SHIPOWNER.
See *Bills of Lading*, No. 1, 2—*Carriage of Goods*, Nos. 5, 6, 7, 13, 14, 15, 16, 17, 20, 27—*Charter-party*, Nos. 4, 6—*Salvage*, Nos. 6, 7.
- SHIPPEES.
See *Carriage of Goods*, No. 15.

SHIPWRIGHT.

See *Necessaries*, No. 8.

SHORTHAND WRITERS.

See *County Court Appeals*, No. 1—*Practice*, No. 11.

SHORT SHIPMENT.

See *Carriage of Goods*, Nos. 13, 14—*County Courts Admiralty Jurisdiction*, No. 1.

SIGNALS.

See *Collisions*, Nos. 3, 4, 5, 8, 20, 29.

SLIPS.

See *Marine Insurance*, Nos. 17, 18, 19, 20, 37, 38.

SOLICITOR'S LIEN.

1. *Priority—Necessaries—Admiralty Court.*—Where a solicitor in a cause in the High Court of Admiralty has acquired, by order of the court under 23 & 24 Vict. c. 127, sect. 28, or otherwise, a lien for his costs upon a ship, as for property recovered or preserved by his exertions, or upon its proceeds in court, his lien takes precedence of liens for necessaries supplied after the institution against the ship of the cause in respect of which he is entitled to costs, but not of liens for necessaries supplied before the institution of that cause. (*Adm.*) *The Heinrich* page 260
2. *Priority—Master's wages—Master part owner.*—A solicitor's lien takes precedence of the lien of the master of the ship for his wages, where the master is also part owner, and has instructed the solicitor to defend a cause instituted against the ship. (*Adm.*) *The Heinrich* 260
3. *Wages suit—Lien for costs—Change of solicitors—Practice—Order for payment—Admiralty Court.*—Where a solicitor for a defendant in a wages suit was entitled to a lien for his costs on the balance of a sum of money paid into the registry in lieu of bail (after payment of the plaintiff's claim and costs) and the defendant wishing to dispute the registrar's report on the plaintiff's claim, to which he had previously submitted, caused another appearance to be entered for him by other solicitors, without previously paying his original solicitor's costs, the court ordered the second appearance to be set aside, and the original solicitor's costs to be paid out of the fund, after payment of the plaintiff's claim and costs, leaving the other solicitors to apply and enter an appearance after this had been done. (*Adm.*) *The Onesta* 470

SOVEREIGN PRINCE.

See *Admiralty Court*, No. 3—*Jurisdiction*, No. 1, 2, 3, 4.

SPECIFIC PERFORMANCE.

See *Sale of Ship*.

SPEED.

See *Collisions*, Nos. 5, 6, 7, 8.

STAMP ACTS.

See *Marine Insurance*, No. 38—*Marine Insurance Association*, No. 4.

STATUTE.

See *Admiralty Court*, No. 1—*Compulsory Pilotage*, Nos. 1, 2, 3, 4—*Necessaries*, No. 1.

STEAMSHIP.

See *Carriage of Goods*, No. 2—*Collisions*, Nos. 3, 5, 6, 7, 8, 9, 10, 11, 13, 15, 19, 39—*Salvage*, No. 22.

STRANDING.

See *Marine Insurance*, Nos. 15, 32—*Salvage*, No. 3.

SUBROGATION.

See *Marine Insurance*, No. 33.

TENDER.

See *Salvage*, Nos. 29, 30.

TONNAGE RATES.

Registered tonnage—Wrong computation—Payment in mistake—Recovery back.—Where a dock company are empowered to charge tonnage rates on vessels entering their docks according to the registered tonnage of those vessels, and shipowners have paid rates on the registered tonnage of their vessels, but such tonnage has been erroneously computed, owing to the issuing of invalid regulations by the Commissioners of Customs, the shipowners cannot recover back from the dock company the amount paid in excess over the rate that would have been payable if the tonnage had been rightly registered. (*Q.B.*) *Moss v. The Mercury Docks and Harbour Board* page 274

TOTAL LOSS.

See *Collisions*, Nos. 32, 40, 44—*Limitation Liability*, No. 2—*Marine Insurance*, Nos. 6, 30, 31, 32.

TRADING.

See *Jurisdiction*, Nos. 3, 4.

TRANSFER OF CAUSES.

See *Necessaries*, No. 12.

TRANSHIPMENT OF CARGO.

See *Bottomry*, No. 12—*Carriage of Goods*, Nos. 10, 11, 24.

TRINITY MASTERS.

Admiralty Court. Nautical assessors—Duty of—Decision of questions of fact.—The duty of Trinity Masters, sitting as assessors in the High Court of Admiralty, is to assist the judge in questions of nautical skill. In case of a difference of opinion between the judge and the assessors, the judge is not at liberty to act upon any inferences which they may draw from the evidence as to a question of fact, except they accord with his own. If it is the duty of the judge to decide the case upon his own responsibility. (*P.C.*) *The Magna Charta* 153

TUG.

See *Carriage of Goods*, No. 20—*Collisions*, Nos. 9, 10—*Damage*, No. 3.

UNBORN CHILD.

See *Loss of Life*.

UNLIQUIDATED CLAIM.

See *Bottomry*, No. 13—*Carriage of Goods*, Nos. 13, 14.

UNDERWRITERS.

See *Marine Insurance*, Nos. 17, 18, 19, 20, 21, 22, 37, 38.

UNSEAWORTHINESS.

See *Carriage of Goods*, No. 7—*Marine Insurance*, No. 36.

USAGE.

See *Marine Insurance*, No. 8, 37.

VALUE OF SALVED PROPERTY.

See *Salvage*, Nos. 1, 20, 31.

VALUED POLICY.

See *Marine Insurance*, Nos. 6, 7, 9, 31.

VENDOR AND PURCHASER.

Contract—Construction—Sale of specific parcel—Loss before shipment—Shipment of same quantity.—A contract saying "We have this day sold to you about 600 tons, more or less, being the

SUBJECTS OF CASES.

entire parcel of soda expected to arrive at port of call per P. Should any circumstances or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void," is a contract for the sale of a specific parcel then purchased and supposed to be existing; and if that specific parcel be destroyed before shipment, the purchasers are not entitled to claim delivery to them of another cargo of the same nature and quantity sent home by the same ship by the vendors. *Exch. Ch. from Q. B.* *Smith v. Myers* page 222
See *Consignor and Consignee*, No. 3—Principal and Agent.

VESTING OF PROPERTY IN GOODS.

See *Consignor and Consignee*, Nos. 1, 2, 3.

VICE-ADMIRALTY COURTS.

Jurisdiction, Practice, and Rules of (notes) 477, 481
See *Collision*, Nos. 2, 23—*Compulsory Pilotage*, Nos. 1, 2, 3, 4—*Necessaries*, No. 13—*Practice*, Nos. 1, 2, 3.

WAGES.

1. *Admiralty Court—Jurisdiction—Foreign seamen—Protest of consul.*—A court of Admiralty, although it has jurisdiction to entertain a suit for wages instituted by foreign seamen, will not do so against the protest of the consul of the country to which the ship belongs, unless there are special circumstances. (U.S. Dist. Ct. Mass.) *The Becherdass Ambassadors* 138
2. *Lien—Priority—Master's wages and disbursements.*—A master's lien for wages and disbursements takes priority over all other claims upon a

ship, save claims for salvage and damage by collision. (Adm.) *The Penthen* page 133
See *Maritime Liens*, Nos. 2, 3, 4—*Necessaries*, No. 9—*Solicitor's Lien*, No. 2.

WAR.

Existence of—Declaration—Hostilities.—War may exist *de facto* without declaration, but only where there has been an actual commencement of hostilities. (Adm. and Priv. Co.) *The Teutonia; Duncan and others (apps.) v. Koster (resp.)*...32, 214
See *Carriage of Goods*, Nos. 4, 19, 20, 21, 22, 23, 26, 27.—*Foreign Enlistment Act 1870*, Nos. 1, 2, 3—*Marine Insurance*, No. 16.

WARRANTY.

See *Marine Insurance*, Nos. 16, 20.

WAR RISK.

See *Marine Insurance*, Nos. 16.

WAREHOUSING.

See *Carriage of Goods*, Nos. 16, 17.

WHARFINGER.

Title to goods—Refusal to accept—Subsequent transfer of bills of lading—Right of consignee.—A wharfinger who has received goods under a bill of lading deposited with him by the consignee has, after any lien for freight has been discharged, no better title to the goods than his bailor; and, the consignee having refused to accept the goods, the wharfinger is bound to deliver them up to the consignor on the latter offering to pay all expenses; and the wharfinger is not discharged by the consignee transferring the bills of lading to a third person after the refusal to accept if it should appear that the transfer was collusive. (Q.B.) *Batut v. Hartley*..... 337



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